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WITH KEY-NUMBER ANNOTATIONS

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CASES ARGUED AND DETERMINED IN THE

CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS
OF THE UNITED STATES AND THE COURT
OF APPEALS OF THE DISTRICT
OF COLUMBIA

DECEMBER, 1920 — FEBRUARY, 1921

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FEDERAL REPORTER, VOLUME 268

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS, THE DISTRICT COURTS, AND THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

STRACHAN SHIPPING CO. v. GULF STATES STEEL CO.

(Circuit Court of Appeals, Fifth Circuit. October 18, 1920. Rehearing Denied November 8, 1920.)

No. 3569.

Shipping \$\iff 153\$—Evidence held insufficient to show shipper agreed to pay increased rate required by shipping permit.

Evidence that a shipper, who had a contract with a shipping agent which specified the freight, had informed the agent with reference to a prior contract that it had an arrangement with a foreign government for shipment at the contract rate, under which it could recover any excess it was required to pay, but that, with reference to the contract in controversy, it had insisted on holding the shipping agent to the contract rate, held insufficient to show that the contract had been modified, so as to require the shipper to pay the increased rate necessary to obtain from the foreign government a permit for the shipment.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Libel by the Gulf States Steel Company against the Strachan Shipping Company. Decree for libelant, and respondent appeals. Affirmed.

Samuel B. Adams and A. Pratt Adams, both of Savannah, Ga., for appellant.

A. R. Lawton, Jr., of Savannah, Ga., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. On November 9, 1916, the appellant, Strachan Shipping Company, agreed in writing, subject to conditions stated, to furnish to the appellee, Gulf States Steel Company, freight room for 1,000 tons of steel billets—

"per steamship May shipment * * * from Savannah to Liverpool or Manchester * * * at the rate of eleven dollars (\$11:00) per ton of 2,240 lbs. Freight prepaid."

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 268 F.—1

In July, 1918, after 800 of the 1,000 tons of billets called for by the contract had been shipped in three parcels going by different vessels, the balance of 200 tons was shipped by the appellant on the British steamship Kaduna, pursuant to a permit procured by the appellant from the British Ministry of Shipping, which fixed a freight rate considerably higher than the one stated in the contract. Upon the appellant declining to deliver to the appellee the bills of lading for the billets so shipped, unless the former was paid the amount of freight it had paid on the shipment, the latter paid such amount under protest, and filed its libel to recover the amount of the difference between the sum so paid and the contract rate. The decree appealed from sustained the claim asserted by the libel.

In behalf of the appellant no claim is made that the contract has been canceled, or in any way has ceased altogether to be binding upon it. The evidence adduced does not leave it open to dispute, and it is not disputed, that the contract was modified in respect of the time when the freight space was to be furnished; the appellee acquiescing in the postponement of shipments beyond the month of May, 1917. For the appellant it is contended that the contract was modified in respect of the freight rate also, and that the appellee consented to pay more than the rate stated in the contract if, because of conditions resulting from the existence of war, the appellant had to pay more to obtain the freight space required. There was no express modification of the contract in the last-mentioned respect. There was no evidence that the appellee consented to pay more than the contract freight rate, unless it is found in correspondence now to be mentioned.

On January 19, 1917, the appellant wrote to the appellee a letter which, after referring specifically to contracts covering 4,000 tons of steel billets for January and February shipment, 2,000 tons each month, and mentioning the fact that the owners of steamers chartered to carry the steel mentioned had advised appellant that they were unable to get licenses, except on condition that two-thirds of the cargo carried be government goods of a kind that made it impossible to complete the cargoes with any commodity heavier than cotton, concluded with the following statement:

"We feel under these conditions that we would be justified in canceling all bookings as provided for in requisition and war clauses of contract, but beg to assure you that such is not our desire, and that we intend to continue our efforts to supply tonnage to cover all contracts with you at earliest possible date, although we feel that it is important, and indeed necessary, that we frankly advise you of the situation, in order that you may advise and explain to your buyers that there will be almost certain delay in forwarding parcels mentioned."

On the same day Mr. Armstrong, a director and vice president of the appellant, wrote a personal letter to Mr. Knight, appellee's traffic manager, which, after referring to the letter just quoted from, and mentioning the fact that requisitioning by the British government of much of the space in British steamers then being chartered in this country made it uncertain when space could be obtained for appellee's steel, said:

"I wish to suggest to you privately that, in my opinion, something might be accomplished by writing or cabling Admiralty to provide space to take care of your sales contracts."

The appellee complied with this suggestion, and so notified the appellant by a letter dated January 22, 1917. On January 24, 1917, appellee sent to appellant the following telegram:

"Our London agents Sanders Brothers and Company cable following Grantley Ethelanic parcels thanks to recommendations by ministry of munitions the oversea transport department New York superintendent gets cable instructions to arrange space if not by above vessels then by earliest possible opportunities at freight contract rate with undersanding if vessel claims market rate you pay same as department will issue us certificate enabling refund this end stop. Understand Grantley due Savannah shortly please indicate what tonnage she will lift so we will know what documents necessary to send to you."

As shown by the correspondence which preceded it, that telegram related to freight space for 4,000 tons of billets, 2,000 for January and 2,000 for February shipment. As to those shipments is cannot be said that it plainly showed that appellee consented to pay appellant freight at a higher rate than that contracted for. Certainly the act of the appellee in communicating to the appellant the contents of that telegram did not amount to a representation that the refunding privilege mentioned had been granted as to future shipments other than those specifically dealt with, and for an indefinite time, and did not indicate appellee's consent to pay more than the contract rate on future shipments other than those to which the correspondence referred.

For considerably more than a year following the date of that telegram, and before the shipment now in question was made, there were correspondence and dealings between the parties in reference to the several shipments contracted for. Nothing in such subsequent correspondence or dealings indicated that the parties concurred in construing the above set out telegram as evidencing a consent by the appellee to pay freight at a higher rate than that contracted for, either on the shipments under the contracts for January and February, or on a shipment under the contract now in question. It was not shown that the appellee paid more than the contract rate on any of the shipments made prior to the one now in question, all of which were made under permits obtained by the appellant for the use of space on requisitioned British vessels. The contract rate was charged and paid on the three preceding shipments of parts of the 1,000 tons of billets called for by the contract for May shipments. The facts just stated indicate the absence of anything in the dealings between the parties with reference to previous shipments upon which to base a claim by the appellant that the appellee had estopped itself to insist on the freight rate stated in the contract under which the shipment now in question was made.

The information that the permit under which the 200-ton shipment now in question was made called for a freight rate higher than the one named in the contract was imparted to the appellee in a letter of the appellant dated June 6, 1918. The letter of the appellee to appellant, dated June 18, 1918, accompanying the railroad bills of lading for the 200 tons of billets comprised in that shipment, specifically called

attention to the fact that the ocean freight rate stated in the contract was \$11 per ton. A letter of the appellant to appellee, dated June 19, 1918, contained the following:

"We carefully note all that you write, and in reference to the freight, we observe you mention that same should be calculated at \$11.00 per ton, completing our contract 273. This movement is now covered by permit No. 9118 issued by the British Ministry of Shipping, New York, which shows a rate of 82/6, freight to be prepaid, and we, of course, must be guided entirely by this permit. Kindly, therefore, take note of this difference, and oblige."

The following is a copy of a letter of appellee to appellant, dated June 24, 1918, omitting address and signature:

"Referring to your favor of the 19th instant, file 40619, concerning steel for Bayliss, Jones & Bayliss, we do not understand that the permit issued by the British Ministry of Shipping in any way affects the rate of freight as that is covered by your contract. Of course, if you do not intend to protect your contract, we would like to have some expression from you on the subject."

That correspondence occurred before the 200 tons of billets were delivered to the vessel in pursuance of the permit. Before the shipment was actually made, appellant did not make it known to appellee that the former would not abide by the provision of the contract on the subject of the rate of freight to be paid by appellee. The circumstances attending the shipment negative the conclusion that the appellee estopped itself to hold the appellant to the contract so far as the freight rate was concerned.

The conclusion is that the evidence adduced does not show that there was a meeting of the minds of the parties on the subject of a modification of the contract in respect of its provision stating the rate of freight to be charged, and that it did not show that appellee, by estoppel or otherwise, lost the right to have the shipment in question made by appellant at the contract freight rate.

It follows that the decree appealed from should be, and it is, affirmed,

LOUISVILLE & N. R. CO. v. WESTERN UNION TELEGRAPH CO.*

(Circuit Court of Appeals, Sixth Circuit. July 29, 1920. On Application for Rehearing, October 15, 1920.)

No. 3320.

 Eminent domain \$\infty\$=167(5)—Repealing statute held applicable to pending suit.

Ky. St. Supp. 1918, § 840a, providing that no right of way shall be taken by condemnation longitudinally along the right of way of any railroad company by any telegraph or telephone company, and repealing all acts in conflict therewith, held to apply to a pending suit by a telegraph company to condemn such right of way under Ky. St. § 4679c, which authorized such suits.

2. Statutes \$\iiins 276(1)\$—Repealing statute applicable to pending suit.

Ky. St. \\$ 465, providing that "no new law shall be construed to repeal a former law as to * * * any right accrued or claim arising under

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*Certiorari denied 254 U. S. —, 41 Sup. Ct. 147, 65 L. Ed. —.

the former law, or in any way whatever to affect * * * any right accrued or claim arising before the new law takes effect," held not to preserve the right of action of the plaintiff in a pending suit, where such right of action was given by a statute and has been expressly taken away by a later statute.

3. Constitutional law \$\iiint 280\$—Proceedings to condomn right of way gave no right which could not be withdrawn pending suit.

Under a statute authorizing a telegraph company to maintain condemnation proceedings against a railroad company, and providing that it shall have the right to construct and maintain its line along the right of way of the railroad company on paying just compensation as therein provided, no vested right accrues to the telegraph company until final judgment in the condemnation suit and payment of the compensation fixed, and until that time authority to maintain the suit may be withdrawn by a repealing statute.

4. Eminent domain €==168—Right to condemn property by telegraph company not aided by possession.

The fact that a telegraph company, at the time of instituting a suit to condemn right of way for its line over the right of way of a railroad company, was in possession of and operating such a line, under a right acquired by a contract with the railroad company, which had expired, held to give it no better standing in the condemnation proceedings.

On Application for Rehearing.

Eminent domain \$\infty\$ 320—Trial court's judgment does not vest title irrevocably in condemnor.

Under Ky. St. Supp. § 840a, for condemnation of right of way for telegraph lines, which requires a judicial finding of the right to condemn, from which an appeal may be taken as well as from the award of damages, the title to the right of way does not become irrevocably vested in the telegraph company on judgment for condemnation in the trial court, from which an appeal is subsequently taken.

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit in equity by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. From an order denying a motion to dissolve injunction, defendant appeals. Reversed.

See, also, 207 Fed. 1, 124 C. C. A. 573; 252 Fed. 29, 164 C. C. A. 141.

Helm Bruce, of Louisville, Ky. (Henry L. Stone, Edward S. Jouett, and William A. Colston, all of Louisville, Ky., on the brief), for appellant.

Alex P. Humphrey, of Louisville, Ky. (A. E. Richards, Richards & Harris, and Humphrey, Crawford, Middleton & Humphrey, all of Louisville, Ky., and Rush Taggart and Francis S. Stark, both of New York City, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. Pursuant to a Kentucky statute of 1898 (Ky. St. § 4679c), the telegraph company, in December, 1911, began a proceeding to condemn an easement for a line of telegraph poles and wire over and along the right of way of the railroad company within

the state of Kentucky. The details of the situation involved are fully stated in the opinions of this court in the suits between the same parties, reported in 207 Fed. 1, 124 C. C. A. 573, in 249 Fed. 385, 161 C. C. A. 359, and in 252 Fed. 29, 164 C. C. A. 141. The condemnation proceeding came to a trial upon the law side of the court below, and resulted in a judgment of condemnation and an award of damages to be paid by the telegraph company to the railroad company in the sum of \$500,000. The District Court granted a new trial. Upon the second trial, there was again a judgment of condemnation, and the damages were fixed, by direction of the court and upon the theory that only nominal damages could be recovered, at the sum of \$5,000. This judgment was entered on February 16, 1916. On March 18, 1916, the telegraph company paid into the registry of the court the amount of this judgment and costs. A writ of error from this court was allowed on June 19, 1916, and on May 8, 1918, this court entered judgment reversing the judgment of the District Court and remanding the cause, with instructions to award a new trial generally upon the subject of compensation and to some extent upon the subject of necessity. 249 Fed. 385, 403, 161 C. C. A. 359. In March, 1919, the railroad company tendered and filed in the injunction suit (207 Fed. 1, 124 C. C. A. 573; 252 Fed. 29, 161 C. C. A. 141), a supplemental answer, alleging that the act of 1898, upon which the condemnation suit rested, had been repealed, and that further prosecution thereof would be in violation of the law. It thereupon moved to dissolve the existing injunction, so far as this pertained to Kentucky. It also filed, in the condemnation case, a motion for dismissal upon the same ground. The motion to dissolve the injunction as to Kentucky was denied, and the railroad company brings this appeal.

The substantial question involved is whether the repeal of the 1898 law was effective as against this pending proceeding, and all parties agree that this question may be considered and decided upon this appeal, without regard to the fact that it might be raised somewhat more

directly in the condemnation case itself.

[1] The repealing law was approved March 14, 1916. It is given in the margin. It is so plain that the interests of the owner are not

¹ "An act to protect railroad companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes."

"Be it enacted by the General Assembly of the commonwealth of Kentucky: "Section 1. That no part of the right of way of any railroad company, or any interest or easement therein, shall be taken by any condemnation proceedings, or without the consent of such railroad company, for the use or occupancy of any part of such right of way, on, over and along such right of way longitudinally, by any telegraph, telephone, electric light, power, or other wire company, with its poles, cables, wires, conduits, or other fixtures; provided, that nothing in this section shall be construed as preventing any such wire company from obtaining the right to cross the right of way of a railroad company, under existing laws in such manner as not to interfere with the ordinary use or ordinary travel and traffic of such railroad company's railroad.

"Sec. 2. That all acts and parts of acts in conflict with this act be and the

same are hereby repealed."

³ Carroll's Kentucky Statutes, § 840a; Session Acts Ky. 1916, c. 15, p. 69.

"taken," at least until the effective judgment of condemnation, and the language of this act of 1916 so explicitly forbids the taking of such an interest as is being sought in this condemnation proceeding, that it seems to have been taken for granted, in the court below as here, that the condemnation suit must fail 2 unless for one of the two special reasons urged against giving this new statute its seeming full effect. The first is that, by the force of a general rule of construction embodied in the Kentucky Statutes, the act of 1916 should not be construed as intended to reach pending cases; the second is that, if the Legislature did so intend, it had not the constitutional power.

[2] Section 465 of the Kentucky Statutes says, so far as now perti-

nent:

"No new law shall be construed to repeal a former law as to * * * any right accrued or claim arising under the former law, or in any way whatever to affect * * * any right accrued or claim arising before the new law takes effect. * * *"

So far as concerns the claim that the pendency of a judicial proceeding as to the existing right or conditions is a controlling consideration, it will be apparent that this section (465) makes no direct reference to that subject. It does not say that no new law shall be construed to repeal another, so as to affect any proceeding pending, but speaks only with reference to its effect upon any "right accrued or claim arising under the former law" or "any right accrued or claim arising before the new law takes effect." Those "rights" or "claims" which are thus exempted might or might not be involved in pending judicial proceedings; that would be as it happened; but the exemption would be the same in either case.⁸ In applying this statute (section 465) here, we must lay aside the fortuitous fact that judicial proceedings were pending, and consider merely whether the telegraph company's proposition that it could acquire this easement against the will of the railroad company was a "right accrued or claim arising under the former law," and this is much the same question hereafter considered under the other branch of the case.

In any event, section 465 does no more than lay down a canon of construction for doubtful cases. Except so far as it may embody the constitutional principle that vested rights may not be destroyed, it could not, if it would—and quite clearly it does not attempt to—make invalid any future act which should be made to repeal expressly a former law "as to rights accrued and claims arising" thereunder. It is only when the language of an act is vague and general, and might or might not fairly be taken to show an intent to affect a situation which had arisen under a former law, that the courts would go to section 465 to get a rule of construction.

We cannot find in the statue of 1916 any ambiguity which authorizes reference to section 465. Section 2 of the act repeals all former laws,

² Lewis on Em. Dom. (3d Ed.) § 380; Boone County Court v. Snyder, 9 Ky. Op. 921; Commonwealth v. Ewald Iron Co., 153 Ky. 116, 154 S. W. 931.

³ If there were doubt about this, it would be resolved by the Pannell Case, infra, where suit was pending, but the "right" or "claim" was held not to be saved by section 465.

and, if it stood alone, there would be force in suggesting a resort to section 465; but section 1, in the most express language, forbids the rendering of the judgment which is demanded in the condemnation case. It says:

"No part of the right of way * * * or any interest or easement therein, shall be taken by any condemnation proceeding * * * by any telegraph * * * company," etc.

Whether or not it can be assumed that the Legislature had this particular condemnation in mind, we think that the intent to stop every such immature proceeding, whether initiated or not, is too clear for doubt; section 2 alone would do everything except arrest a case pending; section 1 could have had no purpose except that. Thus we must

come to the question of power.

[3] The right of eminent domain is an attribute of sovereignty. The moment it is thought of as a private right, it ceases to exist. It is none the less a public right, because the state sometimes consents that it may be exercised by a quasi public corporation, like a common carrier. Such license or permission is granted because its exertion in that form is thought to be for the public interest. The statute of 1898 does not grant to or vest in the telegraph companies any property right. It permits them to proceed in their own names, but really on behalf of the state, with the preliminary proceedings to determine whether the condemnation is for the public interest, and to fix the amount of the damages, and then allows them to take the interest in question; but certainly nothing is "taken" until the judgment is obtained and its conditions performed. Until that time, the telegraph company has only a license to exercise, as the agent of the state, a portion of the sovereign power of the state. Even an express provision in such a statute that a subsequent Legislature could not recall the permission and cancel the license, if the steps preliminary to taking had been commenced, but had not ripened into a private right, would doubtless be invalid, because one Legislature cannot limit the governmental power of its successor. The ordinary rules of mutuality lead to the same result. The condemnor may abandon the proceedings, if he thinks the award is too high. Can the state be irrevocably bound, when its licensee has only an option? These considerations lie at the base of the matter now involved, and are so familiar that they need only be stated.

The subject-matter involved is the easement over the railroad right of way. We do not see how it can be claimed that the telegraph company, by filing its petition for condemnation and going to trial on the issue, acquired any right to or interest in this easement. The language of the statute is that it shall "have the right" to construct and maintain its line along the railroad right of way—when? "Upon making just compensation as hereinafter provided"; that is to say, after obtaining a judgment and paying the fixed amount. Until that time the statute does not purport to grant any right.

Nor can we think that any now existing right was acquired by the payment into court of the amount of the judgment. That judgment was reversed. With exceptions not here important, a judgment which is reversed and set aside is as if it had never been. When plaintiff

recovers a judgment upon conditions, he surely cannot, by immediate performance of the conditions, deprive the defendant of the right to go to the reviewing court and get the judgment set aside; yet to this point necessarily comes the claim that, by paying the judgment into court, plaintiff acquired some kind of an interest which was vested, so that it was entitled to protection therein. Upon the new trial which was awarded, there might ordinarily be a judgment that there could be no condemnation at all; and although there was a complete new trial ordered here only as to compensation, the next jury might fix an amount which the telegraph company would not pay.

When the judgment and payment of February and March, 1916, are put out of view, it becomes clear that such inchoate claim as the telegraph company had to this right of way on June 12, 1916, was not such a vested property right or interest as is reached and protected by the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, or the corresponding clause of the Constitution of Kentucky, but was rather a claim, the continued existence of which was contingent upon the existence of the supporting statute, and that, when the statute was repealed, the inchoate right fell with it. Baltimore Co. v. Nesbitt, 10 How. 395, 398, 13 L. Ed. 469; Garrison v. New York, 21 Wall. 196, 205, 22 L. Ed. 612; Manion v. Louisville Co., 90 Ky. 491, 495, 14 S. W. 532; Sandy Valley & Elkhorn Ry. Co. v. Bentley, 161 Ky. 555, 559, 171 S. W. 178.

[4] It is sought to escape from this hardly questioned general rule by force of the fact that the telegraph company was in possession of the easement when the repealing statute was passed. If this possession had been acquired through or even in contemplation of the condemnation proceedings, it would be necessary to consider its force; but that was not the character of the telegraph company's possession. It had been acquired by contract with the railroad company many years before, and when the contract right expired the telegraph company had continued to stay in possession without any surrender or reacquire-It is true it had obtained the aid of an injunction to maintain this possession pending the condemnation, but this injunction is in no way equivalent to an ouster and re-entry; it was rather collateral to the continuing, undisturbed possession which the telegraph company had acquired under a right foreign to any thought of condemnation. See 249 Fed. 385, 395, 161 C. C. A. 359. Such a possession cannot be thought of as a "right," which gives the telegraph company any better standing in the condemnation proceedings than it would otherwise have.

In concluding that, when the repealing act was passed, the telegraph company had acquired no "right" to condemnation in any pertinent sense of that word, we do not overlook the line of cases holding that one who commences a proceeding to condemn acquires thereby a priority of right as against a junior condemnor, who perhaps seeks to better his position by taking a deed from the owner. Cumberland v. Pine Mt., 96 S. W. 199, 28 Ky. Law Rep. 574; Sioux City v. Chicago (C. C.) 27 Fed. 774; Lewis, Em. Dom. (3d Ed.) p. 905. That there is such a priority of right as between two claimants does not per-

suade that either one of them has that kind of a right which will survive the repeal of the statute on which both are based.

The main reliance, however, of counsel for the telegraph company in this court, and of the court below in its careful opinion, is the proposition that the Legislature of Kentucky has no power to change the status of the parties in any pending litigation. This proposition does not depend on any express provision of the Constitution of the state, but on an implied prohibition said to be established by the Kentucky courts; and in examining whether such a prohibition exists, it must be remembered that, to be effective here, it is to be broad enough to extend to cases where no vested right is impaired—for this is such a

It must also be remembered that, in reviewing the decisions of the Supreme Court of a state upon a state law, as well as in considering those of the Supreme Court of the United States upon a federal law, we are bound only as to the very point decided, and not by general language extending further. In the familiar words of Chief Justice Marshall, in Cohens v. Virginia, 6 Wheat. 264, 399 (5 L. Ed. 257):

"General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of the maxim is obvious," etc.

There are said to be nine Kentucky decisions supporting the proposition. They are cited in the margin. A careful study of them shows the error of this contention—at least, so far as concerns the present applicability of the proposition. They all purport to be based upon Gaines v. Gaines; but the only matter there really decided was that the Legislature could not invade the province of the judiciary, and change the rights of one specific person after the controversy had arisen which fixed those rights. The fact that litigation was pending as to these rights was mentioned by the court; but this was a convenient manner of reference to the fact that the rights had become either vested rights. in the full sense of that term, or at least so fixed that it had become a iudicial function to examine and determine what they were. Substantially the same situation existed in each of the other cited cases in which the legislation was held unlawful; the question was one of infringement by the Legislature upon the judiciary. The most that can be said of these cases, when decisions are distinguished from dicta, is that retroactive authority to lay a tax has been held bad in some cases where litigation was pending on the subject, and good where there was no suit in progress. This (possibly) anomalous result may depend on the peculiar character of the rights and powers involved. See decision in Manion v. Louisville. However, if we concede the existence of a rule

⁴ Gaines v. Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; Cabell v. Cabell's Adm'r, 1 Metc. (Ky.) 319; Hedger v. Rennaker, 3 Metc. (Ky.) 255; Allison v. L., H. C. & W. Ry. Co., 9 Bush (Ky.) 247; Allison v. Railway, 10 Bush (Ky.) 1; Thweatt v. Bank of Hopkinsville, 81 Ky. 1; Norman v. Boaz, 85 Ky. 557, 4 S. W. 316; Manion County v. L. & N. R. Co., 91 Ky. 388, 15 S. W. 1061; Turner v. Town of Pewee Valley, 100 Ky. 288, 38 S. W. 143, 688.

on this subject, peculiar to Kentucky, it does not reach the present case. It is concisely stated in Turner v. Pewee Valley, where the opinion says:

"This court has repeatedly held that no legislation can affect the rights of parties litigant enacted after the institution of the suit."

As we have pointed out, the matter here involved was not a right in the sense in which that term is used in any of these cited opinions. It was a revocable license; and we are satisfied that the Court of Appeals of Kentucky never intended to, and never did, pass upon the real question here involved until it decided the case of Pannell v. Louisville Co., 113 Ky. 630, 68 S. W. 662, 82 S. W. 1141. It there appeared that a statute regulating the conduct of warehousemen provided penalties for its violation, and it also provided that the party injured might bring an action and recover for his own benefit the prescribed penalty. Such a penalty had accrued, and the party had brought an action, when the Legislature repealed the statute. Upon full consideration, it was held that the right of the plaintiff to recover had not been saved, either by the Legislature's lack of power to remit an accrued penalty, or by the effect of section 465 in saving existing rights. It is true that the court did not, in terms, refer to the constitutional limitation now invoked (a strange omission, if it is as far-reaching as is claimed); but we can see no distinction between that case and this, in the principles involved. The right to impose a penalty upon a citizen who disobeys the law, like the right to take a citizen's property by eminent domain, is a right of sovereignty. In either case the state, in pursuit of its public policy, may delegate to a citizen power to exercise the right; in either case the person to whom the right is delegated becomes a licensee, and may thereupon proceed in execution of the power; but in either case the power may be withdrawn pending the incomplete attempt to execute it.

Not only that, but the statutes involved in the two cases are so similar in form as to suggest that the repealing law in the condemnation matter was adopted from the repealing law in the warehouse matter. In each case the law had two sections. In the latter, section 1 repealed the law which authorized suit for a penalty, and section 2 declared that "no penalty provided in said act shall hereafter be recoverable." In the former, section 1 declared that "no right of way * * * shall be taken by any condemnation proceeding," and section 2 repealed the old law. There is no distinction in language between the two, save that in the penalty case the law says, "No penalty shall hereafter be recoverable," while in the condemnation case it says, "No right of way shall be taken." If any distinction thereby results, the use of the word "hereafter" would tend to show an intent not to apply to existing suits; but the Kentucky court held even that language to apply to such suits. Even if the questions of constitutional power and of applying section 465 were otherwise doubtful, we would be compelled to think them foreclosed for us by the decision in the Pannell Case. We may add that the "right" of the person injured by a warehouse overcharge to carry his pending suit to judgment and to collect the prescribed penalty is plainly not of less degree or dignity than the "right" of a telegraph company to pursue to the end its pending condemnation, where the

result will be only to give the company an option to take the property or abandon it. It cannot be that the former right may be destroyed by the Legislature, while the latter is inviolable.

Our conclusion is confirmed, when we remember that a license not coupled with an interest is revocable until executed, and when we compare the license granted by the condemnation act of 1898 with a private license. If we may suppose that A., owning land, had granted a revocable license to B. for a right of way thereover, in order that B. might reach the adjoining land of C., wherein B. claimed certain rights, and litigation was pending between B. and C., wherein B.'s contention involved and rested upon this license, it could not be thought that the pendency of this suit between B. and C. would, of itself, prevent A. from revoking the license, or that B.'s rights, which depended solely thereon, could survive the revocation.

Notice should be given to the case of Treacy v. Elizabethtown, 85 Ky. 270, 3 S. W. 168, upon which appellee relies. A special act provided for condemnation by a railroad. The prescribed proceeding was commenced by the railroad, an award of damages had, and the amount of the award paid into court. The property owner appealed, and secured a reversal, because the railroad had not proved the necessity of taking for public use. Pending this appeal, the Legislature repealed the special act, and substituted a more general law, differing in important particulars. A new trial was conducted under the repealed special act, and from the resulting judgment the property owner again appealed, thus presenting the matter decided by the opinion just cited. For reasons which are not now important, the court reached the conclusion that if, under the special act, the railroad had proved the necessity for taking, and an award had been made, and it had paid or tendered the amount of the award, it would thereby have acquired a vested and perfected right to enter upon and use the property—a right so unconditional that it could not have been affected by any subsequent reversal and new trial on the subject of damages. 5

Upon the basis of this conclusion, the court holds that, since the railroad company had not thus acquired this kind and degree of a right before the repeal of the special statute, it was error to continue proceedings thereon. Since, in the present case and under the condemnation law of 1898, it is clear that the telegraph company had not acquired any vested right when the repealing act was passed, and that the reversal of the judgment (unlike the reversal contemplated by the special act in the Treacy Case) had retrospective effect to destroy the basis of any such right, the decision in the Treacy Case supports the present contention of the railroad company. If such a right as is acquired merely by commencing a condemnation suit, were sufficient to excite the saving action of section 465, or to invoke the supposed Ken-

⁵ The court is apparently quoting from or paraphrasing the special act, when the opinion says: "Immediately after the return of the first verdict, and whether the same was set aside and a new jury ordered or not, the appellee had the right to enter upon the land and construct its road; and upon payment or tender of payment of the amount assessed, the appellee was clothed with the actual title to the property."

tucky rule that legislation may not change the status of parties in a pending litigation, the decision of the Treacy Case must have been the other way. It could not be of controlling importance in that case that a new law was substituted for the one repealed, while in the present case there was no such substitution. The question was whether the old

law did or did not continue in force for the pending case.

We may add that further consideration of the case of Marion v. Louisville, etc., supra, seems to lead us inevitably to the conclusion that we are adopting. It was there held that the railroad company, prosecuting condemnation, could abandon the proceedings at any time, because it was merely exercising authority delegated by the state, and it should have the same right to abandon which the state concededly had. The statute of 1916 was only a method of directing the abandonment of all proceedings pending under the 1898 statute. The Marion Case can be distinguished only by saying that the agent may abandon

but the principal may not.

The impression easily arises that repealing legislation of this kind, which affects pending suits, is obnoxious to principles of fairness, but that is a question for the Legislature, and not for the courts. Nor is it wholly one-sided. It appeared beyond dispute in the previous phases of this litigation that the erection and maintenance of such a telegraph line would necessarily cause some degree of annoyance and embarrassment in the operation of the railroad. It is not necessarily arbitrary and unreasonable for the Legislature to think it will no longer lend its aid to one who is trying to locate such a line upon a railroad right of way against the will of the railroad, but will rather compel the telegraph company to buy its right of way from those who are willing to sell, or to use the roads and streets which the public owns.

We do not consider the matter foreclosed by our former mandate directing a new trial. The fact that the law of 1898 had been repealed did not then appear by the record in the case, and our mandate must be construed by the existing record. Since the only matter involved is as to the construction and validity of the law, there is no question of a permissible discretion exercised by the court below in refusing to

dissolve the preliminary injunction.

The order must be reversed, and the case remanded, with instructions to dissolve the injunction, as to Kentucky, as prayed.

On Application for Rehearing.

PER CURIAM. [5] In an application for rehearing, the telegraph company insists that by the law of Kentucky, when the jury in a condemnation matter assesses the damages and the condemnor pays or tenders the amount to the owner, the title vests, and is unaffected by any subsequent reversal of the award on appeal; that the condemnor's election, after the first award, to pay and take the property, is irrevocable; and that, where there are unknown or unreachable owners (as the mortgagees here), the statute may rightly provide (as this did) for payment into court in lieu of personal payment. It refers to several

Kentucky decisions in railroad condemnations 6 which hold that the immediate possession and use of the property may be had by the condemnor upon payment of the assessed damages, and that if, upon the statutory appeal for de novo trial, the damages are increased, the owner's remedy is a personal judgment for the excess.

We find nothing held in any of these decisions which necessarily reaches beyond a present and perhaps contingent possession, or which would deny the right of the owner to have possession returned to him if the damages, as finally fixed, were not paid—a protection which seemingly would be necessary under the Kentucky Constitution-or if the right to condemn should finally be denied. These decisions rest upon the pecunar nature of the railroad condemnation laws. In condemnation for railroad purposes the right is not usually disputed, but the amount of damages is the thing contested. It is therefore not necessarily inappropriate that the right of possession should at least contingently pass, pending a judicial review of the award, and on condition that the payment to be finally adjudged is properly secured. But see Covington Co. v. Piel, 87 Ky. 267, 8 S. W. 449. Perhaps upon this theory sections 838 and 839 of the Kentucky Statutes provide for assessment by commissioners, a report to the circuit court, an order of confirmation if there are no exceptions, and if there are exceptions a jury trial as to the amount of damages. The statute does not in terms contemplate any review of the judgment so rendered, but provides that the railroad, on payment of the judgment, may take possession of, use, and control the property as fully as if the title had been conveyed. Some special charters upon which some of the cases depend expressly state that this possession may be maintained in spite of a new trial or further trial. It is in execution of a policy so declared that the conclusions of the Kentucky Court of Appeals, in the cases cited, have been reached; the right to condemn was not challenged, nor was any question involved, excepting as to damages. On the contrary, in Tracy v. Elizabethtown Co., 80 Ky. 259, it was recognized that the right to condemn may be disputed in the same proceeding or in an injunction suit, and the discussion found in that opinion must, we think, lead to the conclusion that if the right should finally be denied, the possession taken by the railroad must be given up.

The telegraph condemnation act here involved contains no corresponding provisions; on the contrary, it in effect declares that upon appeal there shall be supersedeas unless the condemnor gives a bond in double the amount (which was not done here). The statute expressly requires, as the first step, a judicial finding that certain conditions exist upon which the right to proceed further rests; an appeal from this finding, as well as from the award, is necessarily contemplated; it is not to be supposed that, while it is still open for the courts to decide that the right does not exist, the title may nevertheless become irrevocably vested in the condemnor. Even if there were in this statute provisions

⁶ Chicago Co. v. Sullivan, 24 Ky. Law Rep. 860; Hamilton v. Maysville Co., 84 S. W. 778; Long Fork Co. v. Sizemore, 184 Ky. 54, 211 S. W. 193; Shirley v. Southern Co., 118 S. W. 268; Madisonville Co. v. Ross, 126 Ky. 138, 103 S. W. 330, 13 L. R. A. (N. S.) 420.

more closely analogous to the railroad statute, we cannot think that the Kentucky courts would consider the title to be transferred and vested by a payment into court, which payment the owner refused to accept, and which was pursuant to a judgment later wholly vacated.

The application is denied; but our orders will be without prejudice to the right of the District Court to maintain the injunction for such brief period as may be necessary for the telegraph company, using care and diligence, to remove its property.

HAMILTON et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1920.)

No. 1816.

Seamen € 12—Not entitled to discharge in port of distress.

Under Rev. St. §§ 4511, 4530, and amendments (Comp. St. §§ 8300, 8322), neither master nor crew can renounce their duties under the contract until the end of the voyage, which means the port of destination, not a port of distress; so that the seamen are bound to serve until the voyage ends in the port of destination, if it is extended beyond the time mentioned in the contract, not by the intention or negligence of the master, which would be a breach of the contract releasing the seamen, but by perils of

2. Seamen 34-Agreement of crew to refuse to work is "revolt."

The agreement of the entire crew of a ship anchored in a port of refuge before the end of the voyage to refuse to obey the orders of the master, because the time mentioned in the contract had expired, is endeavoring to make a "revolt," and conspiring to revolt, under Criminal Code, § 292 (Comp. St. § 10465), though there was no effort to usurp the command of the master, or to take charge of the ship, since the master cannot be in command of the ship unless the crew is obedient to his orders.

[Ed. Note.—For other definitions, see Words and Phrases, Revolt.]

3. Seamen 34-Statute punishing "willful disobedience" applies to indi-

vidual acts, while "revolt" implies combination.

Rev. St. \$ 4596, subds. 4 and 5, as amended by Act March 4, 1915 (Comp. St. § 8380), making a misdemeanor the "willful disobedience" of seamen, relates to mere ordinary disobedience or neglect of duty by one or several seamen, while Criminal Code, § 293 (Comp. St. § 10466), covers the more serious offense of "revolt," by such combination and co-operation of refusal to obey as deprives the master of his authority and command.

4. Seamen 34—Erroneous construction of statute by seamen does not disprove guilt of revolt.

The fact that seamen erroneously construed the statute as giving them the right to quit service in a port of refuge at the termination of the contract term, though such construction was contrary to the terms of the statute and its construction by the courts, and the American consul advised them they were still bound to serve, is no defense in a prosecution for revolt, though an honest mistake by them as to a fact on which their liability for further service depended would be a defense.

5. Seamen 59—Need serve to end of voyage only if vessel is "seaworthy." Inherent in the shipping articles of seamen is the absolute obligation of the owners and operator to see that the vessel was seaworthy; that is, she must be tight, staunch, and strong, and so equipped and the cargo so stored as to resist all ordinary action of the sea. But it is not necessary that she be in perfect condition or equipped with the most improved appliances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Seaworthy,]

6. Seamen 9—Presumption is that vessel is seaworthy.

While seamen are not bound to serve on a vessel which is unseaworthy, or which they believe on reasonable grounds is unseaworthy, though it may turn out on further investigation that it was in fact seaworthy, the presumption is in favor of seaworthiness, and the crew should not refuse further service because of unseaworthiness, until after they had used reasonable means to ascertain the actual condition of the vessel, including a resurvey, if that be practical.

7. Seamen \$\iiins 34\$—Evidence held not to show vessel was unseaworthy.

Evidence which showed that the vessel's failure to reach port of destination before the time stated in the contract was due to engine trouble and to the loss of three propeller blades held not to establish unseaworthiness, which would justify refusal of the crew to serve further, where there was no evidence that they complained of any defect in the vessel or its machinery, and they made no demand for a survey, and the testimony of the master was undisputed that he had a Lloyd certificate of seaworthiness.

8. Criminal law =1172(1)—Erroneous charge immaterial, where guilt un-

disputed.

Where the sole ground for the joint refusal of the crew to serve to the end of the voyage was an erroneous construction of the statute, so that their guilt was indisputable, any erroneous statement of law in the charge was immaterial.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Judge.

E. Hamilton and others were convicted of endeavoring and conspiring to make a revolt as merchant seamen, and they bring error. Affirmed.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 15, 65 L. Ed. —,

Henry Bowden, of Norfolk, Va., and George Sutherland, of Washington, D. C., for plaintiffs in error.

Hiram M. Smith, U. S. Atty., of Richmond, Va.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. A general verdict of guilty was found against the appellants, seamen of the United States merchant ship Poughkeepsie, on an indictment framed under section 292 of Penal Code (Comp. St. § 10465). The first count charged an endeavor to make a revolt; the second, conspiracy to make a revolt; the third, a combination and conspiracy "to refuse and neglect to perform their proper duty on board of the said vessel."

The pivotal question is whether the evidence required the direction of a verdict of acquittal. The shipping articles, dated August 5, 1919,

stipulated for the voyage as follows:

"From the port of New York to one or more ports in France, and such other ports and places in any part of the world as the master may direct, and back to a final port of discharge in the United States (north of Cape Hatteras), for a term of time not exceeding six calendar months."

Leaving New York on August 29, 1919, the vessel arrived in Havre in about 131/2 days. She left Havre November 12th for Southampton, and left Southampton November 14th for New York. On November 22d, on account of boiler trouble, she went to Fayal, Azores, as nearest point for repairs. Having remained there until December 30th, she again sailed for New York in abundant time to reach that port and complete her voyage before the end of the 6-months period. On January 2d, 5th, and 6th the ship lost three propeller blades in succession and became helpless. In response to a wireless call for assistance, another vessel towed her to Granaway's Deep, about three miles from Hamilton, Bermuda, considered a part of its harbor, though not closely landlocked. Here she anchored on January 22d, for repairs. On February 4th, before the repairs had been completed, the defendants stopped work and served on the master a written ultimatum, claiming the remainder of wages due them and free transportation to New York, on the ground that their term of service had expired. The master refused to accede to the demand and reported the matter to the American consul. The consul in person and by written communication warned the seamen that they were violating their shipping articles and should return at once to work. They persisted in their refusal to work, but remained on the vessel, having no money, and received from the vessel food and shel-The defendants were guilty of no violence, and made no effort to interfere with the control of the ship, unless refusal to perform the duties of a crew can be so regarded. Another crew was employed, and the defendants were arrested and brought in the ship to the port of Newport News.

Counsel contend that a verdict of acquittal should have been directed for three reasons: First, the term of service of the seamen was at an end when the ship reached a port of safety after the expiration of the period of 6 months from the date of the contract; second, the action of the defendants did not constitute an endeavor or a conspiracy to commit a revolt, within the meaning of the statute, and therefore the evidence did not sustain the charge of the first and second counts; third, the statute does not make a combination or conspiracy to neglect and refusal to perform proper duty on board the vessel a criminal offense.

[1] The first position is clearly untenable. Section 4511, Revised Statutes, and amendments (section 8300, Compiled Statutes), and the form provided in the schedule annexed, and section 4530, Revised Statutes, and its amendments (section 8322, Compiled Statutes), for the protection of seamen, relate to the voyage, and impose duties on the ship and seamen for the voyage. Neither can renounce those duties during the voyage. These statutes on their face, and the judicial construction given them, leave no doubt of these conclusions: (1) The master cannot discharge the crew, and the crew cannot demand wages in full, until the end of the voyage; (2) the end of the voyage is not a port of distress, but the port of destination; (3) seamen are bound to serve until the voyage ends in the port of destination, unless there has been a breach of the contract by the master as to the time of the voyage or in some other material particular; (4) extension of the time of the

voyage by intention or neglect of the master is such breach of the contract as entitles the seamen to demand their release on that ground in any safe port; (5) but extension of the voyage beyond the time mentioned in the contract, due to perils of the sea which the master or owner could not be reasonably expected to guard against, is not a breach of the contract as to time, and does not warrant seamen in leaving the vessel or demanding wages in full before reaching the port of destination; (6) on the other hand, seamen are entitled to their wages and discharge when the ship reaches the port of destination before the expiration of the stipulated time of the voyage. Fairchild v. The Aurelius, 8 Fed. Cas. 953; The Hotspur, 12 Fed. Cas. 562; Schermacher v. Yates (D. C.) 57 Fed. 668; The Falls of Keltie (D. C.) 114 Fed. 357; The Belvedere (D. C.) 100 Fed. 498; Belyea v. Cook (D. C). 162 Fed. 180; The Catalonia (D. C.) 236 Fed. 554; Board of Trade v. Baxter (1907) A. C. 373, 9 Ann. Cas. 501, 505. There was no demand for release and payment of wages on the ground that the voyage had been extended by the willful or negligent action of the owner or master, and the proof did not require the conclusion that the extension of the voyage was due to that cause.

Was there a failure of evidence from which a reasonable inference of endeavor to make a revolt or conspiracy to revolt could be drawn? Section 293 of Penal Code (Compiled Statutes, § 10466) defines revolt:

"Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and mutiny, and shall be fined not more than two thousand dollars and imprisoned not more than ten years."

Section 292 of Criminal Code (Act of 1835, Compiled Statutes, § 10465), under which defendants were indicted, provides:

"Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or other commanding officer thereof, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

of the specific question is whether the agreement of the entire crew of the ship, anchored in a port of refuge before the end of the voyage, to refuse to obey the orders of the master, and their united action in carrying out the agreement, while remaining on board, is endeavoring to make a revolt. This was not usurpation of the command from the master, for there was no effort to take charge of the ship. But evidently it was a successful endeavor to deprive him of authority and command on board, and to resist and prevent him in the free and lawful exer-

cise of his command. The united action of a crew in refusing to yield obedience to the lawful command of the master deprives him of the authority and command he was in duty bound to exercise. This is as much resistance and prevention of the free and lawful exercise of his authority and command as an undertaking by a crew to deprive him of any inanimate instrumentality necessary to the command and management of the ship. A master may have possession of the ship alone, but he cannot be in command of it, if the crew unite in refusing to carry out his orders. Command of a fortress means actual control of the garrison for military purposes. Command of a ship means actual control of the crew for nautical purposes. If all the garrison of a fortress, or all the crew of a ship, refuse obedience to the commander, they deprive him of authority and command; they resist and prevent the exercise of his authority and command.

"An endeavor to commit a revolt may be complete, not merely by stirring up, encouraging, or combining with others of the ship's crew to produce a general disobedience of all orders, but also by stirring up, encouraging, or combining with any one or more of the crew to produce a deliberate disobedience to any one lawful order of the master or other officers." United States v. Thompson, 28 Fed. Cas. 102; United States v. Cassedy, 25 Fed. Cas. 321; In resimpson (D. C.) 119 Fed. 620; United States v. Lynch, 26 Fed. Cas. 1033; United States v. Forbes, 25 Fed. Cas. 1141; United States v. Nye, 27 Fed. Cas. 210.

It is true the Supreme Court in United States v. Kelley, 11 Wheat. 417, 6 L. Ed. 508 (1826), said the offense of endeavoring to commit a revolt—

"consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person."

This definition does not include a combination of the entire crew to refuse obedience and the actual refusal of obedience to the master. But Justice Story, in United States v. Haines, 26 Fed. Cas. 62 (1829), held that such combination and co-operation did constitute an endeavor to commit a revolt, saying as to the language of the court in United States v. Kelley:

"In truth, I consider the definition given by the Supreme Court not to have been designed to have more than an affirmative operation; that is, to declare that such acts would amount to the offense, and not negatively, that none others would. I was one of the judges who concurred in the opinion given in the Supreme Court; and it was matter of utter surprise to me when I first learned that such a narrow interpretation of it as is now contended for had been contended for at the har. I have reason to know that it was equally a surprise upon others of my brethren who concurred in that opinion."

In United States v. Gardner, 25 Fed. Cas. 1258, decided later in the same year Judge Story again holds that proof of such combination and co-operation is sufficient. So it seems clear that the action of the defendants would have been an endeavor to commit a revolt, even before it was made clearly so by the act of 1835. Other cases touching the point, but not deciding it, need not be reviewed.

- [3] The argument was earnestly pressed that if the defendants violated any penal statute it was subdivision 4 and 5 of section 4596 of Revised Statutes (Compiled Statutes, § 8380), as amended by the act of 1915, which provides for the punishment of the misdemeanor of willful disobedience of seamen by imprisonment for not more than one month, and continued willful disobedience or continued neglect of duty by imprisonment not more than three months. It is evident that this section relates to mere ordinary disobedience or neglect of duty by one or several seamen, while section 293 of the Criminal Code covers the more serious offense of revolt by such combination and co-operation in refusal to obey as deprives the master of his authority and command, or amounts to resistance or prevention of his free and lawful exercise of his authority and command, and section 292 covers an endeavor or conspiracy to make such revolt. United States v. Forbes, 25 Fed. Cas. 1141.
- [4] There is authority for the position that seamen's refusal to obey the master under mistaken belief, having reasonable foundation, in the existence of a fact which, if it existed, would justify their refusal, is not criminal. United States v. Givings, 25 Fed. Cas. 1331. But the defendants were ignorant of no fact necessary to constitute the crime. The most that can be said for them is that, in doing the acts which constituted crime, they deliberately took the risk of their own opinion of the law, in the face of the warning of the master and the American consul. It is not even claimed that they were ignorant of the existence of the statute, but only that they relied on their own construction of it, that they were entitled to discharge before they had reached the port of destination merely because the term of 6 months had expired, which we have seen was without reasonable foundation in the language of the statute or in the decisions of the courts. Confidence in their construction of the statutes may be a ground for such judicial clemency as was actually exercised in this case—the sentence being two days' imprisonment and a fine of \$50, without costs—or for executive elemency. It is not a ground of acquittal. Reynolds v. United States, 98 U. S. 145, 167, 25 L. Ed. 244; State v. Simmons, 143 N. C. 613, 56 S. E. 701; Commonwealth v. Middleby, 187 Mass. 342, 73 N. E. 208.

The trial judge charged the jury in effect that they must find as a condition of conviction that—

"Reasonable care had been exercised by the master of the Poughkeepsie to determine whether she was in seaworthy condition."

The defendants insist that the District Judge should have charged as requested by them:

"If the jury believe from the evidence that the voyage as described in the shipping articles was prolonged beyond the period of 6 months without fault on the part of the crew because of unseaworthy or defective condition of the ship with reference to her boilers, engine, propeller and other equipment and not because of unusually violent weather, then if the jury also believe from the evidence that at the expiration of the period of 6 months the said vessel was safely in port at Hamilton, Bermuda, then the accused were legally entitled to their discharge and were not legally compelled to obey any commands of the master or other officers of the ship after that time, unless the ship was in danger."

- [5] Inherent in the shipping articles was the absolute obligation of the owners and operators to see that the vessel was seaworthy. To be seaworthy the vessel must be tight, staunch, and strong, and so equipped and the cargo so stored as to resist all ordinary action of the sea. Du Pont v. Vance, 19 How. 162, 167, 15 L. Ed. 584; Corsar v. Spreckels & Bros. Co., 141 Fed. 260, 264, 72 C. C. A. 378; The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760; Thompson Towing & Wrecking Ass'n v. McGregor, 207 Fed. 209, 211, 124 C. C. A. 479; The Caledonia, 157 U. S. 124, 133, 15 Sup. Ct. 537, 39 L. Ed. 644; Rainey v. New York & P. S. S. Co., 216 Fed. 449, 453, 132 C. C. A. 509, L. R. A. 1916A, 1149. But the requirement does not extend to perfect condition of the vessel or the most improved appliances. In re Tonawanda I. & S. Co. (D. C.) 234 Fed. 198; The Santa Clara (D. C.) 206 Fed. 179. The correlative duty on the part of seamen is to serve until the end of the voyage. But they are not bound to serve on a vessel which is unseaworthy, and they should be acquitted of the charge of desertion or revolt, or endeavor to revolt, if in apprehension of danger they leave the ship or refuse to serve, asserting and believing on reasonable grounds that the ship is unseaworthy, although it may turn out on further close investigation that it was in fact seaworthy, for reasonable apprehension of loss of life or limb is set above delay of the vessel. United States v. Givings, 25 Fed. Cas. 1331; United States v. Ashton, 24 Fed. Cas. 873.
- [6] But the presumption is in favor of seaworthiness, since the owners and officers ordinarily would not venture the risk of property or life in an unseaworthy ship, and from their superior ability and skill their judgment is entitled to much greater weight than that of the crew. United States v. Ashton, supra; United States v. Nye, 27 Fed. Cas. 210; United States v. Staly, 27 Fed. Cas. 1290. The importance of obedience and discipline on a ship, to the end that it may proceed on its voyage, imposes on the crew, after they have commenced the voyage, the duty to use reasonable means to ascertain the actual condition of the vessel, including a resurvey, if that be practicable, before refusal to serve for unseaworthiness. United States v. Staly, supra; The C. F. Sargent (D. C.) 95 Fed. 179; The Shawnee (D. C.), 45 Fed. 769; The Condor (D. C.) 196 Fed. 71.

We are not called on to determine the right of seamen, when the voyage is extended from any cause so much beyond the stipulated time as that service to the port of destination would be oppressive; for the end of the voyage would have been only a few days beyond the 6 months mentioned in the articles.

[7] Applying the rules stated, we think the evidence leaves the defense of unseaworthiness of the vessel without support. It is true that the failure to reach the port of destination was due to the fact that the engine had to be repaired at Fayal and that the ship lost three propeller blades. There was some vague testimony also from the crew that on the voyage the master had expressed dissatisfaction with the propeller blades. But mere failure of machinery, or failure to provide the best machinery, does not prove unseaworthiness, nor even negligence. There is not a particle of evidence that the crew ever complained

of any defect in the vessel or its machinery, or that they ever had apprehension for their safety. They made no demand for a survey at Havre, Southampton, Fayal, or Hamilton. The testimony of the master was undisputed that he had a certificate from Lloyd's of seaworthiness after examination in England and the Azores.

[8] In short, the reason for allowing seamen to refuse to serve to the port of destination is reasonable apprehension of danger to themselves from unseaworthiness of the ship at the time. There was never any claim of apprehension of danger or charge that the vessel was unseaworthy, and it was in course of having the propeller blades replaced. The sole averred ground in the communication to the master, and in the evidence of the defendants for the combination to refuse to serve when within a few days of the port of destination was that the period of 6 months mentioned in the contract had expired. This position being untenable, the testimony on both sides makes out an indisputable case of guilt under the first and second counts of the indictment. The request to charge was therefore inapplicable, and any erroneous statement of law in the charge was immaterial. This conclusion makes discussion of the third count unnecessary.

Affirmed.

WESTERN UNION TELEGRAPH CO. v. ESTEVE BROS. & CO.

(Circuit Court of Appeals, Fifth Circuit. May 26, 1920.)

No. 3506.

1. Telegraphs and telephones \$\iinstruction 54(7)\$—Limitation of liability not binding on sender without notice.

Where plaintiff delivered a telegraphic message to the government telegraph company at Barcelona, Spain, for transmission to New Orleans, which message was correctly transmitted by the Spanish & French telegraph systems to Havre, where it was delivered to defendant for further transmission by cable and land lines to New Orleans, and in such transmission from New York it was materially clanged, causing serious financial loss to plaintiff, a regulation of defendant, unknown to plaintiff, limiting its liability for mistakes or negligence in transmission or delivery to the amount paid for the service unless the message was repeated, for which a higher rate was charged, held not binding on plaintiff.

2. Telegraphs and telephones 54(7)—Filing of rates and regulations not required by law not notice of limitation of liability.

The Interstate Commerce Act, as amended (Comp. St. § 8563 et seq.), does not require telegraph or cable companies to adopt and file schedules of rates and regulations in regard to transmission of messages, and in the absence of such requirement by the Interstate Commerce Commission the filing of rates and regulations by a telegraph company does not charge a sender with notice of such regulations or of a classification of messages therein, permitted, but not required, by section 8563(3), and a sender of a message is not bound by such a regulation limiting the liability of the company for negligence; to which he did not assent, and of which he had no knowledge or notice.

3. Telegraphs and telephones \$\infty\$=67(1)—Damages, including special damages, recoverable for error in transmission.

In the absence of statutory or contractual modification of the liability of a telegraph company, if there is negligent failure to transmit a mes-

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sage correctly, the party in whose favor the liability is incurred is entitled to recover such damages as are the direct and natural result of that breach of duty, including special damages which the terms of the message disclose to be likely to result from the default.

4. Telegraphs and telephones 36—Sender given preferential rate, without

his knowledge, may recover for negligence.
Interstate Commerce Act 88 1(3) and

Interstate Commerce Act, §§ 1(3), and 3, as amended (Comp. St. §§ 8563[3], 8565), requiring charges by telegraph companies to be just and reasonable, and prohibiting unjust or unreasonable preferences, do not enable a telegraph company to escape liability for breach of its undertaking to render a service in the line of its business by showing that the party for whom that service was undertaken was, without his knowledge or fault, charged less therefor than its reasonable value or than was charged others for similar services, or was otherwise accorded undue preferential treatment.

In Error to the District Court of the United States for the Eastern

District of Louisiana; Rufus E. Foster, Judge.

Action at law by Esteve Bros. & Co., against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari granted, 254 U.S. —, 41 Sup. Ct. 13, 65 L. Ed. —.

Esmond Phelps, of New Orleans, La., and Rush Taggart, of New York City, for plaintiff in error.

J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La., for defendant in error.

Before WALKER, Circuit Judge, and CALL and HUTCHESON, District Judges.

WALKER, Circuit Judge. This was an action by the defendants in error (herein referred to as the plaintiffs) against the plaintiff in error, the Western Union Telegraph Company (herein referred to as the defendant), for the alleged amount of the loss or damage occasioned to the former by the latter's negligent failure to transmit correctly a cable message addressed and sent on September 13, 1917, to the plaintiffs at New Orleans, La., by its representative at Barcelona, Spain, where the plaintiffs have their main office. The body of the message as sent read:

"Sell two hundred bales futures, naming equivalent New Orleans October price."

The body of the message as it was delivered by the defendant at New Orleans read:

"Sell two thousand bales futures, naming equivalent New Orleans October price."

On the trial the following facts were admitted: The plaintiffs at Barcelona deposited the above-mentioned message in the central office of the telegraph administration, which is owned and operated by the Spanish government, for transmission to New Orleans. It was correctly transmitted by the Spanish telegraph administration to Paris, France, was correctly transmitted by the system of telegraphs owned

and operated by the French government from Paris to Havre, France, and was there delivered to the defendant, which transmitted it correctly by cable to New York City, and turned it over, reading correctly, to its land line system. An error occurred in the transmission of the message by the defendant from New York City to New Orleans; the word "thousand" being substituted for "hundred." The amount paid by plaintiffs to the Spanish telegraph administration at Barcelona for the transmission, in the above-stated manner, of the message to its destination was \$6.60, of which the defendant subsequently received \$4.65 for transmitting it from Havre to New Orleans, of which \$3.75 was apportioned to the transmission from Havre to New York and 90 cents to transmission from New York to New Orleans. Immediately upon receipt of the message as it read when delivered on the day it was sent, the plaintiffs' New Orleans office sold 2,000 bales of cotton for future delivery in January at 19.57 cents per pound, and on September 15, 1917, advised its Barcelona office by cable, sent over the defendant's lines, that it had done so. Immediately upon receipt of that cable, plaintiffs' Barcelona office advised their New Orleans office, by cable sent over the defendant's lines, that the order was for 200, instead of 2,000 bales. Immediately upon receipt of the last-mentioned cable, plaintiffs' New Orleans office bought 1,800 bales of cotton for future delivery in January at 23.01 cents per pound, resulting in a loss to the plaintiffs of \$31,095; that being the aggregate of the difference between the price at which the plaintiffs sold 1,800 bales and the price at which it subsequently bought the same number of bales and the commissions paid.

In the month of May, 1916, the defendant, acting through duly authorized representatives, filed with the Interstate Commerce Commission its classification of land line and cable messages and filing forms of such messages, together with the conditions under which the various classes of land line and cable messages are handled, and its tariffs and schedules, all which documents remained on file and unchanged at the time the message in question was sent. One of the classes of land line and cable messages so shown is unrepeated messages, as to which it was provided and shown on the filed forms that defendant was not liable for mistakes or delays in transmission or delivery, or for nondelivery, beyond the amount received for sending the same; the tariff rates for unrepeated messages being less than such rates for repeated messages. The amount paid for sending the message in question was the rate called for by such filed tariff for an unrepeated message from Barcelona. Spain, to New Orleans, La. The plaintiffs did not request to have the message in question repeated. If they had so requested, they would have been required to pay a higher rate. It is not usual to ask that such messages be repeated. The plaintiffs had no actual information of the filing by the defendant with the Interstate Commerce Commission of any forms, blanks, tariffs, or schedules. None of those forms or blanks were used at any time in the receiving or transmission of the message in question. The Interstate Commerce Commission has not adopted any rule or regulation requiring the filing of any tariffs, schedules, blanks, or forms of telegraph or cable companies.

Exceptions were reserved by the defendant to the action of the court in granting a motion of the plaintiffs to direct a verdict in their favor for the sum of \$31,095, and in refusing a motion of the defendant that it direct a verdict in favor of the plaintiffs in the sum ot \$4.65,

with interest at 5 per cent, from September 13, 1917.

[1] There was no evidence tending to prove that in any way the plaintiffs were made aware that the payment of more than was charged and paid for the transmission of the message was required to make the defendant liable to the plaintiffs for the loss or damage sustained by the latter in consequence of such a breach of duty as the one alleged and admitted. No evidence adduced would support a finding that the plaintiffs consented to the limitation of liability claimed by the defendant. What was disclosed was the tender and acceptance of the message for transmission, unaccompanied by any stipulation or condition as to the liability thereby incurred. From the acceptance, in the manner disclosed, of the message for transmission and delivery, it is not to be inferred that there was an understanding between the parties to the transaction that the service was undertaken on a condition limiting a carrier's liability for a default. The rate charged and paid was, unknown to the plaintiffs, less than the defendant's customary one for such a service when liability is not limited to the amount paid by the sender; but in no way did the plaintiffs assent to a limitation of the defendant's liability. The case is one of a carrier of messages according preferential treatment to a sender without the latter's knowledge or consent, and not one of a carrier stipulating for a limitation of liability for a negligent failure to transmit correctly. The rate charged and paid could not have signified a limitation of the carrier's liability to a sender who was not aware or notified of the condition on which that rate customarily was given.

[2] The defendant relies on provisions of the Interstate Commerce Act (Comp. St. Ann. § 8563 et seq.) to sustain the contention that, though the plaintiffs were unaware that the rate charged and paid for the transmission of the message was the filed tariff rate for an unrepeated message, and that according to that tariff a higher rate was required to be paid to make the defendant liable for more than the amount paid for the service, the plaintiffs are deprived of the right to recover more than that amount by provisions contained in documents on file with the Interstate Commerce Commission, of the existence and contents of which the plaintiffs had no knowledge or notice. Section 1 of that act, as amended June 18, 1910, provides that the provisions of the act shall apply to telegraph, telephone, and cable companies (whether wire or wireless), engaged in sending messages from one state, territory, or District of the United States to any other state, territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of the act, and that section contains the following provision:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; Pro-

vided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

Section 3 of the act contains the following provision:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Amended section 15 of the act empowers the Commission to determine and prescribe maximum rates for the transmission of messages by telegraph or telephone, and classifications, regulations, or practices of companies subject to the act and engaged in transmitting such messages. By amended section 20 of the act the Commission is empowered to require annual reports from all common carriers subject to the provisions of the act, and to prescribe forms of accounts required to be kept by such common carriers. At the time of the transaction in question the Commission had not, so far as telegraph, telephone, or cable companies are concerned, exercised any of the powers conferred on it by sections 15 and 20 of the act. By their terms many of the provisions of the act do not apply to telegraph, telephone, or cable companies. Among such inapplicable provisions are those requiring the adoption, filing, and publication of rates for interstate or foreign transportation, and regulations in regard to such transportation, and prohibiting and penalizing departures by either carriers or shippers from rates or regulations so filed and published. The act contains no requirement as to filing or publishing rates, classifications, rules, or regulations voluntarily adopted by telegraph, telephone, or cable com-

[3] The above-quoted provision of section 1 of the act with reference to classification of messages by telegraph, telephone, or cable, and charging different rates for the different classes of messages, is a permissive, not a compulsory, one. It does not purport to give to the adoption and filing with the Commission of a classification by a carrier of such messages and of rates and regulations applicable to the different classes of messages the effect of binding a sender of a message by an adopted and filed regulation or provision of which the sender in no way is informed or notified. It does not purport to charge senders of messages with notice of classifications, rules, or regulations filed by the carrier with the Commission. It does not provide for a limitation of liability not contracted for by parties undertaking to transmit and deliver such messages. In the absence of a statutory or contractual modification of such liability the party in whose favor it is incurred, if there is a negligent failure to transmit the message correctly, is entitled to recover such damages as are the direct and natural result of that breach of duty, including special damages which the terms of the message disclose to be likely to result from such a default.

Nothing in the last referred to provision affects the question of the extent of the carrier's liability for a negligent failure to transmit correctly a message tendered and accepted under circumstances furnishing no basis for the conclusion that the sender assented to any modification or limitation of the carrier's liability for such a default.

[4] The other provisions of the act which must be relied on to support the contention made in behalf of the defendant are the abovequoted ones of sections 1 and 3, to the effect that charges for the transmission of messages by telegraph, telephone, or cable, or in connection therewith, shall be just and reasonable, unjust or unreasonable charges for such services being prohibited and declared to be unlawful, and that the giving of any undue or unreasonable preference or advantage, or the subjecting of any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever are prohibited. Obviously the legislative motive for the enactment of those provisions was to protect parties procuring the services of the carriers mentioned from exactions by such carriers of unjust or unreasonable charges for such services, and from being made the victims of undue or unreasonable discriminations against such parties, and in favor of others having similar dealings with the carriers. It is not to be supposed that those provisions were intended to have the effect of enabling a carrier to escape liability for a breach of its undertaking to render a service in the line of the business in which it is engaged by showing that the party for whom that service was undertaken was, without the knowledge or fault of that party, charged less therefor than its reasonable value, or than was exacted of others for similar services, or otherwise was accorded undue preferential treatment. The provisions were intended for the benefit of parties unjustly discriminated against, and were not intended to enable a carrier to shield itself from the consequences of a breach of its obligation to a party who was an unconscious recipient of the carrier's preferential treatment.

Before by amendment of the act those provisions were made applicable to telegraph, telephone, and cable companies, and before by amendment of the act both interstate shippers and carriers of things and persons were required to conform to duly filed and published rates and regulations, the above-quoted provisions of sections 1 and 3 of the act were in force and applicable to such carriers of persons and things. While the statute law was in the condition just indicated, it did not, as to carriers then subject to its provisions, have such effect as is attributed to it in behalf of the defendant. In Merchants' Cotton Press & S. Co., v. Insurance Co. of North America, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195, it was contended that the giving and acceptance of a rebate on a shipment of cotton rendered void the bills of lading issued by the carrier for the cotton, with the result that the carrier was not liable for the loss of the cotton. It was not shown that the consignees or owners knew of the rebate. In overruling that contention, the court quoted with approval the following from the opinion of the court whose judgment was under review:

"We are of opinion, however, and rest our decision upon the ground, that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and * * * could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's [and insurer's] negligence."

In deciding that under the law as it now is an interstate carrier is not liable under a stipulation in a shipping contract for a special service not provided for in its filed and published tariffs, the court was careful to point out that the question of the carrier being under such liability for the goods accepted for carriage as it lawfully could subject itself to was not presented for decision. Chicago & Alton Ry. Co., v. Kirby, 225 U. S. 155, 166, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501. It seems that the reasons supporting the conclusion reached in the case of Merchants' Cotton Compress & S. Co. v. Insurance Co., supra, that the allowance of an unlawful rebate did not enable the carrier to escape liability for the goods undertaken to be carried, also would support the conclusion that the fact that there was an unlawful discrimination in favor of a sender of a telegraph or cable message would not enable the carrier of such message to escape liability for a negligent failure properly to transmit it, where the discrimination in favor of the sender was without his knowledge or consent. The ground on which courts refuse to enforce contracts made in contravention of such statutes as those above mentioned is that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. Gibbs & Sterrett Mfg. Co. v. Brucker, 111 U. S. 597, 4 Sup. Ct. 572, 28 L. Ed. 534. That ground does not exist where the sender of a message, not by law chargeable with knowledge of the rate payable for the service he contracts for, unwittingly pays less than that rate for such service.

The opinion in the case of Mobile & Ohio R. Co. v. Dismukes, 94 Ala. 131, 10 South. 289, 17 L. R. A. 113, well illustrated how such provisions as the above-quoted ones of the Interstate Commerce Act would be perverted from the purpose of their enactment by giving them the effect attributed to them in behalf of the defendant. It may be supposed that not infrequently an applicant for telegraphic or cable service would find conveniently at hand blank paper on which to write his message and would be charged the unrepeated message rate, without anything being said about a limitation of the carrier's liability, if the adoption of that method of dealing could result in the carrier's liability for a negligent failure to transmit correctly being limited to the amount paid by the sender. The injustice of such a result is obvious where neither the law nor the party contracting to render service makes ade-

quate provision for notice to the party to be served of conditions on which the service is undertaken.

Under the Interstate Commerce Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8563 et seq.) as it is now in force an interstate shipper is chargeable with notice of duly filed and published rates and conditions subject to which shipments at those rates are allowed, with the result that such a shipper is bound by a limitation of liability shown by the carrier's filed and duly published tariffs to be an incident of the rate charged. Boston & Maine R. R. Co., v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593. But such a shipper was not forbidden to depart from rates or regulations adopted by a carrier, and subjected to penalties for so doing, until the law afforded him adequate means of ascertaining what those rates and regulations are, without having to depend upon such information in regard thereto as the carrier might choose to impart. The act, as it was in force at the time of the transaction in question, did not require senders of interstate or foreign telegraph or cable messages to conform at their peril to rates or regulations adopted by carriers of such messages; and, in the absence of authorized action on the subject by the Commission, provided no means for the senders of such messages acquiring authentic information as to rates, classifications, or regulations adopted by such carriers. The senders of such messages have not been brought under the provisions of the act as amended, which bind an interstate shipper of goods to conform to duly filed and published rates and conditions applicable to his shipment, whether the shipper does or does not know of or assent to such rate and conditions. No provision of the act purports to put it in the power of a carrier of messages by telegraph or cable to bind senders thereof by conditions not brought to the notice of the latter. Nothing in the act manifests an intention to deprive a sender of such a message, who is the unconscious and innocent recipient of forbidden preferential treatment at the hands of the carrier, of the right to enforce the liability incurred by the latter by a breach of its undertaking.

In view of the facts just mentioned, we are of opinion that nothing contained in the act justifies the imputation to the law makers of the intention to give to the adoption by a carrier by telegraph or cable of interstate or foreign messages or rates, classifications, regulations, etc., and the filing thereof with the Commission, the effect of charging senders of such messages with notice of rates, classifications, regulations, etc., so adopted and filed, and of prohibiting and penalizing departures therefrom by such senders, who actually and without fault on their part are uninformed in regard thereto. Assuming, without admitting, that the contract which resulted from the acceptance in Europe of the message in question for transmission and delivery could not be enforced by the senders, if the act would not permit the enforcement of such a contract made in this country, we are of opinion that nothing in that act properly can be given the effect of enabling the defendant to limit its liability for the default alleged and admitted to the amount charged the plaintiffs for the service and paid by them without knowl٥

edge or notice that it was less than the amount customarily paid for

such a service when no limitation of liability is stipulated for.

The question as to whether the defendant had a valid claim against the plaintiffs for the amount of the difference between what was paid and what is payable for the service when no limitation of the defendant's liability is stipulated for was not in any way raised. It is not contended that the plaintiffs were not damaged, as a proximate result of the default alleged and admitted, in the amount for which a verdict in their favor was directed; nor is it contended that the terms of the message failed to indicate that such damages might result from such a default.

The conclusion is that the court did not err in giving the instruction requested by the plaintiffs. The judgment on the verdict rendered in pursuance of that instruction is affirmed.

HARTFORD LIFE INS. CO. v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. June 28, 1920.)

No. 5447.

1. Courts 508(3)—Federal court without jurisdiction to enjoin enforcement of state judgment for errors committed on trial.

A federal court is without jurisdiction to enjoin enforcement of a judgment of a state court for errors committed in the trial of the cause in construing the statute of another state, not affecting the validity of such statute

2. Judgment \$\infty\$ 498—Judgment of court erroneously sustaining jurisdiction

not subject to collateral attack.

Jurisdiction of the subject-matter of a suit depends on allegations, and not on facts, and even if a court sustains its jurisdiction erroneously, when put in issue, its judgment is not subject to collateral attack, unless want of jurisdiction is shown on its face.

3. Judgment 489-Not subject to collateral attack because of subsequent

adjudication.

That subsequent to a judgment of a state court against a corporation of another state the courts of the latter state so construed the charter of the corporation that an action such as that in which the judgment was rendered could only be brought in the courts of that state *held* not to render the judgment subject to collateral attack, nor its enforcement unconscionable, since adjudication was not necessary to enable defendant to set up the defense, but it did not do so.

4. Courts €=2_"Jurisdiction" defined.

Jurisdiction is the power to hear and determine the subject-matter in controversy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit in equity by the Hartford Life Insurance Company against Garland S. Johnson, administrator of the estate of Nannie M. Johnson,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

deceased. From our order dissolving a temporary restraining order and denying a preliminary injunction, complainant appeals. Affirmed.

James C. Jones, of St. Louis, Mo. (Jones, Hocker, Sullivan & Angert, of St. Louis, Mo., on the brief), for appellant.

Peyton A. Parks, of Clinton, Mo., and M. A. Fyke, of Kansas City,

Mo., for appellee.

Before HOOK and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. This is an appeal from an order dissolving a temporary restraining order and denying a temporary injunction to enjoin the appellee from enforcing a judgment of the circuit court of Henry county, Mo., affirmed by the Supreme Court of that state (271 Mo. 562, 197 S. W. 132), in favor of appellee's intestate against the appellant. The hearing was on the complaint and exhibits thereto. For convenience the parties will be referred to as they appear in the court below; the appellant as plaintiff, and the appellee as defendant.

The complaint alleges that the defendant was engaged in the business of life insurance under the assessment and mutual or co-operative plan, maintaining and operating a department of said insurance business known and designated as "Men's Division of the Safety Fund Department," organized and existing under the laws of the state of Connecticut, having its domicile in that state. The members of this department, and Johnson was one of them, were issued certificates of membership like unto policies of life insurance. The certificates of membership were conditioned on the payment of quarterly assessments, and provided a mortuary fund, from which death claims are to be paid; a safety fund is also provided for, which becomes available for equal distribution to all the members, if the mortuary fund is found to be insufficient to pay the death claims. This fund is accumulated out of one payment made by each member equal to \$10 per thousand of the death claim payable to him. Whenever the fund shall amount to \$1,000,000, the subsequent premiums therefor shall be divided by said company among all the holders of certificates in force, who shall have contributed, five years prior to the date of such division, their stipulated proportion of said fund, by applying the same to the payment of their future dues and assessments. The members were required to pay \$30 per annum on each \$1,000 indemnity, and to pay, within 30 days from the date on which notice bears date, all mortality calls at the home office of the company in Connecticut, and upon failure to do so the certificate shall be null and void. The insurance company was the trustee of the mortuary fund, which was maintained in the state of Connecticut. On or about May 2, 1902, the plaintiff levied a mortuary assessment upon the members of said division, including the assured, Johnson. The amount payable by him upon this assessment was \$74.55. This assessment was designated as quarterly assessment call No. 95, but this assessment was never paid. On or about October 19, 1906, one Chas. H. Dresser, and various other members of said division, residing in various states, filed

their bill, in behalf of themselves and all other members of said division, in the superior court of New Haven, in the state of Connecticut, to which action the said Johnson was by representation a party com-

plainant.

In said bill the members of said division complained that various and sundry prior assessments and calls, including quarterly call No. 95, were illegal and excessive, and were not properly levied and demanded by the plaintiff; that the company had no right to maintain a mortuary fund and to assess the members to replenish it, but could only make such assessments when death losses occurred, and when there were no moneys in the mortuary fund, or not enough to meet accrued outstanding death losses; that on July 10, 1907, the said James B. Johnson died, and said Nannie N. Johnson, who was a citizen of the state of Missouri, instituted her action against this plaintiff in the circuit court of Henry county, Mo., seeking recovery of the sum of \$5,000, the face of the policy of which she was the beneficiary; that in that cause the plaintiff in its answer asserted, among other things, that by reason of the terms of said certificate the membership of the said James B. Johnson was forfeited, by reason of his failure to pay the quarterly call No. 95. On May 12, 1909, the cause was heard upon that issue, and upon a trial to a jury a verdict rendered in favor of Mrs. Johnson for the full amount of the policy. On March 23, 1910, the Dresser suit, pending in the superior court of New Haven county, in the state of Connecticut, came on to be finally heard, and it was there adjudged and decreed that the prior assessments made by the company for mortuary purposes, including quarterly call No. 95, had been legally and properly made, and not in any excessive amounts; that the plaintiff had a right under the charter to maintain the surplus which it was then maintaining in the mortuary fund, and to levy mortuary assessments upon members of the division to replenish the same; that at no time had the safety fund been in excess of \$1,000,000, and that therefore members of the division had no right to insist that the company resort to it in reduction or discharge of their mortuary assessments; that said judgment is now in full force and effect; that the judgment of the circuit court of Henry county, Mo., in favor of Nannie N. Johnson, was appealed to the Kansas City Court of Appeals, and afterwards to the Supreme Court of Missouri; that this plaintiff exhibited to said court a certified copy of the record and proceedings of the superior court of New Haven county, state of Connecticut, rendered after the judgment of the circuit court of Henry county, Mo., as being res adjudicata and a final conclusive determination of the rights of said Nannie N. Johnson, and that court refused to notice or consider the same, because, under the law and practice on appeals pending in the Supreme Court of Missouri, matters not appearing in the record of the lower court, but transpiring subsequently, could not be brought into the record of the appeal, and thereupon affirmed the judgment of the circuit court.

It is then claimed that, unless the court shall interfere by granting the injunction to restrain the defendant from issuing execution on the judgment of the Supreme Court of Missouri, great injustice will be done to the plaintiff. Copies of the certificate of insurance on the life of Mr. Johnson, of the record in the suit by Nannie N. Johnson against the plaintiff in the circuit court of Henry county, and an exemplified copy of the Dresser suit before the superior court of New Haven county, Conn., against the plaintiff, and the decree of the court in that case, together with the opinions of the judges, were filed as exhibits.

[1] That a court of the United States, by virtue of its general equity powers, has jurisdiction to enjoin the enforcement of a judgment of a state court, if there is a diversity of citizenship, or a federal question involved, and the amount involved exceeds \$3,000, if the allegations in the complaint state a proper cause of action, is beyond doubt. But this does not authorize such a court to enjoin the judgment for errors committed in the trial of a cause, in construing a statute of another state, not affecting the validity of such statute. Johnson v. New York Life Ins. Co., 187 U. S. 491, 496, 23 Sup. Ct. 194, 47 L. Ed. 273; Finney v. Guy, 189 U. S. 335, 340, 23 Sup. Ct. 558, 47 L. Ed. 839; Allen v. Alleghany Co., 196 U. S. 458, 463, 25 Sup. Ct. 311, 49 L. Ed. 551; Western Indemnity Co. v. Rupp, 235 U. S. 261, 275, 35 Sup. Ct. 37, 59 L. Ed. 220.

[2] It is claimed in behalf of the plaintiff that the circuit court of Henry county was without jurisdiction to hear that action, by reason of the fact that by the construction of the charter of the plaintiff by the superior court of New Haven county, Conn., the certificate of insurance was payable only out of the mortuary fund, which was kept in the state of Connecticut, and an action could only be maintained in a court of that state. The argument of counsel was ingenious, but not convincing. The jurisdiction of the Missouri court of the person of the plaintiff is undisputed, as it was not only served with proper process in the state of Missouri, but entered its appearance and litigated the action. Nor can there be any doubt that the court had jurisdiction of the subject-matter. The jurisdiction of the subject-matter of a court depends on allegations and not on facts. United States v. Arredondo, 31 U. S. (6 Pet.) 691, 709, 8 L. Ed. 547; Evers v. Watson, 156 U. S. 527, 532, 15 Sup. Ct. 430, 39 L. Ed. 520; In re Lennon, 166 U. S. 548, 553, 17 Sup. Ct. 658, 41 L. Ed. 1110; Flanders v. Coleman, 250 U. S. 223, 227, 39 Sup. Ct. 472, 63 L. Ed. 948; In re First National Bank, 152 Fed. 64, 69, 81 C. C. A. 260, 11 Ann. Cas. 355; Van Fleet on Collateral Attack, § 60. In the Arredondo Case it was held:

"The power to hear and determine a cause is jurisdiction; it is 'coram judice,' whenever a case is presented which brings this power into action; if the petitioner states such a case in this petition, that on a demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law."

In Re First National Bank this court said:

"Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought.

A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitled the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to the jurisdiction of the suit or proceeding."

It is the power to hear and determine the subject-matter in controversy which constitutes jurisdiction. Rhode Island v. Massachusetts, 37 U. S. (12 Pet.) 657, 718, 9 L. Ed. 1233; Riggs v. Johnson County, 73 U. S. (6 Wall.) 169, 187, 18 L. Ed. 768; Foltz v. St. Louis, etc., Ry. Co., 60 Fed. 316, 8 C. C. A. 635. It does not depend upon the decision of the case. Columbus Ry., Light & Power Co. v. Columbus, 249 U. S. 399, 406, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648.

It is true the jurisdictional allegations of a complaint may be put in issue by proper plea, but even in such a case the court in deciding such a plea exercises jurisdiction. Even if it sustains its jurisdiction erroneously, the judgment is not subject to collateral attack, although cause for reversal upon appeal. This, of course, would not apply to a judgment, which shows on its face that in no event could the court exercise jurisdiction. If a probate court, with jurisdiction limited to the administration of the estates of deceased persons, should assume jurisdiction to hear an action in equity to foreclose a mortgage or for specific performance, or a police court, limited to try petty misdemeanors, should try one for a capital offense, such a judgment would be a nullity, and subject to collateral attack.

[3] It is next claimed that the enforcement of the judgment would be inequitable and unconscionable, and a court of equity has jurisdiction to relieve against such a judgment. The contention is that at the time the judgment was rendered in the circuit court of Henry county, Mo., there had been no construction of the plaintiff's charter by a Connecticut court, and therefore could not be pleaded. But this has been foreclosed by the decision of the Supreme Court of Missouri

in this cause. 271 Mo. 562, 197 S. W. 132.

It is true that courts of equity will grant relief by enjoining the enforcement of a judgment that is clearly against conscience, and of which the injured party could not have availed himself in the court of law, or the judgment sought to be enjoined had been obtained by fraud, or without jurisdiction of the person or subject-matter, or in a cause in which the defense was purely equitable, and could not, under the practice then prevailing, be pleaded in an action at law. But there is no claim in the case at bar that any fraud had been practiced by the defendant in the action tried in the state court, nor that the court had no jurisdiction of the person of the defendant, and as we hold that the court had jurisdiction of the subject-matter, the only question upon which the plaintiff now relies is that, as the plaintiff's charter had not been construed at the time of the trial of that cause, by a court of the state which had granted it, plaintiff was prevented from pleading that fact. This contention is untenable for several reasons.

The plaintiff could have pleaded that, under the certificate of insurance issued by it and the charter of the company, no action could be maintained on the certificate except in the courts of Connecticut, if that was the law, although not determined by a court of that state. A decision construing a statute does not create the statute. Besides, the cause was tried in the circuit court of Henry county, Mo., on May 12, 1909, and the Dresser suit was then pending in the superior court of New Haven county, Conn., having been instituted, as alleged in the complaint, on October 19, 1906, and as it is claimed on behalf of this plaintiff, and was so held by the Supreme Court in Hartford Life Insurance Co. v. Ibs, 237 U. S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765, that it was a class suit, and the decree therein was binding upon all other certificate holders, that fact was sufficient to require the plaintiff herein to plead it, and, having failed to do so, cannot now be heard.

The authorities relied on by counsel for plaintiff do not sustain the contention that upon the allegations of the complaint the enforcement of the judgment would be unconscionable, and therefore should be enjoined. While the language in Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, relied on by the plaintiff, is rather broad, it was clearly obiter, as the only question involved upon that appeal was whether the state court of Louisiana had erred in denying the plaintiff's petition for removal of the cause to a court of the United States. But, even if the other part of the opinion was obiter, it no doubt stated the rule of law correctly upon the facts as they appeared in that case. The judgment, which was sought to be enjoined, had been obtained upon a forged letter alleged to have been written by the defendant's agent, waiving her lien as a lessor. The agent was dead at that time. The defendant did not know that such a letter was in existence, or would be offered in evidence, and, of course, was unable to prove the forgery at the trial. After the rendition of the judgment, the forgery of that letter was discovered; the defendant having exercised due diligence. The bill was promptly filed to set aside the judgment, after the discovery. Upon these facts the court held that, as the defendant in the action at law could not have availed herself of this defense, and the plaintiff was guilty of a fraud, unmixed with any fault or negligence of herself or her agents, a court of equity would be justified in granting relief.

In Humphreys v. Leggett, 50 U. S. (9 How.) 297, 13 L. Ed. 145, the principal case relied on by the plaintiff, the facts were that the plaintiff had instituted an action against the defendants, sureties on the official bond of a sheriff, for an alleged breach of the bond. The cause was heard by the Circuit Court in 1839, and judgment rendered in favor of the defendant. Upon writ of error the Supreme Court reversed the judgment in 1845 (43 U. S. [2 How.] 9, 11 L. Ed. 159), and directed the Circuit Court to enter judgment for the plaintiff against Humphreys, the only surviving defendant. Upon the filing of the mandate in the Circuit Court, Humphreys asked leave to file a plea, in which he stated that in 1840, while the cause was pending in the Supreme Court and before reversal thereof, judgments had been ren-

dered against him as surety on the sheriff's bond for the full amount of the bond, which he was compelled to pay. The Circuit Court refused to admit the filing of this plea, upon the ground that it was its duty to obey the mandate of the Supreme Court, directing it to enter judgment against him. Thereupon Humphreys filed a bill in equity, setting out these facts, and prayed for an injunction against the enforcement of the judgment. On demurrer the bill was dismissed, and an appeal taken to the Supreme Court. The Supreme Court, in reversing the cause, held that, as the laws of the state of Mississippi, in which said bond was executed, limited the liability of sources on an official bond of a sheriff to the amount of the penalty of the bond, when the surety had been compelled to pay the whole amount of his bond before the plaintiff recovered judgment, the surety should have relief against the execution. The court held that, as the defendant could not avail himself of this defense in an action at law, it would be inequitable to permit the successful plaintiff to compel him to pay this judgment.

In Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, the judgment of the state court against the railway company was enjoined upon the ground that the court rendering the judgment had not obtained jurisdiction of the person of the defendant, who had no knowledge of the pendency of the proceedings until after

the rendition of the judgment.

Aside from this, the judgment of the state court in the instant case was based upon a question which was neither in issue nor decided by the superior court of New Haven county, Conn., in the Dresser Case. The only question upon which the plaintiff recovered judgment in the Missouri courts was that assessment No. 95 was not legally made, as the board of directors of the company were the only ones who could make the assessment, and it had not been made by them. Even if the court committed error in so holding, that does not make the judgment void and subject to collateral attack.

Counsel is in error in claiming that the Supreme Court in Hartford Life Insurance Co. v. Barber, 245 U. S. 146, 38 Sup. Ct. 54, 62 L. Ed. 208, held that the Connecticut court had passed on that question. The ground of reversal in that case was that the court erred in excluding the Connecticut decree when offered by the defendant in that case, thereby denying it full faith and credit, to which it was entitled under the provisions of article 4, § 1, of the Constitution of the United States, as had been held in Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, 670,

35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765.

Of the charge of the trial court that the charter of the company required assessments to be made by the board of directors the court said:

"The verdicts for the plaintiff hardly could have been rendered, except upon the other ground opened by the instructions, that the assessment was for a larger amount than was necessary to pay death losses up to that time. Upon that ground the verdicts were a matter of course, and we regard the reference to the directors' part in the assessment as a makeweight, which adds nothing to the substantial basis for the decision below."

The ground of reversal in that case was that the court instructed the jury:

"That if there was money on hand in that fund, and unless the defendant had so proved, it could not declare the insurance forfeited on that account."

This instruction, it was held, was in the teeth of the Connecticut construction of the company's charter in the Dresser Case.

The judgment of the court below, dissolving the temporary restraining order and refusing to grant a temporary injunction, was right, and is affirmed.

PUBLIC UTILITIES COMMISSION OF KANSAS et al. v. WICHITA R. & LIGHT CO.*

(Circuit Court of Appeals, Eighth Circuit. July 15, 1920.)

No. 5529.

1. Electricity =11-Public Utilities Commissions can raise noncompensatory rates, though they do not render utility insolvent.

A state Public Utilities Commission can enter an order permitting an electric company to charge certain classes of its customers rates exceeding those fixed by the contract with those customers, if the rates fixed by the contract did not compensate for the services rendered, even though the performance of services at the contract rates would not render the utility insolvent or prevent performance of its public service.

2. Constitutional law \$\iiins 135-Order of Public Utilities Commission raising utility rates above contract rates does not impair contract.

Order by a state Public Utilities Commission, permitting the utility corporation to charge rates in excess of those fixed by its contract with a consumer, does not impair the obligation of a contract.

3. Electricity ←11—Public Utilities Commission may make orders changing contract existing before commission is created.

The Kansas Public Utilities Commission can make an order permitting an electric corporation to charge more than the rates specified in a contract with a consumer, which was entered into before the statute creating the commission was enacted.

4. Electricity =11—Public Utilities Commission can remit surcharge on contract rates.

The Kansas Public Utilities Commission has power to enter an order permitting an electric corporation to make specified surcharges in addition to the rates specified by its contracts with certain classes of consumers.

5. Electricity =11-Kansas commission need not make special finding of fact.

Since the act creating the Kansas Public Utilities Commission and defining its duties and powers (Laws 1911, c. 238) does not require the commission to make special findings of fact, failure to make such finding before entering an order permitting a raise in electric rates is immaterial.

6. Electricity =11—Public Utilities Commission can regulate rates of company conducting business in one city.

The fact that an electric company conducted business wholly within one city does not affect the Utilities Commission's power to permit a raise in its rates.

7. Constitutional law \$\infty\$=62\to Giving Public Utilities Commission power to fix rates not delegation of legislative power.

The Kansas Act (Laws 1911, c. 238) granting the Public Utilities Commission authority to make rates does not violate any provision of the United States Constitution or of the state Constitution as a delegation of legislative power.

8. Electricity =11—Jurisdictional facts in petition for rate increase sufficient, although not shown in order.

The petition by an electric corporation for a rate increase, to the Kansas commission is as much a part of the record as the commission's order, in view of Public Utilities Commission Act (Laws 1911, c. 238) §§ 13, 20, so that commission's jurisdiction sufficiently appears, if the necessary facts are stated in the petition, but not in the order.

 Electricity \$\insigm\$11_Rate order presumed reasonable, in absence of evidence heard by commission.

Under Public Utilities Commission Act Kan. § 18, making the order of the commission prima facie reasonable, the court cannot find the commission's order allowing a rate increase to an electric company unreasonable or without substantial evidence, where the record shows that evidence was introduced before the commission, but fails to show what the evidence was.

10. Constitutional law \$\iiint 242\$—Rate order, applying to all of class, is not discriminatory.

An order by a Public Utilities Commission, permitting a surcharge on electric consumers in specified classes, is not discriminatory, where the order applies equally to all members of same class.

Sanborn, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the Wichita Railroad & Light Company against the Public Utilities Commission of the State of Kansas and others. Decree for complainant, and defendants appeal. Reversed, with directions.

This action was instituted by the appellee against the Public Utilities Commission of the state of Kansas, to restrain the commission from putting into effect an order authorizing the Kansas Gas & Electric Company to add a surcharge to its rates for electricity furnished to consumers in the state of Kansas classified according to the quantities consumed. A temporary restraining order was granted by the court. By leave of the court the appellant Kansas Gas & Electric Company was permitted to intervene as a party defendant. For convenience the parties will be referred to in this opinion, the appellee as the Railroad & Light Company, the appellant Public Utilities Commission as the Commission, and the appellant Kansas Gas & Electric Company, as the Gas & Electric Company.

Answers were filed, and thereupon the Railroad & Light Company filed a motion for a final decree upon the pleadings and exhibits. The exhibits filed with the complaint are: Exhibit A is the order of the Commission sought to be enjoined; Exhibit B is a copy of the contract entered into between the Gas & Electric Company and the Railroad & Light Company on May 2, 1910, to continue until November 30, 1930; Exhibit C is a copy of the application of the Gas & Electric Company to the Commission for permission to add a surcharge to certain of its rates on electricity supplied to its patrons in the state of Kansas. Upon a hearing the court held the order of the Commission complained of void and made the injunction perpetual.

The Railroad & Light Company in its complaint charges that, after having received notice from the Commission of the filing of the petition and the date set for the hearing thereof, it appeared and objected to the Commission's jurisdiction. This was by the Commission overruled. The ground upon which it objected was that there was a contract between the Gas & Electric Company and the plaintiff, which contract specifically fixed the rates and charges under which the Gas & Electric Company was bound to furnish it electrical current from the date of the contract until November 30, 1930; but, notwithstanding its objection, the Commission on March 25, 1918, granted the application of the Gas & Electric Company, with some modifications.

Another ground upon which it attacks the order of the Commission is that it was without jurisdiction or authority to determine any question relative to the plaintiff's business, in that it conducts its business wholly within the city of Wichita, and is not subject, under the law, to control or regulation by the Commission. Another ground set up is that its contract with the Gas & Electric Company was made and executed prior to the enactment of the law creating the Commission; that therefore the order of the Commission violates the constitutional provision prohibiting a state from enacting any law impairing the obligation of contracts.

It is next claimed that the added charges by the order of the Commission are preferential and discriminatory against large consumers of electricity, and especially against the plaintiff, for the reason that the rates as fixed are upon a scale, increase as the volume of consumption increases, and thereby is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. It is next claimed that the order fixes the rates unreasonably

high and are confiscatory.

The order of the Commission recites that after hearing the evidence the Commission found that the Gas & Electric Company should be authorized and permitted to add to its existing rates for electricity the following surcharge: For the first 100 KWH per month, no surcharge; for the next 14,900 KWH per month, one mill surcharge per KWH; for the next 20,000 KWH per month, two mills surcharge per KWH—and thereupon made the order authorizing the company to add to its existing rates for electricity supplied all consumers using over 100 KWH per month the surcharge set out, until the further order of the Commission.

The contract between the Railroad & Light Company and the Gas & Electric Company was executed on May 2, 1910, and was to continue until November 30, 1930. It provided for the price the Railroad & Light Company should pay for electrical capacity and energy furnished by the Gas & Electric Company. There are many provisions, such as are usually inserted in contracts of this nature, which it is not necessary to state, as they are not material to the issues involved in this cause.

The application of the Gas & Electric Company to the Commission for permission to add a surcharge to certain of its rates states that the schedudes of rates then in force was filed with the Commission on May 4, 1914; that the rates were based upon the cost of producing and distributing electrical energy at that time, and yielded a reasonable return upon the value of its property used in producing and distributing electrical energy in the state; that since then the cost of producing and distributing such electrical energy has increased enormously, on account of the increased cost of fuel and labor due to the fact that the nation is engaged in war. As a result of this increase the cost of producing energy for the year 1917 was 100 per cent greater than the cost of production for the year 1914, all on account of such increase in the cost of the production and distribution; that its net income for the year ending December 31, 1917, was approximately \$190,000 less than it would have been if it could have operated under the normal conditions existing in 1914, at the time its rates were first installed; that, if said rates are continued in effect, the result will be disastrous to your petitioner, depriving it of a reasonable return upon the value of its said property, and making it impossible to find a market for the securities which it must issue in order to provide funds with which to make improvements, additions, and betterments which are necessary to furnish proper and adequate service.

It further states that in December, 1916, being of the opinion that it would be able to reduce its rates for residential and commercial lighting, it filed a schedule of rates with the Commission, under which it proposed to put in effect a gradual reduction of such rates, such reduction extending over a term of 10 years, and requested an order authorizing it to make such reductions; that the Commission has not yet acted on that petition. Still on January 1, 1917, it did reduce its rates for residential and commercial lighting in accordance with its proposed schedules; that the effect of such proposed reductions for the year 1918 will further reduce its net income in the sum of approxi-

mately \$30,000, making a total loss of net earnings for the year 1918 of at least the sum of \$220,000; that in order to meet this situation, and to enable it to earn an amount sufficient to offset the loss from the conditions set out, it asks for authority to add to its existing rates the surcharge proposed. It is then stated that there are approximately 19,900 consumers served, but that 17,000 consumers use 100 KWH or less per month, and therefore would not be affected by the proposed schedule of surcharges. To proportion the surcharges equitably among the remainder of its consumers, fuel is approximately 75 per cent. of the cost of generating electricity, and therefore the surcharge, for the purpose of reimbursement, should be so adjusted that the surcharge should increase in proportion to the amount of energy consumed. The percentage of increase fixed by such surcharge over existing rates is therefore increased in proportion to the amount of consumption. The last step in the surcharge schedule offered affects at the present time 6 consumers, and the last two steps The schedule proposed by the Electric & Gas Company was: For the first 100 KWH per month, no surcharge; for the next 1,000 KWH per month, 12 mills net per KWH; for the next 10,000 KWH per month, 9.5 mills net per KWH; for the next 1,000,000 KWH per month, 8 mills net per KWH; for all excess, 3.5 mills net per KWH.

The intervening petition of the Gas & Electric Company, which is in the nature of an answer to the complaint and was treated as such, stated that the Public Utilities Commission of the state was created by an act of the Legislature of the state of Kansas in the year 1911, and is vested with full power, authority, and jurisdiction to supervise and control public utilities doing business in the state of Kansas, and fix and regulate the rates to be charged by said utilities for service; it admits the execution of the contract and the order of the Commission set out in the complaint and exhibits, until the further order of the Commission; by reason of said order of the Commission it claims it is lawfully authorized to make the surcharges fixed in the order of the Commission; that although the surcharge, so far as it affects the plaintiff, became effective on April 1, 1918, the plaintiff has failed to pay it, and the amount due from it up to December 31, 1918, amounts to \$9,088.18; that the temporary injunction granted by the court on April 26, 1918, prevented it from enforcing or attempting to enforce the order of the Commission of March 25, 1918; that the bond required of the plaintiff, when the temporary injunction was granted, was for the sum of \$20,000; that the intervener has an interest in this action, and is the party entitled to the benefits to be derived from the order of the Public Utilities Commission; therefore it asks for the dissolution of the injunction and to recover from the plaintiff the amount due it from the plaintiff on account of the surcharge.

Upon these pleadings and exhibits a final decree was entered, making the injunction perpetual.

H. L. McCune, of Kansas City, Mo., and F. S. Jackson, of Topeka, Kan. (McCune, Caldwell & Downing, of Kansas City, Mo., on the brief), for appellants.

T. F. Doran, of Topeka, Kan., and Henry I. Green, of Urbana, Ill. (Green & Palmer, of Urbana, Ill., Harris & Harris, of Wichita, Kan., Ferry & Doran, of Topeka, Kan., and William H. Lee, of Urbana, Ill., on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and TRIE-BER, District Judge.

TRIEBER, District Judge (after stating the facts as above). The learned trial judge held that, although appellee had a contract with the Gas & Electric Company made on May 2, 1910, to remain in force until November 30, 1930, the Commission could, under the police power of the state, to prevent injustice, and unreasonable and extortionate rates

for service by the Gas & Electric Company, exercise the power to raise the rates, if necessary to prevent a loss, but that the facts disclosed by the record did not justify the making of the order to add a surcharge

on the rates fixed by the contract with the plaintiff.

In behalf of the Railroad & Light Company it is claimed that the petition of the Gas & Electric Company did not state facts authorizing the Utilities Commission to take cognizance of the petition, as it failed to show that the contract rates are discriminatory and will result in injustice to the public, nor that without this surcharge the company would be unable to discharge its public duties, or that they will be impaired; nor does it claim that insolvency would result unless permitted to add an additional surcharge to the contract price. It is further claimed that the petition failed to show any reason or justification for annulling the contract, of the parties; that no facts are stated in the order of the Commission authorizing the exercise of its statutory power as prescribed in the public utilities statute; that there is no finding of the unreasonableness of the rates existing between the parties nor any discrimination between this contract and the rates charged other members of the public.

The Commission made no order against the Railroad & Light Company; there is nothing in the order referring to any contract in existence; all the order attempts to do, and does, is to classify the customers of the Gas & Electric Company and allow a surcharge on three of the four classes, in which they are divided. That the Commission has, under the law creating it, authority to classify customers,

is not questioned, nor can it well be.

[1] The failure of the Gas & Electric Company to state in its petition that the rates then in force would cause it to become insolvent, or would prevent it from discharging its duty to the public, did not deprive it of the right to ask for compensatory rates from the large consumers, if the rates charged these consumers are noncompensatory, even if, when added to the rates charged the smaller consumers, the net income is sufficient to prevent the company from becoming insolvent, or enable it to discharge its duty to the public. In Northern Pacific Ry. v. North Dakota, 236 U. S. 585, 594, 596, 597, 35 Sup. Ct. 429, 432, 433 (59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1), the Supreme Court of North Dakota had held:

"In order to establish such a noncompensatory rate to be confiscatory (referring to rate on one article, lignite coal), it must further appear that any deficit under the rate affects the net intrastate freight earnings materially, and reduces them to a point where they are insufficient to amount to a reasonable rate of profit in the amount of the value of the railroad property within the state contributing to produce such net earnings."

This the Supreme Court of the United States held to be erroneous. The court said:

"The state cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat, or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities.

* * The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned."

The same principle was announced in Norfolk & Western Ry. v. Conley, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745. In that case the act involved was a passenger rate on railroads. The Supreme Court of West Virginia had followed the rule adopted by the Supreme Court of North Dakota in the Northern Pacific R. R. Case. The Supreme Court, reversing the decree, held:

"The state may not select either of these departments [freight or passenger] for arbitrary control. Thus it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service."

In the instant case the Commission must have found the allegations in the Gas & Electric Company's petition for the surcharge, that in the generation of electrical energy for large consumers fuel is approximately 75 per cent. of the cost of generation, and that the low rates given to these large consumers, in the schedule then in force, were noncompensatory by reason of the large increase in the cost of the coal used for the generation of electricity, and that for this reason there should be a surcharge sufficient to allow some profit on the investment, from the electricity furnished these large consumers.

[2] That the effect of the order would be to nullify the contract theretofore entered into by the parties does not make the order obnoxious to the constitutional provision prohibiting states to enact laws impairing the obligation of contracts has been conclusively determined in Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309. The court in its opinion said:

"Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion. That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court"—citing a number of authorities.

[3] The same conclusion was reached in Producers' Transportation Co. v. Railroad Commission, 251 U. S. 228, 40 Sup. Ct. 131, 64 L. Ed. where the court said:

"That some of the contracts before mentioned were entered into before the statute was adopted or the order made is not material."

This disposes of the claim that the Commission was without authority to make the order, to affect the contract of the plaintiff, because it was made before the act creating the Public Utilities Commission was enacted.

In Kansas City Bolt & Nut Co. v. Kansas City Light & Power Co., 275 Mo. 529, 204 S. W. 1074, it was held: Rates fixed by contract with a public service company for electricity to be supplied, are superseded by rates fixed by the Public Service Commission, since the police power of the state cannot be abridged by contract. On writ of error from the Supreme Court, this judgment was affirmed by a

per curiam opinion upon the authority of Union Dry Goods Co. v.

Georgia Public Service Corporation, supra.

[4] It is next claimed that the Commission had no authority, under the act creating it, to make such an order; but that has been adversely decided by the Supreme Court of Kansas in State ex rel. v. Kansas Postal Telegraph & Cable Co., 96 Kan. 298, 150 Pac. 544.

[5] That the Commission, when making the order complained of, made no special findings of fact, is wholly immaterial, as there is nothing in the act creating the Commission and defining its duties and powers requiring it. As said in Detroit, etc., R. R. Co. v. Railroad Commission, 171 Mich. 335, 137 N. W. 329:

"It is unfortunate that the courts do not have the assistance which would be derived from a finding made by the Commission which would distinctly state the ultimate facts found and the factors, at least the controlling factors, considered in determining whether a rate was or was not reasonable."

Springfield Gas & Electric Co. v. Barker (D. C.) 231 Fed. 331, 344, and Public Utilities Commisson v. Springfield Gas Co., 291 Ill. 209, 125 N. E. 891, relied on by counsel for appellee are not applicable, as the statutes of Missouri and Illinois expressly provided that the Commission shall make and file its findings of fact in writing. In the Barker Case the opinion quotes that section of the Missouri statutes. There is no such provision found in the Kansas statute.

The only act in writing required by the statute is found in section 16

of the act (Laws 1911, c. 238), which provides:

"All orders and decisions of the Public Utilities Commission whereby any rates * * * are altered, changed, modified, fixed or established, shall be reduced to writing, and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail."

[6] The fact that plaintiff's business is conducted wholly within the city of Wichita is immaterial. Pawhuska v. Pawhuska Oil Co., 250

U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 1054.

- [7] It is also claimed that the act granting the Commission authority to make rates is unconstitutional, as being a delegation of legislative power. That it is not violative of any provision of the national Constitution was conclusively determined in Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, and followed by all the national courts ever since. That it does not violate any provision of the Constitution of the state of Kansas was determined in State v. Johnson, 61 Kan. 803.
- [8] It is next contended that the order of the Commission does not state facts necessary to show that it had jurisdiction, and the rule that when a special tribunal, created with special powers to act, not in conformity with the rules governing actions at common law inter partes, the record must show all the facts necessary to establish jurisdiction, is invoked. But the petition of the Gas & Electric Company to the Commission is as much a part of the record as the order, and it contains all the allegations necessary for the Commission to act in the matter. The petition is a part of the record. The allegations in the petition determine the jurisdiction. Hartford Life Ins. Co. v. Johnson (C. C. A.) 268 Fed. 30, decided June 28, 1920.

The act creating the Commission, by section 20, expressly authorizes the Commission to act:

"Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in any rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier," etc.

Section 13 of the act provides:

"It shall be the duty of the Commission, either upon complaint or upon its own initiative, to investigate all rates, * * * and if after full hearing and investigation the commission shall find that such rates, * * * are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, * * * as shall be just and reasonable."

[9] Section 18 of that act makes the orders of the Commission prima facie reasonable. As the record fails to show what evidence was before the Commission when it made its order, and recites that evidence was introduced, there is nothing to enable the court to find that the order was unreasonable, or without substantial evidence. The presumption is that there was substantial evidence to warrant the findings made.

[10] The claim that the order of the Commission is discriminatory against the plaintiff is clearly without merit. It applies to each party within the classes enumerated in the order. A rate which affects equally all in the same class, when the classifying is not arbitrary,

cannot be said to be discriminatory.

Counsel for appellee cite Kaul v. American Independent Telephone Co., 95 Kan. 1, 147 Pac. 1130, and Mollohan v. Atchison, Topeka & Santa Fé Ry., 97 Kan. 51, 154 Pac. 248, L. R. A. 1918A, 175, in support of the contention that such an order as made by the Commission in the instant case is discriminatory, and therefore void. Neither of these cases sustain this contention. In the Kaul Case the Telephone Company sought to raise its rates without any action of the Commission authorizing it, and it was held that the act did not automatically overthrow contracts, but that the Commission must first act. In the Mollohan Case it was held that the special privilege to stop cattle in transit is unlawful, until the schedules had been filed with and approved by the Commission, and the privilege is open to all shippers on equal terms. If it fails to grant the privilege to all shippers on equal terms, it is discriminatory.

The court below erred in refusing to dissolve the temporary injunction and making it perpetual. The case is reversed, with directions to proceed in conformity with the views expressed herein.

SANBORN, Circuit Judge (dissenting). On May 2, 1910, the Gas & Electric Company made a valid contract with the Railroad & Light Company to supply it with electric energy from that date until November 30, 1930, at rates specified therein. On May 4, 1914, the Gas & Electric Company filed its schedule of these rates with the Commission.

and they took effect pursuant to the act of Legislature of Kansas of May 22, 1911, creating the Public Utilities Commission of that state (General Statutes Kansas 1915, c. 97), and became the lawful established and reasonable rates for this service. On January 22, 1918, the Gas & Electric Company filed a petition with the Commission upon

which it has made an order raising these rates.

Under the police power of the state and the statutes of Kansas the Commission has the jurisdiction and the authority to raise the rates for the service of public utility corporations prescribed by lawful contracts between it and others, in cases where the agreed rates are confiscatory, unduly discriminatory, and in cases where the good order, health, comfort, or public welfare requires such action; but in my opinion the jurisdiction of the Commission in this direction extends no further. For example, it does not extend to the changing of contract rates of public utilities with private parties not demanded by the public welfare, because one of the parties to one of these contracts was induced to agree to it by mistake, or by accident, or by the fraud or the deceit of the other party to it. It is no ground, either at law or in equity, either in the courts or elsewhere, for the modification or abrogation of a contract for electric energy or for other public utilities for a long term of years, that the contract turns out to be more profitable during some of the years of the term, or more burdensome during other years of the term, to one or the other of the parties, than that party anticipated at the time it signed the agreement that it would be. Marble Co. v. Ripley, 10 Wall. 339, 355, 356, 357, 19 L. Ed. 955; Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 21, 114 C. C. A. 21. 41.

When carefully analyzed and reduced to its lowest term, the only ground for the raising of the contract rates stated in the petition of the Gas & Electric Company, and the only basis for the order of the Commission raising them upon that petition, is, in my opinion, that the contract rates, which the petition shows were so much more profitable during the first years of the term of the contract than it anticipated that in December, 1916, the Gas & Electric Company filed with the Commission and asked approval of a schedule of reduced rates, became in 1917 so much less profitable that it filed its petition for this raise. The petition does not show what profits the Gas & Electric Company derived from the contract rates during the years prior to 1917. It does not show that the contract rates have been or will be confiscatory. It does not show that the welfare of the public demands the increase, and in my opinion it states no facts or case within the jurisdiction of the Commission, its order was made without jurisdiction, and it is void.

For these reasons I am unable to concur in the opinion and the disposition of this case.

MIAMI CYCLE & MFG. CO. v. NATIONAL CARBON CO.

(Circuit Court of Appeals, Sixth Circuit. July 29, 1920.)

No. 3287.

 Sales \$\infty\$=179(4)—Purchaser estopped by acceptance to deny equality to sample.

Defendant held not justified in refusing to accept further deliveries under a contract for the purchase of 2,500 self-starters for motorcycles, to be made by plaintiff, on the ground that they were not like the sample approved before the contract was made, where the principal difference was that the sample was made by hand, plaintiff not having previously made starters for motorcycles, while the parts of the commercial articles were machine-made, as must have been contemplated by the contract, and where a sample of the latter was also submitted before deliveries began, and defendant, during ensuing months, accepted and paid for several hundred.

2. Evidence \rightleftharpoons 441(9)—Warranty cannot be imported into written contract by prior conversations.

A warranty cannot be imported into a written contract of sale which is silent on the subject by conversations or correspondence between the parties before the contract was made.

 Sales 271—Contract held to raise no implied warranty of fitness under Uniform Sales Act.

Where defendant, a maker of motorcycles, desired a self-starter for its machines, and plaintiff, a manufacturer of self-starters for automobiles and motorboats, thereupon made a model, which, after alterations agreed upon, was approved by defendant after a test of some weeks, and a contract made for several hundred, there was no implied warranty, under Gen. Code Ohio, § 8395(1), of general fitness for the use intended, or beyond a warranty of suitable materials and proper workmanship.

Under Gen. Code Ohio, §§ 8443, 8444, as to damages recoverable by seller for buyer's breach, where buyer of motorcycle self-starters specially manufactured for it repudiated the contract, plaintiff seller was properly allowed to recover the full contract price of the starters delivered, and, as to those not delivered, the contract price, less the cost of completion, and less the value of the finished starters and of the unused materials procured or made for this purpose, all as left on plaintiff's hands, and such measure of damages as to the undelivered goods, even if title had not passed, was not erroneous, on the ground that damages should properly be stated as cost incurred, less salvage, plus lost profits, for cost plus profit equals contract price, and whether this damage is given under the name of the whole or under the names of the parts is unimportant.

5. Sales \$\infty\$ 384(6)—Lost profits recoverable for refusal to accept goods to be specially manufactured.

The provision of Gen. Code Ohio, § 8444 (4), "The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages," does not change the settled rule that lost profits, in case of buyer's refusal to accept goods to be specially manufactured for it, are recoverable as such, nor contemplate that lost profits shall be treated only as an element of the situation, to be given such force as the trier of fact may think proper, but rather declares that this element of damage shall remain, and shall be added to whatever other elements appear.

6. Interest €=53—Inclusion of interest on verdict not error.

Where judgment on a verdict was delayed pending a motion for new trial, the inclusion in the judgment of interest on the amount of the verdict, although the verdict itself included interest, *held* not error, under Gen. Code Ohio, § 8305, and the established practice in the state.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action at law by the National Carbon Company against the Miami Cycle & Manufacturing Company. Judgment for plaintiff and de-

fendant brings error. Affirmed.

The Carbon Company, as the successor of the Ever-Ready Company (hereinafter called plaintiff), brought suit in the court below upon a contract by which the plaintiff agreed to manufacture and sell, and the Miami Company (hereinafter called defendant) agreed to buy, at \$30 each, 2,500 mechanical self-starters, for use in connection with the motorcycles which the defendant was making. About half of these had been delivered, and the greater part of the purchase price thereof paid, when the defendant refused to proceed with the contract, alleging that the self-starters were not in accordance with it, but were worthless, and demanded a return of what it had paid, and damages. The plaintiff brought this suit to recover the unpaid balance of the purchase price of those delivered, and its damages on account of the remainder which the purchaser refused to take; the defendant denied liability and sought judgment by way of counterclaim; and, at the conclusion of a trial before a jury, the court instructed a verdict in favor of plaintiff for the amount of its claim. The substantial question is whether there was any evidence to go to the jury to support defendant's theory of defense or of counterclaim.

The contract of sale was in writing and was an Ohio contract. sisted of an offer by letter and an acceptance. Plaintiff was engaged in the manufacture of a mechanical self-starter, known as the "ever-ready," for automobiles and motorboats. Representatives of plaintiff and defendant discussed whether this could be modified in size and form to make it suitable for motorcycles, and arranged that plaintiff should build a model of such modified character. Plaintiff did so, and furnished the model to defendant. Defendant tested the model for some time and thereupon wrote to plaintiff, under date of August 8, 1912, "You will please enter our contract for 2,500 selfstarters for motorcycles, to be exactly as per sample recently submitted and O. K.'d by us." Shipments in small quantity began in December, 1912, and continued in quantities of 100 to 200 per month until October, 1913. Defendant attached starters to a few of its motorcycles, and put them out in the spring and summer of 1913, but not in any considerable numbers, until December, 1913, and January, 1914. It soon developed to the defendant's satisfaction that the starters were a commercial failure. For some reason, they did not stand up satisfactorily in actual use. There was much correspondence and negotiation between the parties, and plaintiff, while disclaiming responsibility, made changes in the effort to meet defendant's complaints. Finally, in March, 1914, a test was arranged at defendant's factory, in which plaintiff participated, without waiving its right to insist that no question remained open. Upon this test of five starters, they operated correctly for a time; but each one eventually gave out, for some one of several varying causes, about which the parties did not agree. Defendant then finally repudiated the contract.

Thomas B. Paxton, Jr., of Cincinnati, Ohio, and Quincy A. Myers, of Indianapolis, Ind. (Myers, Gates & Ralston, of Indianapolis, Ind., Ben F. Harwitz, of Middletown, Ohio, and Paxton, Warrington & Seasongood, of Cincinnati, Ohio, on the brief), for plaintiff in error.

Judson Harmon, of Cincinnati, Ohio (Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, and Squire, Sanders & Dempsey, of Cleveland, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] Defendant's first contention is that the starters were not "exactly as per sample." This contention arises under conditions which require it to be carefully scrutinized. Although about one-half of the starters contracted for were shipped and received, and most of them were paid for, and the record contains a body of correspondence between the parties extending over several months with reference to the imperfections of the starter, and the oral testimony shows discussions and negotiations between them on the same subject for a long period, the claim that the starters were not like the sample was never distinctly made until the answer was filed. The substance of all the complaints made was that the starter did not perform in accordance with a supposed warranty, and a lack of correspondence with the sample was, at the most, only suggested by the complaint that "some parts seem to be made of the wrong material."

Coming to the trial of this issue—difference between sample and starters—we find that the alleged discrepancies consist in changes in design, in the materials and in quality of workmanship. So far as concerns changes in design, the undisputed testimony is that they were of unsubstantial character, and were agreed upon between the engineers for the respective parties before quantity production commenced. The one later change had reference to the size of one part, caused by defendant's mistake, and discovered after the first 100 had been made, and corrected by furnishing a fitting washer, all as agreed upon by, and to the satisfaction of, both parties. Clearly, in this class of dis-

crepancy, there is nothing to justify rejection.

As to difference in materials used: It appears that the back plate, in the sample, had been "roughed out" from a piece of steel boiler plate, while, in the later manufactured starters, it was a gray iron casting. The evidence also tends to show that the ratchets and dogs in the sample were manufactured by hand from tool steel, while, in the later starters, they were made by the drop-forging process, from a steel suitable for that purpose, and of qualities not wholly the same as tool steel. No other discrepancies in materials are suggested. Both of these are dependent upon, and incidental to, the difference between production of a sample by hand work and quantity production by ordinary factory processes, and it is not open to defendant to rely upon either of them.

The contract was for a large quantity. The correspondence shows that defendant knew plaintiff was intending to manufacture, not by hand, but by the use of jigs, dies, etc. After the making of the contract, the plaintiff expended a large amount of time and money in the making of these preparations for quantity production, and then, before going on, submitted for approval another sample manufactured by these methods. This sample defendant passed upon and approved,

save for some slight changes which were made by agreement.¹ Then quantity production began, and defendant received and paid for several hundred. Defendant does not claim that it ever supposed the back plate, with its right-angled posts, would be cut out by hand from a thick steel plate like the sample. Defendant was expert in the general methods of metal working, and knew that such a method of making would be commercially impossible. Nor does it claim that it supposed plaintiff would use for the ratchets and dogs any grade of steel not workable by the drop-forging process. The substitution of the cast-iron plate was known to defendant from the beginning, and not objected to. Such substitutions of material as were necessarily incidental to quantity manufacture must be deemed within the contemplation of the parties in making such a contract, and did not constitute a departure therefrom.

Whether to such a substitution it was reasonably necessary that this back plate should be of gray iron casting and of the specific thickness here adopted might have been open to question. Perhaps, within the limits of good manufacturing methods, it might have been made of stronger material or of heavier form. Those questions are not open to defendant. A back plate made as these were was considered by plaintiff to be the one called for by the contract, and it was tendered to the defendant as such; no one can say that the tender was not in good faith, or that the iron back plate may not have been a full, substantial compliance with the contract; and the defendant accepted it as a compliance with the contract. This acceptance was not only of the special second sample tendered for that purpose, but continued over a course of business lasting through some months. Under such conditions, defendant cannot say that the article it received is not the article which it bought. See cases cited in 23 R. C. L. "Sales," § 264; Marmet Co. v. People's Co. (C. C. A. 6) 226 Fed. 646, 651, 141 C. C. A. 402. Of course, this conclusion is not inconsistent with the existence of an implied warranty of fitness of material, which might survive some measure of acceptance. That subject is considered later.

There is nothing to indicate that there were any differences in work-manship, beyond those which would be inherent in the contemplated method of manufacture, and these cannot avail defendant. The only matter carrying a suggestion of difference in the quality of the work-manship is that which is discussed hereafter under the subject of reasonable fitness, and with reference to clearance; but the testimony is even less sufficient to show a difference in this respect between the model and the mass of the starters than it is to indicate unfitness.

It is said that these conclusions depend upon defendant's estoppel, and that plaintiff cannot recover on that ground, because no estoppel was specially pleaded in reply to defendant's answer, as the Ohio pleading rules are said to require. We do not so regard the situation. If defendant kept silent while it knew that plaintiff was expending money

¹ There is no express evidence of such approval, but from the making of some changes by request, and the making of shipments thereafter, the inference of approval in other particulars is inevitable.

²⁶⁸ F.—4

preparing to make, and expecting to tender under a contract, articles which were a substantial departure from that contract, a pure question of estoppel would arise, and this rule of pleading would require consideration. In this case, the article furnished was offered, not as a departure, but as the very thing which both parties contemplated, taking into account the expected method of manufacture, and acceptance of the article was confession of identity. If there is an element of estoppel thereby involved, it is sufficiently pleaded, because the declaration alleges that the starters were tendered and accepted as being the contract articles.

Perhaps, as to the starters not delivered when defendant repudiated the contract, there is more color of estoppel, because, as to them, defendant never accepted; but, even if defendant's obligation to accept these be considered as in some measure dependent upon estoppel, rather than upon that construction of the contract which had become fixed and settled by the action of both parties, the fact of the estoppel is so far merely an incidental step in reaching the result that not even a

strict rule can require it to be pleaded.

It is rather vaguely suggested that the jury would be authorized to find the existence of substantial differences between the model and the starters, because the model worked satisfactorily and the starters did not. In many cases, such an inference might be justified from that fact alone. To do so here would require findings that there was marked inferiority of performance and that it was due to this cause. The first would be doubtful here. The model was kept by defendant for test only three weeks, and there is no proof that it was subjected to tests comparable in severity to those which caused the starters to be rejected. As to the second, there are so many other circumstances which might fully have accounted for any comparative inefficiency of operation (if there was any) that for the jury to attribute to it some unknown discrepancy between model and finished article would be that mere surmise upon which the law will not permit a jury to act. Richards v. Mulford (C. C. A. 6) 236 Fed. 677, 680, 150 C. C. A. 9. The model was attached in a certain method to a motorcycle engine in use in 1912. In 1913 the form of the motorcycle had been changed, and a different form of attachment was used, which might have materially affected the operation.

This is an illustration of several other matters to which any existing difference of performance can as well be charged as to some undiscovered difference between sample and starters. We are satisfied, therefore, that upon this record there was nothing to go to the jury to support defendant's contention that the starters were not like the sam-

ple, within the fair meaning of the contract.

[2] Defendant next contends that there was an express warranty of efficient performance. In support of this contention, reliance is had upon correspondence and conversations which occurred before the written contract was made. A warranty cannot thus be imported into a contract which is silent on the subject. Blue Grass Co. v. Steward (C. C. A. 6) 175 Fed. 537, 540, 99 C. C. A. 159; Marmet Co. v. People's Co., supra., 226 Fed. at page 650, 141 C. C. A. 402.

In the same connection, defendant complains because it was refused permission during the trial to file a second amended answer, setting up a similar express warranty made after the delivery and acceptance of the first part of the starters, and pending negotiations as to the remainder. Counsel rely upon the theory that, when a controversy has arisen between buyer and seller as to whether there has been a breach by the seller, and the buyer claims the right to repudiate because of such breach, it has the power to do so with or without right, and its forbearance to do so and continuing in performance is a sufficient consideration for a further promise or warranty by the seller applying to the whole contract, past and future. We need not consider the soundness of this theory. What happened here was that after defendant had expressed its dissatisfaction, and intention not to continue unless the starter could be so modified as to work properly, both parties engaged in negotiations as to such modifications. Defendant was willing to complete the contract, if satisfactory changes could be made, and plaintiff, protesting that it was under no obligation to do so, joined in an experiment as to some changes. It is at this time and in this connection that the additional warranty is said to have been made; but nothing came of this. The desired changes were never agreed upon. The defendant did not continue under the contract and forbear to repudiate, but, after some delay, refused to reconsider and confirmed its repudiation. Clearly, the theory of its proposed amendment does not fit these facts, and it was rightly disallowed.

[3] The next contention is that, since the plaintiff knew the particular purpose for which these articles were required, and since the defendant relied on the plaintiff's skill and judgment as an expert manufacturer of these things, there was an implied warranty, under section 8395 (1) of the Ohio General Code, that the starters would be reasonably fit for the purpose for which they were intended; but that they were not reasonably fit therefor, whereby the defendant was entitled, both by way of defense and counterclaim, to all the damages that flowed from such breach. We assume, for the purposes of this opinion, that there was no acceptance which would, as matter of law, bar such claim to damages (see Kansas City Co. v. Rodd [C. C. A. 6] 220 Fed. 750, 755, 136 C. C. A. 356; Gen. Code Ohio, §§ 8427, 8429); but we see nothing in the record which would have justified a finding that the defendant relied upon plaintiff's skill or judgment within the meaning of this section. It was understood by both parties that this article had never been manufactured in forms suitable for this purpose; to modify the plaintiff's self-starter used on automobiles and boats, and adapt it to successful use on motorcycles, involved questions of design and manufacture with which plaintiff was specially familiar, and questions of combining the starter with and attaching it to a motorcycle and using it there, about which plaintiff knew nothing and as to which, the defendant would be comparatively expert.

The second class of questions was at least as important as the first, and perhaps involved more uncertainties. In addition, there was the further question whether, however perfect the device might be, and

however perfectly its combination with the motorcycle engine and frame was accomplished, it would be a commercial success by reason of its ability to meet the hard usage attendant on motorcycle travel and the ignorant or careless treatment commonly given by the ordinary user. Upon this subject, neither party could be positive; but the defendant was the better qualified of the two to be judge. It was obvious that there could be no safety to either party in a contract until there had been a satisfactory test, and both parties proceeded on that theory. The first model was found objectionable; the second model was worked out with some collaboration, and seemed so satisfactory that defendant's engineer, after tests during only one day, approved it and sent it to the plaintiff to have manufacture begin. The plaintiff returned it to defendant, saying:

"We are returning to you the starter which you had for test before, for the purpose of you giving same a further thorough test. We hope that you will arrange to keep this starter working for at least several weeks, so in case any defect should show up during the severe test you can notify us and we will be able to remedy same. We don't expect that you will find any trouble whatever.; but, as this starter has not had a sufficient time test, we want to make sure, before going ahead with all the work, that it is perfectly right."

During the ensuing three weeks, defendant made every test it cared to, and then made the written contract. In the face of such a record as this, there can be no implied warranty of general fitness for the intended purpose.

However, there remains room for the contention that, so far as there was substitution of materials for those contained in the sample and as made necessary by the contemplated methods of manufacture, the material substituted should be reasonably fit for the intended purpose. Specifically, this means that the contention should be examined with reference to the cast-iron back plate and the drop-forged dogs and ratchets. As to the back plate, it would seem that those qualities of cast iron which would make it fit or unfit would be as well known to defendant as to plaintiff. At any rate, no witness said that the material was unfit, or that any trouble came because of such unfitness.

As to the quality of steel in the dogs and ratchets, the situation is different. The quality would not be obvious on inspection. These dogs and ratchets seem to have been the parts that generally gave out first, and it is not impossible that, either because of the first selection of the material or because of its quality as affected by the final casehardening, these parts were too hard or too soft to be fit for their intended use, and therefore either broke or wore sooner than they should; but here, again, we have only surmise. No witness testified that their quality was unsuitable, or that any better quality of steel suitable for drop-forgings could have been used or treated in a way that would have made any difference in the performance of these parts. Their actual giving out, in the starters that went into public use, may have been caused by faulty design, imperfect attachment to the motorcycles, or disregard by the user of any one of several instructions that were considered vital to the success of the device. The conclusion that they gave out because the steel was not reasonably fit would be not a permissible inference from the testimony, but a selection at random out of several equally probable theories. Richards v.

Mulford, supra.

Another trouble which developed should be mentioned: In certain starters that were rejected, it was found that the dogs rode upon a certain collar, so as not to engage properly with the ratchet, and so as to be a possible cause of imperfect operation. It is not impossible that this was the result of lack of care in assembling by plaintiff's workmen, and, if this were true, defendant would have cause of complaint, because that defect would not be apparent by any inspection which defendant was called upon to make; but here, again, there is nothing whatever definite upon which any such finding could be based. Plaintiff fixed over some starters, by grinding off this collar, giving more clearance. The most natural inference from what was said and done on this subject is that it was thought there would be an improvement upon the model, if it was departed from in this respect. If the trouble was due to defective assembling, no one says so, and the starters which were altered in this respect were no more satisfactory to defendant than they had been before.

Upon review of all these matters, and others not mentioned, we must conclude that upon this subject also—the breach of an implied warranty—there was nothing sufficiently definite to go to the jury. We cannot be content to reverse this case upon such mere doubts as to whether the evidence justified an instructed verdict as might be sufficient under other conditions. Defendant's conduct, in the direction of acceptance, waiver, and estoppel, was so extreme as to put upon it a heavy burden to lay before the jury at the trial, and to put into the bill of exceptions and preserve for our benefit, clear and substantial evidence tending to show distinctly in what particulars, if any, the starters differed from the model or embodied materials or workmanship that were not reasonably fit; and this defendant has failed to do. It saw fit to rely upon its two theories that changes required for quantity production were substantial departures from the model, and that there was warranty of good performance. Each of these theories we think erroneous, and there should not be an opportunity for another trial upon some other theory, unless it is clear that error exists.

[4] Another question is as to the measure of damages. The court ruled that the contract was first definitely repudiated by defendant in March, 1914, and that the plaintiff was entitled to recover the full contract price of the starters delivered, and, as to those not delivered, the contract price, less the cost of completion and less the value of the finished starters and of the unused materials procured or made for this purpose—all as left on plaintiff's hands. There was no conflict in the evidence on these amounts, and accordingly the court computed the total which it told the jury to find. Counsel now urge an assignment of error to the effect that, for the purpose of fixing plaintiff's duty to minimize damages when it became apparent that the starters would not be accepted (as declared in section 8444 (4) of the Ohio 1910 General Code), the effective date was in the preceding October, and that the plaintiff has therefore erroneously recovered an unknown amount

for work and labor, if not for special materials purchased, after that date; and the record tends to support the claim. However, the point was not saved by any objection or exception; on the contrary, it was defendant's theory, in the pleadings and on the trial, that it did not

repudiate the contract until March.

The rule of damages adopted seems to have been in accordance with the settled principles which have been formulated in the Uniform Sales Act, as embodied in section 8444, supra. The only specific criticism made of the rule adopted by the trial court is that the plaintiff was allowed to recover the contract price, diminished as above stated; whereas, under sections 8443 and 8444, it should have received only its actual damages, with due reference to its lost profits. "The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages." The seller's damages, in such a case, where title has not passed—and it is defendant's theory that title has not passed—is cost incurred, less salvage, plus lost profits; and cost plus profit equals contract price. Whether this damage is given under the name of the whole or under the names of the parts is of no importance.

[5] Counsel also urges that the statute does not contemplate lost profit as recoverable, as such, but only that it shall be treated as an element of the situation, to be given such force as the trier of fact may think proper. No precedent is cited for such a construction of this clause, nor do we see justification therefor. Before this act was passed, it was the settled rule that the vendor in such cases was entitled to recover the profit which he would have made, and the statute seems to declare that this element of damage shall remain and shall be added

to whatever other elements appear.

[6] The verdict was rendered October 9, 1917, and it included \$8,-657 interest. The judgment (delayed by motion for new trial) was entered August 12, 1918, and included \$2,454 interest on the verdict. The verdict and this judgment would thus embody about \$435 interest on interest; and since the judgment itself draws interest upon its own total, there will be a continual accrual of compound interest. Was there any error on this subject-matter?

Section 8305 of the Ohio General Code of 1910 says that, in cases not covered by express contract, the creditor shall be entitled to interest at 6 per cent., and no more, and section 8303 provides that the parties may agree upon a rate not exceeding 8 per cent., payable annually. There seems to be no provision expressly and universally forbidding compound interest, and the express provision, found in sections 8304 and 8305, that judgments shall draw interest, when taken with the common knowledge that judgments on contract include interest computed to their date, demonstrates that there was no intent to forbid compound interest by any absolute and all-inclusive rule.

Section 8305 permits the allowance of interest upon "settlements between parties"; and with reference to an earlier statute in the same form, and considering a finding or award which had been made in a case, the Supreme Court of Ohio said, in Sproat's Ex'r v. Cutler, Wright, 157, that interest should be allowed upon such award just as

it would be allowed upon the verdict of a jury if judgment had been delayed. This remark was obiter, but it indicates the prevailing practice in Ohio. In Griffith v. Baltimore Co. (C. C.) 44 Fed. 574, 584, Judge Sage, sitting in the United States Circuit Court for the Southern District of Ohio, considered the precise question, reviewed such authorities as there were—one of which was an opinion in that same court by Judge Swing (Gibson v. Cincinnati Enquirer, Fed. Cas. No. 5,391),—and stated that, after consultation with Circuit Judge (later Mr. Justice) Jackson, they had decided that interest upon the verdict should be allowed in computing the amount of the judgment to be entered.

This has doubtless been the practice in the federal courts in Ohio ever since, and we have no reason for departing from it. We are not referred to any Supreme Court decision of Ohio, excepting Sproat's Ex'r v. Cutler. Baltimore Co. v. Griffith was considered by the Supreme Court, in 159 U. S. 603, 605, 16 Sup. Ct. 105, 40 L. Ed. 274, and the point was reserved without discussion or intimation of opinion. We cannot regard Washington Co. v. Harmon, 147 U. S. 517, 590, 13 Sup. Ct. 557, 37 L. Ed. 284, as overruling the earlier Supreme Court cases upon which the conclusion of Judge Sage, in part, depended; nor is what is said in Massachusetts v. Miles, 137 U. S 689, 691, 11 Sup. Ct. 234, 34 L. Ed. 834, inconsistent with the conclusion of Judges Jackson and Sage. In considering R. S. § 966 (Comp. St. § 1605), it was intimated that no sufficient basis could be there found for allowance of interest upon a verdict, but, in this respect, R. S. § 966, is to be distinguished from Gen. Code Ohio, § 8305, which is at least open to the interpretation given to it by the Ohio Supreme Court in assuming that findings and awards are "settlements" under the statute.

The judgment is affirmed.

OREGON-WASHINGTON R. & NAV. CO. v. WILLIAMS.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1920.)

No. 3441.

1. Limitation of actions \$\sim 55(7)\$—Right of action for obstruction of stream

accrues at date of injury.

A right of action for damage to plaintiff's land from overflow of a river, caused by permanent obstructions built by defendant below plaintiff's land, held to accrue at the time of the injury, and not from the time the obstructions were built.

2. Waters and water courses =171(2)—One knowingly obstructing stream

liable for resulting damage.

A railroad company, which filled in a side channel of a river through which it was obvious that the water flowed in time of flood, cannot claim exemption from liability for the flooding of land above because of such obstruction, on the ground that the freshet was so unprecedented as to be an act of God.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action at law by C. H. Williams, for himself and as administrator of the estate of Mabel Grace Williams, deceased, against the Oregon-Washington Railroad & Navigation Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. C. Spencer and J. F. Reilly, both of Portland, Or., and Hamblen & Gilbert, of Spokane, Wash., for plaintiff in error.

A. H. Featherstone, of Wallace, Idaho, and John P. Gray, of Cœur d'Alene, Idaho, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The case shows that one Joseph Papineau was the owner of a certain quarter section of land in Shoshone county, Idaho, near the town of Cataldo, and opposite that portion of the railroad built by the predecessor in interest of the plaintiff in error where was constructed across the Cœur d'Alene river a long bridge and approaches thereto, including piling, fills, and a shear dam. At Cataldo, and a short distance from the Papineau land, the predecessor in interest of the plaintiff in error built a bridge across the river, consisting of one span of about 250 feet across the main channel, and a long approach thereto of piles, about 1,460 feet in length, which approach crossed an overflow or high-water channel of the river.

The predecessor in interest of the plaintiff in error also filled a considerable portion of the approach, including the high-water channel, with rock and earth approximately 15 feet in height, about 12 feet wide at the top, and sloping to a base of about 30 feet at the bottom, which fill was about 960 feet in length—leaving open for the passage of the water about 770 feet. The predecessor in interest of the plaintiff in error also constructed a shear dam of rock in the channel of the river and running from the bank in a diagonal direction a distance of

about 195 feet. The character of all of the work mentioned leaves no

room for question that it was intended to be permanent.

The last of the work above referred to was done in the year 1908. In 1913 the waters of the river suddenly rose to an unusual height, and flooded and damaged the land of Papineau, and, the latter having subsequently died, an action was brought by the administrator of his estate, which reached the Supreme Court of Idaho and was by it decided February 24, 1916, on the trial of which action in the court below one of the principal controversies as to the facts—

"was waged around the question of whether the construction of the shear dam and the filling in of the pile approach of the bridge had in fact diverted the current of the Cœur d'Alene river and caused the damage complained of." Rogers v. Oregon-Washington R. & Nav. Co., 28 Idaho, 609, 614, 156 Pac. 98, 99.

In that action it was adjudged by the Supreme Court of the state that, the flow of the river having been impeded by the filled-in approaches to the bridge and the shear dam, and the water thereby thrown upon the land of Papineau, resulting in the injury complained of, the representative of his estate was entitled to recover, the cause of action not having accrued until the injury was sustained, from which time only the state statute of limitations began to run, and not from the time of the construction of the permanent impeding works of the

railroad company.

Subsequently and during the last days of December, 1917, and the first days of January, 1918, the water of the river became again unusually high, during which time the channel left open by the railroad company was insufficient to carry all of it, and a portion thereof was impeded by the filled-in approaches to the bridge and the shear dam, and again thrown upon the same quarter section of land thereto-fore owned by the deceased, Papineau, which was thereby damaged to at least the extent that the recovery by the defendants in error was allowed in the court below—the amount thereof being conceded to have been reasonable by the plaintiff in error—there being likewise no question made respecting the acquirement by the defendant in error Williams individually and as administrator of the estate of his deceased wife of the property damaged and of the cause of action growing out of the jury complained of.

[1] Respecting the statute of limitations of Idaho pleaded and relied upon in bar of the action, it is enough to say that, as the latter was commenced within a few months of the infliction of the injury complained of, it is plain that the point is without any force, unless it be, as is contended on behalf of the plaintiff in error, that the commencement of the running of the limitation statute is to be taken as the time of the building of the obstructions by the predecessor in interest

of the plaintiff in error.

We think a complete answer to that contention is that the injury which constituted the cause of action of the defendants in error did not occur until the last days of December, 1917, and the first days of January, 1918, and the present action was begun in the month of August of the latter year. It is in our opinion obvious that until

the injury complained of was inflicted no cause of action for damages existed. It is not pretended that the bridge over the Cœur d'Alene river, or the approaches thereto, or the shear dam, were constructed on the land now owned by the defendants in error, and it cannot be doubted, we think, that, had its then owner sought to prevent the predecessor in interest of the plaintiff in error from constructing the bridge, or the shear dam, or the piling, or fills, he would have been met with the conclusive objection that it was none of his business, and that it would be time enough for him to complain when he was injured thereby; and so it was held in effect by the Supreme Court of Idaho in the case above cited, in which an action was sustained for damages to this same land, occasioned by an overflow of the water of the river in the year 1913, caused by the impediments that have been mentioned.

[2] The contention that the freshet that caused the injury here involved was so unprecedented as to be properly considered by the court as an act of God is equally without merit. It is readily conceded, as a matter of course, that no person or corporation is or can be liable for an act of God. But one or two suggestions are sufficient, we think, to show that the freshet involved in the present case cannot be properly so regarded. First and foremost, the predecessor in interest of the plaintiff in error, when it built the piling and permanent embankment across the overflow channel of the river, thereby preventing that channel from carrying off any of the flow of the main channel, and when the plaintiff in error acquired its interest and maintained the property in the same condition, both had ocular demonstration of the fact that there had previously been such freshets as could not be carried in the main channel, the overflow of which had theretofore cut the overflow channel, and with such knowledge the latter was blocked.

Then, too, while we have no doubt, from the evidence in this case, that the freshet that caused the damage here involved was much more severe than the one that occurred in 1913, involved in the case of Rogers v. Oregon-Washington R. & Nav. Co., supra, the water of the river was in each instance of such large volume that the space and main channel of the river left open by these railroad companies was not sufficient to carry it off, and the impediments constructed and maintained by them caused the overflow and injury in each case complained of.

No other point, we think, requires special mention.

The judgment is affirmed.

UNITED STATES v. BRASLEY et al.

(District Court, W. D. Pennsylvania. May Term, 1920.)

No. 148.

Witnesses 298—Defendant cannot be required to produce his private papers to furnish evidence to grand jury.

Under Const. Amends. 4, 5, declaring that no person shall be compelled in any criminal case to give evidence against himself, defendants, who composed a partnership, could not be required to produce their records before the grand jury for the purpose of furnishing evidence in a criminal prosecution against them, and such records having been brought in on subpoena duces tecum served on one of such defendants alone, special agents of the Department of Justice who served the subpoenas, superintending the bringing of the records into court, they must, on petition of defendants, be returned, and any memoranda taken therefrom, and any copies or photographs made thereof should also be returned.

Simon Brasley and others, indicted for alleged violations of Act Aug. 10, 1917 (Comp. St. §§ 3115½e-3115½r) as amended by Act Oct. 22, 1919 (41 Stat. 297), and Criminal Code, § 37 (Comp. St. § 10201), petition for an order upon the United States attorney, requiring the return of sales slips, papers, and records alleged to have been unlawfully taken from defendants. Rule made absolute, and records ordered returned.

A. P. Burgwin, Asst. U. S. Atty., of Pittsburgh, Pa. Ben Paul Brasley, of Pittsburgh, Pa., for defendants.

ORR, District Judge. A petition has been filed by Simon Brasley, Leon Krieger, and Bessie B. Cohen for an order upon the United States attorney, requiring him to return certain sales slips, papers, and records which the petitioners aver belong to them, and which they charge were unlawfully taken from them, and used against them, in violation of their rights as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States. The facts material to the issue raised by the said petition and an answer thereto, filed by a former United States attorney, are as follows:

Said United States attorney, on the 3d day of May, 1920, presented to this court his petition for subpœnas duces tecum, entitled:

"In the Matter of the Grand Jury Investigation of Alleged Violations of the Act of August 10, 1917, as Amended by the Act of October 22, 1919, and Section 37 of the Criminal Code of the United States, on the Part of the Brasley-Krieger Shoe Company, Simon Brasley, Leon Krieger, and Bessie B. Cohen, Owners and Officers Thereof."

Said petition contained the averments that his attention had been called by various persons, including officers and agents of the government of the United States, to alleged violations of the said acts of Congress by the persons named as aforesaid, that he believed that the said persons were guilty, that the grand jury was now sitting in this district, and that he believed it to be his duty to bring such matters before the grand jury for investigation, and that in the conduct of such

investigation certain documentary evidence should be produced. There is an averment in the petition that the Brasley-Krieger Shoe Company conducted a chain of retail stores as follows: Fifth Avenue, Pittsburgh; Frankstown Avenue, Pittsburgh; Homestead, and Braddock—all within this district. The petition contained the prayer for leave to issue subpœnas duces tecum directed to the Brasley-Krieger Shoe Company, its officers, agents, and employés hereinafter named, requiring them to produce the documentary evidence as follows, to wit:

"To the Brasley-Krieger Shoe Company, Simon Brasley, Leon Krieger, and Bessie B. Cohen, Pittsburgh, Pa., to appear before the grand jury and with you bring: All books showing all sales of shoes made by the Brasley-Krieger Shoe Company since October 22, 1919, together with the price received in consideration thereof; also all contracts for hire of clerks and employés that have been in the employ of the company since October 22, 1919; also all books showing the wage or salary accounts of such clerks, together with all pay rolls and all canceled checks in payment of wages and salaries; and also all books or records of account showing commissions paid to clerks in addition to or in connection with their regular pay, wages or salary; also all books and records of accounting for the portion of the sale price of shoes over and above the regular fixed and marked price of such shoes; also all sales tickets showing sales made since October 22, 1919."

On the same day the court ordered and directed that subpœnas duces tecum issue as prayed for, and on the same day the subpœnas were issued. There was no time stated in the subpœnas at which the witnesses should appear, but they were required to appear "forthwith." The United States attorney did not cause the subpoenas to be served as soon as they were issued, but directed them to be served on the 5th day of May, 1920. In addition to the subpoenas duces tecum, other subpœnas were issued, summoning clerks of the Brasley-Krieger Shoe Company to appear and testify before the grand jury. All of these subpænas were served on the morning of the 5th of May, 1920, by special agents or officers of the Department of Justice. It appears that four of said officers or special agents, named Van Vleck, Rice, Morgan, and Murdock, went to the Fifth avenue store. Mr. Rice and Mr. Van Vleck went into the store first, leaving Mr. Morgan and Mr. Murdock outside. Mr. Morgan had the subpœnas for the clerks. It was arranged that he should remain outside until Mr. Rice had served the subpœnas duces tecum. Mr. Rice served the subpœnas duces tecum upon Mrs. Bessie B. Cohen, by giving her a copy of the subpoena, which she read. Thereupon Mr. Van Vleck left the store and notified Mr. Morgan that service had been made upon Mrs. Cohen, whereupon Mr. Morgan entered the store and served subpoenas upon certain of the employes. Mr. Morgan and Mr. Rice remained in the store until the books and papers were done up in packages and ready to be taken before the grand jury, and they accompanied the clerks and the books to the Federal Building, where the grand jury was in session; the said two agents carrying the packages containing the books from the store to the Federal Building. Mrs. Cohen asked Mr. Rice if it would not be possible for him to wait a while and permit part of her clerks to go to luncheon. According to his testimony, he said:

"I would be very glad to do it, and as I remember I waited in her store 40 minutes, in order to enable part of her clerks to go to lunch."

The records desired were kept in the office, which was located on a balcony in the store. Mrs. Cohen proceeded up to the office to get the records, and, as Mr. Rice testified, after she had been there about two minutes, Mr. Morgan said: "We had better go up." Mr. Morgan went up to the office, and so did Mr. Rice. Mr. Rice, in direct examination was asked the question: "Q. Did you not taken possession of any of the books or papers?" To which he answered: "Not while I was in the store." He was asked the further question:

"Q. Did Mr. Morgan take possession of any books or papers? A. Mr. Morgan did not take possession of any papers, but he assisted Mrs. Cohen in wrapping up some papers in my presence. Q. While she was engaged in wrapping, Mr. Morgan went to her assistance? A. They both started to put the records together. The paper didn't seem to be large enough."

Looking at Mr. Rice's testimony further, we find the following:

"Q. Those composed all the records of the cashier's desk? A. Not all of them, because we left some records she said she wanted to use that day. Q. What did she say about those records? A. She said they were records in regard to the sales of the day, or other day. Q. What did you say to that? A. I consented to that; I said we would be glad to leave those records, and call for them later, if required."

The same witness testified that he carried one of the packages out of courtesy to one of the women clerks, who had it in her hand as she was about to leave the store. On cross-examination, he testified as follows:

"Q. Mr. Morgan was with you at the time? A. Mr. Morgan was within a few feet. Q. He had also been introduced as a representative of the Department of Justice? A. Yes, sir. Q. Why did you intrust valuable papers, as you thought, to two lady clerks that were leaving the store? A. What did I do? Q. To two lady clerks. A. There was nothing unusual about that; I couldn't get away from the papers; no reason why I shouldn't have that much confidence in those two ladies. Q. Did you have them under your control? A. Yes, sir; practically."

Again the same witness testified:

"Q. You knew the importance of the papers? A. Yes. Q. Still you were not interested enough to see where they were carried to? A. I knew they were not going to get away. Q. If you didn't see, they might have disappeared without your knowing anything about them? A. No; Morgan and I stood there, and we knew generally what was going on."

On redirect examination, the same witness was asked:

"Q. Did you make any request for the books relating to the wholesale business? A. I made a request for whatever books she had in regard to the retail sales, purchase and sales slips, everything was described; the necessary books were described in the subpœna served on Mrs. Cohen."

It must be found as a fact in the case that the orders which the four agents of the Department of Justice had received, as testified to by Mr. Morgan, were that if neither Mrs. Cohen, Simon Brasley, or Leon Krieger had been in the store, then Mr. Morgan would not have gone in, and Mr. Rice would have come out, and all would have proceeded back to the office. From that a fair inference must be drawn that, if the evidence desired could not be secured on that occasion, they would carry out the same plan at a later date. The witness Morgan testified:

"Q. Did you go up into the balcony? A. Not until after Mrs. Cohen went up. Q. How long after that did she and Mr. Rice go on the balcony? A. They stayed downstairs quite a while; she got some books or records in this little alcove; after they went up, I remarked to Mr. Rice that one of us should go up, and we both went up; whether he preceded me or not I don't know."

He was further asked:

"Q. Did you take possession of any of these books or papers yourself? A. Not at that time. Q. What time did you take possession of them? A. Coming out of the store. * * * Q. Who carried these two packages downstairs? A. Mr. Rice went downstairs before either Mrs. Cohen or myself, and I don't know which one of us carried it down. Miss Harper was there, and the cashier was there, and Mrs. Cohen was there. Q. You didn't carry any of them? A. They were carried down to the main floor, and one package was set on the radiator, or something, a shelf, in that little alcove. We waited there 15 or 20 minutes, waiting for some men, of the men that Mr. Rice had sanctioned going out to lunch."

The witness states that he took the package from one of the women clerks "through courtesy." He testified:

"Q. What did you say to her? A. I said: 'I will take that package off you.' Q. Did you see Mr. Rice take a package from the other young lady? A. I didn't see him take it, but I saw him with the package on the way up."

After the officers reached the Federal Building, they turned the packages over to two of the men clerks who had been summoned as witnesses. On cross-examination the witness further said:

"Q. Before that time you thought it important enough, and you were suspicious enough, to go up to the balcony and see that you got the records. Do you mean to say— A. Not suspicious. Q. Didn't you state to Mr. Rice that 'we had better go up and see—' A. Just to see that we got the records. Q. You were afraid you wouldn't get them? A. Possibly. Q. And with that state of mind, didn't you watch who carried those records, down from that balcony? A. Not particularly who carried them down. Just so they were carried."

Further on he testified:

"Q. Those records were setting on the ledge; weren't you watching them all the time? A. Yes, sir."

He further testified:

"Q. Why didn't you turn that package of books over to Caplan right away?
A. Just for that fact; we would have to wait for him to get to the Federal Building."

It appears from the testimony of the witness, who was then United States attorney, that after the books and witnesses had been brought to to the Federal Building he was not ready to proceed with the matter before the grand jury further than to introduce the books, papers, etc., and have them identified, after which they were placed in his vault. They were used later before the grand jury, who returned a true bill against petitioners on May 22, 1920.

The subpœnas duces tecum were in the usual form, and contained

the command:

That the witnesses, "laying aside all manner of business and excuses whatsoever," should appear before the court "forthwith to give evidence on

the part of the United States generally, and not to depart the said court without leave thereof or the United States district attorney. Herein fail not under penalty of \$400."

Said subpænas further contained the direction on the outside that—
"All witnesses subpænaed on behalf of the government are required to report in person at the office of the United States attorney promptly on their arrival in the city; otherwise, they will be presumed not to have obeyed the subpæna, and will be subject to attachment."

As will be seen by reference to the petition for the subpœnas duces tecum, an inference may be drawn that the proposed investigation was directed to the conduct of a corporation and its owners and officers. As a matter of fact, the investigation was intended to be directed against a partnership composed of Simon Brasley, Leon Krieger, and Bessie B. Cohen, who are the petitioners who now ask for the return

of their books and papers.

The court must find that the production of the books and papers of the petitioners was compulsory. Indeed, the evidence justifies a finding that there was a seizure of the books and papers by officers of the Department of Justice. They were the private documents of the three petitioners. No one of them had any greater right therein than each of the others. From the petition of the United States attorney, the documents were necessary in the investigation undertaken by him. We must assume that, without the documents, the indictment would not have been found.

It is no answer on the part of the government that no objection was made by Mrs. Cohen at the time to the proceedings. There were in the store two representatives of the Department of Justice, one of whom presented to her the command of this court that she forthwith appear before the grand jury, while the other was serving clerks with subpænas requiring them also forthwith to appear. There were the watchful eyes of the two men, known to her to be agents of the Department of Justice, seeing that the documents were immediately put in bundles, and that no material documents should be omitted. The eyes were watchful, according to the testimony of the witnesses, to see that none of the records got away while in the store. The hands of the officers kept a grasp upon the records while they were being taken from the store to the Federal Building. The officers "sanctioned" that some of the men could go to lunch while they waited for their return. It is clear to my mind that there was restraint put upon all the witnesses in the store, and restraint upon Mrs. Cohen intended to result in the production of the documents that were deemed necessary by the United States attorney.

It is unfortunate for the administration of justice that the fundamental rights of citizens and residents of the United States are, from time to time, ignored by those having to do with the administration of justice. Time and again it has been necessary for the courts to emphasize the fact that it is much better that many offenders of the law escape justice than that the fundamental rights guaranteed by the Constitution should be in any way violated. We have to do, in this case, with the Fourth and Fifth Amendments, which it is well should be

often reprinted, that they may be often seen and constantly kept in mind:

"Article IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"Article V. No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use,

without just compensation."

The cases in which the courts have held that the constitutional provisions found in the foregoing sections have been violated are so numerous that a review of them would avail nothing. This is a case of individuals whose books were taken from them by the process of this court, to be used as evidence against them, in order to indict them for criminal acts

In the case of Hale v. Henkel, 201 U. S. 43, 76, 26 Sup. Ct. 370, 379 (50 L. Ed. 652), a case arising wholly out of a writ of habeas corpus, the Supreme Court says:

"We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpæna duces tecum, against which the person, be he individual or corporation, is entitled to protection."

A reference to the Boyd Case (see Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746) is all that is necessary, because, so far as it has been brought to my knowledge, it is referred to in every case in which the question of unlawful searches and seizures and involuntary self-incrimination is considered. That was a proceeding under the Revenue Act, in which a certain partnership, E. A. Boyd & Sons, were claimants. In accordance with certain provisions of law, the claimants were notified to produce a certain invoice or paper tending to support the cause of the government in the forfeiture proceedings, with a clause in said notice that, if they failed to produce such invoice or paper in obedience to such notice, the allegations on the part of the United States should be taken as confessed, with the further provision that, if produced, the paper might be examined in the presence of the claimants and offered in evidence on behalf of the United States. Mr. Justice Bradley, speaking for the court, says:

"It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure."

The court, then, having determined that the steps taken in the court below constituted a search and seizure, proceeded to consider whether it was an "unreasonable search and seizure," within the meaning of the

Fourth Amendment, or was a legitimate proceeding. The court then holds:

"That a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment."

The particular facts as found in the case at bar may be kept in mind as we quote the following from the opinion of Justice Bradley (116 U. S. 635, 6 Sup. Ct. 535, 29 L. Ed. 746):

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

It is not necessary to say anything more upon the branch of the case now before us than that the entire proceedings whereby the books of the petitioners were seized and produced in evidence before the grand jury were illegal, as being in contravention of their rights fixed by the Fourth and Fifth Amendments. The petitioners, having been illegally deprived of their books and papers, are entitled to have them returned to their possession, and not only that, but to have every memorandum taken therefrom, every photographic or other copy made thereof, returned to them, so that none of the documents shall be available to the United States in the prosecution of the defendants under the indictment, to the extent of furnishing evidence of their guilt. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367; Silverthorn Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, decided January 26, 1920.

At the time of the hearing the United States attorney presented a petition that all the documents hereinabove referred to should be impounded in the custody of the court, and that the clerk be directed to take and hold them, so that they may be available for use as evidence in the trial of this case. This petition must necessarily be refused, in view of our finding that the compulsory production and use of the documents was in violation of the rights of the several partners who asked for the return of the same.

The rule granted upon the United States attorney must be made absolute, and the petition of the United States attorney for the impounding of the books must be refused. Let a proper order be drawn,

THE BESSIE J.

(District Court, D. Massachusetts. August 19, 1920.)

No. 1714.

Shipping \$\iff 208\to 0\text{where of barge, sunk because not properly manned, held guilty of personal fault and not entitled to limitation of liability.

A barge was improperly loaded under direction of her master, so that during the night she sprang a leak and sank at the loading wharf in the port of Boston. The leak could have been controlled, if seasonably discovered; but the master left the barge, on which he was the only man, unattended during the night. The owner of the barge had given orders that barge captains were to remain on board at night, when away from the home dock; but it had no system of following them up to see that the order was obeyed, and it had reason to believe that its barges were frequently left unattended at night when lying at Boston wharves. An action was brought by the dock owner against the barge owners to recover damages due to her sinking. Held, that the barge owners were not free from personal fault for the unmanned condition of the barge, and were not entitled to limit their liability.

In Admiralty. Petition of the Boston Towboat Company for limitation of liability as owner of the barge Bessie I. Petition denied.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for petitioner.

Alexander Wheeler, of Boston, Mass., for claimant.

MORTON, District Judge. This is a petition to limit liability brought by the Boston Towboat Company as owner of the barge Bessie J., which, by sinking on March 6, 1917, at the wharf of the Darrow-Mann Company, the damage claimant, in Boston, blocked the slip and caused damage. There is a cross-libel by the Towboat Company to recover damages from the Darrow-Mann Company for alleged improper loading. The facts are as follows:

The Bessie I. was a schooner built in 1879, acquired by the petitioner in 1912, and reconstructed as a barge. In 1914 and in 1916 repairs of rather extensive character were done to her. Batchelder Bros. hired her from the petitioner to take a cargo of coal from the Darrow-Mann wharf, where it was to be loaded. The Darrow-Mann Company had nothing to do with the hiring; their only connection with the barge was to load her for account of Batchelder Bros. The barge was placed by the petitioner at the damage claimant's dock about 3 p. m. on March 5, 1917. She was in charge of Capt. Pendleton, who was hired by the petitioner and seems to have been a competent man, as far at least as knowledge and experience went. Pendleton staid on board the Bessie J. until 5 o'clock that afternoon, when the day gang stopped work on the wharf. Up to that time about 175 tons had been loaded, most of it in the two or three after hatches. Pendleton then left for the night, and the work of loading was suspended until resumed by the night gang an hour or two later. At that time there was nobody in charge of the barge. The Darrow-Mann workmen went ahead, however.

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and loaded her with the stipulated amount, which was less than her carrying capacity, putting it into the hatches forward of those previously loaded. The loading was finished about 9 p. m. For the rest of the night the barge lay at the Darrow-Mann wharf under observation of its watchman, who looked at her from time to time and noticed nothing wrong with her. About 6:30 the next morning the tug French, belonging to the petitioner, arrived at the wharf to move the barge out. Pendleton came over on the tug, having boarded her at the petitioner's wharf. They found the barge in a sinking condition, her after deck awash. She shortly went down stern first at the wharf.

Of course, there is no right to limit liability unless the vessel was seaworthy and reasonable care was exercised by the owner to see that she was properly manned, equipped, and supplied. Eastern S. S. Co. v. Great Lakes D. & D. Co., 256 Fed. 497, 168 C. C. A. 3. Nor is there any question but that a partially loaded vessel ought not to have been left to lie through the night with no one on board. See The Scotia, 6 Asp. M. C. N. S. 541; The On-the-Level (D. C.) 128 Fed. 511. The real issues are (1) whether the Bessie J. was seaworthy; (2) whether the Darrow-Mann Company was negligent in loading her; and (3) whether the petitioner exercised reasonable care to see that she was

properly manned.

As to seaworthiness: The history of the Bessie J. is not such as to inspire confidence in her soundness. She was old; she had been wrecked and rebuilt; she had sunk and been raised; she had leaked and been repaired. But the petitioner had a competent inspection and repair force, and she seems to have been well looked after and kept up. Her owners recognized that it was not safe to subject her to any great strain, and used her only for harbor purposes and an occasional trip, presumably in good weather, as far as Lynn or Gloucester. The evidence as to whether she was recognized as a leaky vessel is conflicting. The fact very likely is that from time to time she had developed leaks when loaded which had been repaired when she was light. The evidence for the petitioner is that the barge was tight when placed at the Darrow-Mann wharf. Nothing happened to her during the night. Various witnesses testify that it was improper to load 175 tons into the after hatches without putting any load into the forward hatches, and that to do so would be very likely to strain the barge and start a seam or butt, which would cause her to leak. She was either in a leaky condition when placed at the wharf, or she was injured during the loading in the way stated. I think that the weight of the evidence supports the latter alternative; and I so find.

At the time when the Bessie J. was placed at the wharf, she was, for the limited purpose for which she was in use, seaworthy. She was equipped with a pump of sufficient capacity to have easily controlled such a leak, if it had been seasonably started. The failure to operate the pump due to the absence of Pendleton, was the proximate cause of the accident.

As to loading: The loading was, as far as the barge was concerned, under the control of her master. It was his business to direct where cargo should be placed, so as to keep her in proper trim and avoid

straining. The loading which occasioned the strain was done before 5 o'clock, during the time when Capt. Pendleton was on board; and on Noel's testimony it was done according to Pendleton's instructions. The responsibility for it therefore does not rest on the Darrow-Mann Company. The night gang loaded according to instructions from Noel, who passed along what he had received from Pendleton. The Darrow-Mann Company was not negligent in loading the barge.

As to the manning: Some time before the accident Mr. Page, general manager of the petitioner, had given explicit orders that men should at all times be kept on barges which were away from the home dock, and its insurance policies contained a warranty which in effect required that to be done. This order was known to Pendleton. The petitioner did not, however, pay additional wages for night duty nor hire additional men for that purpose. It had no system of following up its barge captains to ascertain whether they stayed on board at night, and it took no steps to see that Mr. Page's order was obeyed. Barge captains are as a class rather unreliable, and it was easy for them to leave their vessels when lying at wharves in Boston or nearby harbors. Some of the barges had no living accommodations, although this was not true of the Bessie J. Under such circumstances, disregard of the order was to be expected, and was undoubtedly of frequent occurrence.

It was the petitioner's duty to exercise reasonable care and diligence to see that its vessels were at all times properly manned. The rights or property of others might be endangered by a failure in this respect. It employed a very competent manager for its fleet, Capt. Nickerson, who had full charge and control of its vessels under the general supervision of its vice president, Mr. Page, and its board of directors. The actual management of the vessels, so far at least as their manning, equipment, and supply went, was left entirely to Capt. Nickerson. He hired or caused to be hired a competent man (Pendleton) to take charge of the Bessie J., who seems to have understood the requirements of his position. There does not appear to have been any failure to give adequate instructions.

Generally speaking, this would discharge the owner's personal duty as to manning. The petitioner's fleet manager knew, however (or should have known), that, notwithstanding instructions to the contrary, its barge captains, not being followed up, were likely to leave their vessels at night when in Boston.

There is direct testimony by two witnesses that after 5 o'clock Pendleton said to them that he was going to telephone to the office of the petitioner, and report the condition of the barge as to loading, and ask whether he should stay on her, and that he returned shortly after, saying he had done so, and had been told not to stay. Another witness not now connected with the Darrow-Mann Company testifies that Pendleton told him the same thing the next morning after the barge had sunk. All this testimony is doubted by the petitioner; but it is clear that its tug French received orders to take the barge out early enough the next morning to make the 7 o'clock opening of the draw, and that Pendleton knew of this arrangement and boarded the tug at the petitioner's wharf to come to the barge.

The petitioner has offered no evidence as to how it learned that the barge would be ready to be moved in the morning, or came to give the order to the tug to move her, or how Pendleton came to be on hand when the tug left its wharf. These facts are wholly unexplained, if the testimony as to Pendleton's statements about telephoning be rejected. There was nothing in the appearance of the witnesses which led me to believe that they were lying. Pendleton's action in coming over on the petitioner's tug in the morning shows that he was not conscious of having left his post in violation of orders; nor was he accused of having done so immediately after the accident. He is dead, and his knowledge of the facts is lost; it is easy to suggest that he was derelict in his duty. I find that Pendleton made the statements attributed to him, and telephoned as he said he did. Who the person was to whom he telephoned is absolutely undisclosed. As Pendleton had been working for some years for the petitioner, and must have been familiar in a general way with its organization, it is fair to assume that the person was one whom he understood to have authority to deal with such matters. That the permission came from a person for whose act the petitioner would be personally responsible is not established. But the fact that such permission was given at the petitioner's office lends support to the view that Page's order to keep men on the barges at all times was customarily disregarded in the actual operation of the vessels, and that Capt. Nickerson had reason to foresee and expect the condition of things which actually existed; and I so find.

While the question is by no means free from doubt, it seems to me that, under the peculiar circumstances here shown, the petitioner or its managing officers, for whose conduct in this matter it is personally responsible, did not exercise reasonable care and diligence to see that the Bessie J. was properly manned at the time in question, and that it was not without privity or knowledge of the unmanned condition to which her sinking was ultimately due; and I so find.

There must accordingly be a decree denying the petition for limitation of liability and dissolving the injunction against the proceedings in the state court.

UNITED STATES ex rel. McMASTER v. WOLTERS et al.

(District Court, S. D. Texas, at Galveston. August 23, 1920.)

No. 657.

 Militia [∞]15—Action of Governor in calling into service not reviewable by courts.

Under the authority conferred on the Governor by Const. Tex. art. 4, §§ 7, 10, and the statute enacted pursuant thereto (Vernon's Sayles' Ann. Civ. St. 1914, art. 5776), to call out the militia to enforce the laws in case of riot, or breach of the peace, or imminent danger thereof, the determination of whether such conditions exist is solely for the Governor, and his decision is not reviewable by the courts.

2. Insurrection 5—5—Governor may institute military court to enforce civil laws.

A Governor, having authority to call out the militia to enforce the laws, and having done so, and proclaimed martial law in a city, held to have power to suspend the officers of the city for failure and refusal to execute the laws, and to institute a military court to take the place of a municipal court, whose officers were suspended, with jurisdiction to enforce the ordinances of the city.

3. Habeas corpus \$\iii 45(2)\$—Action of state tribunal not reviewable by federal court

Refusal of a state tribunal to grant a jury trial, or to allow an appeal, held not reviewable by a federal court on habeas corpus.

At Law. Petition for habeas corpus by the United States, on the relation of William McMaster, against Jacob F. Wolters and others. Petition denied.

John T. Wheeler, Frank S. Anderson, and D. B. MacInerney, all of Galveston, Tex., for relator.

C. M. Cureton, Atty. Gen., of Texas, E. F. Smith, of Austin, Tex., C. L. Stone, of Henderson, Tex., and John M. Mathis, of Houston, Tex., for respondents.

FOSTER, District Judge. This is a petition for a writ of habeas corpus by William McMaster, a civilian resident of Galveston, wherein it is charged that Brig. Gen. Jacob F. Wolters, Col. A. W. Bloor, and Capt. O'Brien Stevens, all officers of the Texas militia, and respectively the commanding officer of the district, the provost marshal, and the provost judge, are unlawfully restraining his liberty and detaining him in custody, in violation of his rights guaranteed by the Constitution of the United States.

The case, as made out by the pleadings and argument of counsel, and admissions in argument, is this: Gov. Hobby, of Texas, issued a proclamation on June 7, 1920, declaring there had been acts of violence in Galveston and danger of insurrection, riot, and breach of the peace, and declaring martial law in Galveston. By the same proclamation Gen. Wolters was directed to assume command of a district embracing the city of Galveston, which he did. That was followed by a proclamation on July 14, 1920, declaring that the mayor, four city commissioners, the city attorney, the judge of the city court, chief of police, the chief of detectives, and all members of the police and detective departments had failed, refused, and neglected to maintain order and preserve the peace, and suspending the city officials, and directing the commanding general to enforce order and cause the civil law to be faithfully executed. On that Gen. Wolters issued his General Order No. 12, of July 15, 1920, directing the provost marshal to take charge of the police station, city hall, office of the city judge, and all records, and directing that all persons charged with violations of cityordinances be tried by the provost marshal. This order was supplemented on the same day by General Order 13, detailing Capt. O'Brien Stevens as provost judge, with full authority to try such cases as

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might come before him under the provisions of General Order No. 12.

With these proclamations and general orders in force, the militia on the scene and in charge of the city of Galveston, the relator was arrested on a complaint by a civilian, charging him with exceeding the speed limit for automobiles in violation of the traffic ordinances of Galveston, and tried before Capt. Stevens. He objected to the jurisdiction of the court and asked for a trial by jury. A trial by jury was denied, and his exception to the jurisdiction disregarded. He was found guilty, sentenced to pay a fine of \$50, and committed to jail in default of payment.

The only question before this court is the jurisdiction of the provost court. I have examined the authorities cited by both sides; some of them are more or less persuasive, none of them in point are controlling on this court, and I think the case can be decided on funda-

mental principles.

[1] There is no doubt that under the Constitution and laws of Texas the Governor is charged with the duty of enforcing the laws of the state, and has the authority to call out the militia to enforce the laws. in case of riot, or breach of the peace, or imminent danger thereof. Const. Tex. art. 4, §§ 7, 10; Acts 1905, c. 104, § 13. See Vernon's Sayles' Civil Stat. Texas (Ed. 1914) art. 5776. The question as to whether there is riot, or insurrection, or breach of the peace, or danger thereof, is one solely for the decision of the Governor. The courts will not interfere with his discretion in that, and will not inquire as to whether or not the facts justify the Governor. Luther v. Borden, 7 How. 1, 12 L. Ed. 581, so, I must conclude that the Governor had complete authority to institute martial law in the city of Galveston. That is conceded by the relator. Since he had the authority to institute martial law, notwithstanding there is no statute of the state of Texas authorizing him to do so, he could do anything necessary to make his proclamation effective. If the civil officers of Galveston were not performing their duties, and not aiding in the enforcement of the law, the Governor would be authorized to suspend them. He did that, and in my opinion the suspension was legal.

[2] The question then comes up as to the appointment of this military court. The order of Gen. Wolters directs the provost marshal to enforce the civil law, and jurisdiction is given to the provost court to enforce the ordinances of the city of Galveston. The justices of the peace of the state courts are not superseded or suspended; but it is elemental that, where the same state of facts may constitute a violation of a state statute and also constitute a violation of the city ordinances, the offender may be proceeded against under either law; one does not prevent the other being enforced, so it is a mere incident that in this case the offense with which the relator was charged might also have been an offense under the state law, and would not deprive the city court of Galveston was suspended, and a military officer had been appointed to sit in place and stead of the judge, and to enforce the ordinances of the city. That is not without precedent in history. When Gen. Butler

was in command of New Orleans, he did this very thing. He appointed the provost marshal and gave him jurisdiction to try civil cases. Subsequently President Lincoln created a provisional court by proclamation for the same district. The jurisdiction of this court was upheld. The Grapeshot v. Wallerstein, 9 Wall. 129, 19 L. Ed. 651.

The point is also made by relator that only the Legislature can suspend a law. Const. Texas, art. 1, § 28. Suspending a judge is not suspending a law. On the contrary, in this case the military was directed to enforce existing laws, and the provost court was created for that

very purpose.

[3] It seems to me it was necessary and proper that this court should have been instituted. It is conceded in argument there are other ordinances of the city of Galveston, a violation of which would not also be a violation of any state statute. Some court would have to be instituted to try these cases. So, if a court of jurisdiction tried the offender, and did not lose jurisdiction during the course of the trial, then this court cannot inquire into any irregularities arising in the course of that trial. That would apply particularly to the statements made in argument that an appeal was denied the relator. That would be a mere irregularity: if he was entitled to an appeal, that right could be enforced by mandamus or some other proper remedy. Kohl v. Lehlback, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432.

In regard to the denial of the trial by jury, it is well settled the federal Constitution does not guarantee a trial by jury in the state courts. It applies only to trials in the federal courts, and if some other due process of law and some other method is provided by the state statutes it is sufficient. Manifestly, in a community under martial law,

a trial by jury would be impracticable.

So, on the whole, I must conclude this military court was properly constituted, and had jurisdiction for the trial of this offense, and that proceedings having been had there, and relator convicted and sentenced, his imprisonment cannot be inquired into in this court on a writ of habeas corpus.

The petition is denied.

PRICE v. ZERBST, Warden of United States Penitentiary.

(District Court, N. D. Georgia. September 3, 1920.)

Criminal law \$\sim 987\$—Presence of defendant essential to validity of sentence.

A corrected sentence, imposed by a federal court on a prisoner in hts absence, although he was present when the original sentence was pronounced, *held* void.

2. Habeas corpus \$\iiint 109\$—Prisoner held under void sentence remanded to trial court.

Where it is determined by a federal District Court on habeas corpus that the sentence of another District Court, under which a prisoner is held, is void, the proper practice is to remit the prisoner to the court wherein he was sentenced, for further action by that court. Habeas Corpus. Application by Richard F. Price against Fred G. Zerbst, Warden of the United States penitentiary at Atlanta, Ga. Petitioner ordered returned to Southern district of New York.

Richard F. Price, of New York City, in pro. per. John W. Henley, Asst. U. S. Atty., for the warden.

ERVIN, District Judge. [1] In this case it appears: That petitioner heretofore filed an application for habeas corpus before Judge Sibley, in which petition he stated that he had been sentenced by Judge Learned Hand, in the District Court for the Southern District of New York, on April 30, 1919, to serve a term of three years upon his plea of guilty to using the mails in consummation of a scheme to defraud; that later on he had been sentenced by Judge Hand to serve two years and six months for the same offense, but was not present when such sentence was rendered—each of these sentences being that the time should be served in the Atlanta Penitentiary. Upon the petition containing these allegations Judge Sibley correctly denied the writ, and this finding was affirmed by the Fifth Circuit Court of Appeals in 264 Fed. 669.

The petition now presented, and coming on to be heard before me, strikes out any statement as to the three-year sentence by Judge Hand, and sets up that the warden holds this applicant under a mittimus issued on a sentence of two years and six months rendered by Judge Hand, and that the applicant was not present in court when this sentence was rendered. The record is silent as to the presence of defendant, though it should have recited his personal presence when sentence

was rendered.

Under the rulings in the case of Frank v. Mangum, 237 U. S. 341, 35 Sup. Ct. 582, 59 L. Ed. 969, this court can go behind the record itself and ascertain the facts tending to show whether or not the court had jurisdiction, or whether the court had lost the jurisdiction which it had once possessed. Acting under this authority, I have investigated the facts, and the correspondence between Judge Hand and the applicant, and I conclude from this investigation that what happened was as follows:

The prisoner had been indicted, and, withdrawing his plea of not guilty, filed a plea of guilty, whereupon the date of sentence was fixed, and on that date, to wit, April 30, 1919, Judge Hand passed a sentence of three years, dating from October 31, 1918, which date of commencement of sentence was some six months prior to the actual rendition of the sentence; the defendant being then before the court. The defendant was then taken out of court, and later, and upon receipt of a letter from the defendant, calling attention to the fact that the commencement of the sentence was a date some six months prior to the actual rendition of it, Judge Hand changed his sentence, so as to make it read two years and six months from the time he was received in Atlanta, instead of three years from October 31, 1918, and at the time of this change in the sentence the applicant was not present before Judge Hand. The two years and six months sentence was entered upon the minutes of the court, but the three-year sentence was never

entered. The mittimus to the warden of the United States Penitentiary at Atlanta was issued on the two years and six months sentence, and he is now being held under that mittimus.

There were submitted by the warden two affidavits, one by a deputy clerk and the other by an attorney, who swear they were present in court, and that the applicant was present when the sentence was rendered. I am satisfied that these witnesses were present when the threeyear sentence was rendered, and, finding only one sentence entered upon the minutes, they naturally assumed, at this time, that that was the sentence they had heard and seen passed. We therefore find that the sentence of three years was passed in the presence of the defendant, but never entered upon the minutes of the court, but the sentence of two years and six months was entered, which was never in fact passed, in the personal presence of the defendant. This presents a very different case from the one presented to Judge Sibley heretofore, and ruled on by him and the Fifth Circuit Court of Appeals.

The question arises, then: Was the sentence for two years and six months, which was entered upon the minutes of the court, and under which the mittimus was issued on which this applicant is now being held, void? In the case of Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011, which is quoted with approval in Frank v. Mangum, 237 U. S. 341, 35 Sup. Ct. 582, 59 L. Ed. 969, it is held that the trial practice in the United States courts being regulated by the common law, it is a leading principle therein that after indictment nothing should be done in the absence of the prisoner, and that in the absence of some statute these rights should not be abrogated. It is true the rights therein referred to and therein being questioned were not the right to be present when the sentence was passed, but what is said is equally as applicable to that as to the questions then being considered.

I therefore conclude that a sentence passed in the absence of the personal presence of the defendant is void. The practice that would seem to have been pursued by Judge Hand is one that many judges have indulged in, viz. that of correcting, in the absence of the accused, some clerical or other error in the sentence which he has rendered, and yet. under the strictness which is required where penal servitude is imposed as a sentence, we cannot be too careful in conforming to the essential requisites of the law, one of which being the personal presence of the prisoner when the sentence is imposed, and if we impose a sentence which we see fit thereafter to change, we should be careful in having the prisoner brought in, so as to be present when the change is made.

[2] The question then arises: What should be done with this prisoner? I find that in many instances the courts have released prisoners, when they found the authority for holding them was invalid; but the proper practice is laid down in the case of In re Bonner, 151 U.S. 259, 14 Sup. Ct. 323, 38 L. Ed. 149, which is to remit the prisoner to the court wherein he was sentenced for further action by that court in conformity to law. It is objected, however, that the term of that court in which the sentence was rendered has passed, and therefore that court would have no jurisdiction to now make any further order in the case. The contrary was held in Bryant v. U. S., 214 Fed. 53, 130 C. C. A. 491, where the court held that, if a court imposes a void sentence, it does not lose jurisdiction to impose a proper sentence at a later term, particularly where the question is raised at the instance of the defendant, on whom such sentence had been passed.

A decree will therefore be entered, instructing the warden to return this applicant, Richard F. Price, to the Southern district of New York,

for such further action as that court sees fit to take in his case.

HEALEY V. BOSTON BATAVIA RUBBER CO.

(District Court, D. Massachusetts. August 19, 1920.)

No. 895.

Bankruptcy = 140(3)—Contract consigning goods to bankrupt for sale does not pass title.

A contract made in good faith and in accordance with a custom of the trade, under which defendant consigned automobile tires and tubes to a subsequent bankrupt, a local dealer, for sale, and containing no provision for the purchase of such goods by bankrupt, held valid, and to entitle defendant, on insolvency of bankrupt, to retake the goods remaining unsold.

In Equity. Suit by Patrick Healey, trustee in bankruptcy of the Malay-Wilson Company, against the Boston Batavia Rubber Company. Decree for complainant on part of claim.

C. H. Richardson, Joseph B. Jacobs, and Jacobs & Jacobs, all of Boston, Mass., for plaintiff.

Joseph P. Fagan and John W. McAnarney, both of Boston, Mass., for defendant.

MORTON, District Judge. This suit is to recover about \$1,900 worth of automobile tires and tubes, which were retaken by the defendant from the bankrupt on November 11, 1915, at Waterbury, Conn.; the plaintiff alleging that such action, which was done with the assent of the bankrupt, constituted a recoverable preference. The facts are as follows:

The bankrupt corporation was organized in the spring of 1915 to carry on the business of dealing in tires and automobile accessories at Waterbury, Conn. It is a Connecticut corporation, and was adjudicated bankrupt in that district on December 6, 1915, on an involuntary petition filed November 22, 1915. On November 12, 1915, its store was attached on mesne process and was closed by the sheriff. That ended the business. The tires in question were removed on the preceding day, before any attachment, and before the petition was filed.

The defendant was one of the petitioning creditors in the bankruptcy proceedings, and alleged in the petition that the Malay-Wilson Company was insolvent on October 30, 1915. The defendant cannot be heard to deny the statement which it then made under oath, and, if it could, the facts show clearly that at the time here in question the Malay-Wilson Company was deeply and hopelessly insolvent, and that the defendant had reasonable cause to believe that to be the fact. The real ground of defense is that the goods retaken were the property of the defendant, and that it had the right to retake them as it did.

The defendant was the general distributing agent for Batavia tires and Genesee tires. Under date of April 7, 1915, it made a written contract with the bankrupt whereby it constituted the latter a distributor of those tires in a certain district. This contract expressly provided that the Batavia tires and tubes would not be sold to the Malay-Wilson Company, but would be consigned to it. The Genesee tires were to

be sold to it outright.

In accordance with this contract the defendant kept on its books two accounts with the bankrupt—one in the usual form, which included only Genesee tires and tubes; the other, headed "Consignment Account," included all Batavia tires and tubes. The understanding was that, when the bankrupt sold any of these latter goods, it would report such sale to the defendant, which thereupon credited the consignment account of the bankrupt with the amount so reported. Payment for consigned goods so sold became due on the 10th of the following month and was subject to a discount of 5 per cent. for prompt payment.

There does not appear to have been any obligation on the bankrupt to buy the consigned goods. On two occasions the defendant ordered the bankrupt to turn over consigned goods in its possession to other persons for the defendant's account, and both orders were obeyed; the bankrupt's consignment account being in each instance credited with the amount of goods so delivered. The bankrupt did not keep, and was not expected by the defendant to keep, the moneys received from the sale of consigned goods in a separate account. The defendant knew that it mingled them with its general funds. The arrangement described was made and carried out in entire good faith.

The trustee contends that it amounted to an unrecorded conditional sale, as to which, by the law of Connecticut, the condition may be disregarded by attaching creditors of the vendee. Gen. Stats. of Conn. 1902, c. 285, §§ 4864, 4865; Acts 1905, c. 113. But the foundation of a sale is an understanding that the goods were bought and sold. Unless there was, either in form or in fact, an obligation on the part of the Malay-Wilson Company to buy the goods consigned to it, the transaction was not a sale. No such obligation is shown by the evidence. The case seems to me purely one of consignment, both in form and in substance, made in good faith. In re Aronson (D. C.) 40 Am. Bankr. Rep. 177, 179, 245 Fed. 207.

"While consignment agreements are permitted and upheld under the law of Connecticut, the main question at issue always is: Was the agreement entered into by the parties in good faith?" Thomas, J., In re Cozatsky, 216 Fed. 920, 926 (Dist. Ct. Conn.).

It follows that, as to the Batavia tires and tubes, the defendant was within its rights in retaking them, and it is unnecessary to pass upon the other questions raised by the defendant. In the late summer or early autumn the bankrupt's payments to the defendant became unsatisfactory, and it was understood between them that on and after October 1, 1915, no more goods would be sold to it, and that all goods—Genesee, as well as Batavia—would be consigned. There seems to be no doubt that this new arrangement also was made in good faith, and I see nothing illegal or unenforceable about it. Delivery of goods on consignment is a legal method of doing business and has a legitimate and useful place. It is not prohibited by Connecticut law. The consignment of tires to local agents for sale appears to have been customary in the tire trade, and not to have been in any respect fraudulent in this case.

The Genesee tires, consigned to the bankrupt after October 1st, remained the property of the defendant, and were rightfully retaken

by it.

Some of the tires retaken were Genesee goods which had been sold prior to October 1st. These the defendant had no right to retake. The plaintiff is entitled to a decree covering such tires and tubes. If the parties cannot agree on the amount, the case must go to a master to state it.

THE COPPERFIELD.

(District Court, S. D. Florida. August 17, 1920.)

- 1. Salvage 26—Value of cargo salved not increased by freight prepaid.

 Where a schooner laden with lumber, on a voyage from Mobile to a Spanish port, was stranded and brought by salvors into the port of Tampa, Fla., the value of the cargo at Tampa cannot be increased for salvage purposes by addition of the amount of freight prepaid, under a provision of the charter party that it should be considered earned and not returnable "vessel and/or cargo lost or not lost."
- 2. Salvage
 26—Salvors not allowed for unnecessary expense.

 Salvors of a stranded vessel held not entitled to an increased award by reason of their taking the vessel to a port over 200 miles distant, when there was a port equally available within 40 miles.
- 3. Salvage 21—Right to compensation forfeited by embezzlement of property.

 The master of a sulving the who tack from the salvaged respectively.

The master of a salving tug, who took from the salvaged vessel nautical instruments, books and papers, and a boat, which were retained until after answer was filed in a salvage suit, excluded from participation in the salvage award, and allowance for salvage of such articles denied.

In Admiralty. Suit for salvage by the Gulf Refining Company against the schooner Copperfield and cargo. Decree for libelant.

McKay & Withers and H. S. Hampton, all of Tampa, Fla., for libelant.

Raney & Morris, of Tampa, Fla., and E. J. L'Engle, of Jacksonville, Fla., for claimant and others.

CALL, District Judge. The facts of this case may be stated in short as follows:

On August 25, 1919, the four-masted schooner Copperfield left Mobile, Ala., on her maiden voyage, bound for Alicante, Spain, loaded with some 550,000 feet of pine lumber in her hold and on deck. She proceeded on her voyage until September 8th, when she encountered such weather that she attempted to make Key West for an anchorage until the weather settled. No pilot coming aboard, the master tried, on the 9th, to beat into Key West Roads for anchorage; at 1:30 p. m., anchored with the port anchor; at 6 p. m., let go the starboard anchor. She rode by these until a third anchor was let go. On the 10th the hurricane struck her while riding with three anchors. This hurricane continued through the 10th and 11th, leaving the vessel with masts broken at the deck, jibboom gone, deck load partly washed overboard, and masts and rigging over the side, drifting, with anchor chains and hawser broken. The last entry in the log is on the 11th, and the crew must have abandoned the wreck between the 11th and the afternoon of the 12th, when she was sighted by Lieut. Roberts, some three miles from where she was found by the Senator Bailey. The Senator Bailey, an ocean-going tug belonging to the Gulf Refining Company, was at Port Tampa during the hurricane, and under orders from the owner left Port Tampa on September 13th, to look for the barge Monongahela, which had broken loose from the steamer towing her. On the 14th the barge was found and towed into the harbor of Key West. arriving on the 15th, in the early morning. The tug remained in the harbor of Key West through the day of the 15th, with instructions to remain in that harbor and take the barge out to meet the vessel from which she had broken loose, when she should arrive.

Under orders from the owner, the tug left Key West in the early morning of the 16th, to go out and render aid to the steamship Winona, then ashore not far from Tortugas. Arriving there, and finding that no aid could be rendered to the steamship, the tug started on her return to Key West, and while on her way discovered the Copperfield aground on Half Moon Shoal, about half past 4 in the afternoon. The schooner was aground about southeast from the buoy marking the western edge of the shoal, lying in a kind of bight or pocket. The chart shows the depth of water on the shoal to range from 2 to 3 fathoms. By using the lead line the Bailey approached to within 300 yards of the wreck, anchored, and sent her small boat and put a part of her crew aboard. By sounding from the small boat and from the tug, they succeeded in approaching within 75 feet of the wreck, and anchored about northeast from the wreck; the first anchorage having been about southwest from the wreck. The schooner was lying with her bow pointing about east. Afterward the Bailey was brought alongside the port bow of the wreck and made fast. The crew of the tug commenced to clear away the wreckage of spars, rigging, etc., which lay on the starboard side of the schooner, and continued this labor until about in the neighborhood of 4 o'clock in the morning of the 17th, using pocket flash lights and the searchlight of the tug to aid them. A

hawser belonging to the schooner was attached to the anchor chain hanging over the schooner's bow and carried aboard the tug, and the tug then commenced to pull, and in a short time cleared the schooner from the shoal.

The draft of the tug is left uncertain; no one apparently knowing what her exact draft was. It was somewhere between 11 and 14 feet, probably between 11 and 12. The draft of the schooner was probably in the neighborhood of over 16 feet.

The entrance to Tampa Bay was some 190 miles away and Key West some 40-odd. The tug started for Tampa, towing the schooner by the hawser astern. The schooner had considerable water in her hold, her rudder was broken, steering gear out of order, and owing to the inability to steer her, and the water in her, sheered badly, and some two or three hours after the tow commenced, parted the hawser, and was then taken alongside, and during the remainder of the day of the 17th was towed in this manner. At nightfall she was dropped astern again, and thus proceeded slowly during the night, and next morning taken alongside again, and thus continued until the night of the 18th, when she was taken into Tampa Bay, and docked at Eggmont Key about 12 o'clock, midnight. Next morning she was taken to the city of Tampa, and tied up to the Seaboard dock.

During the 17th, while towing alongside the tug, the stern line parted, and it was necessary for the tug to use one of her wire cables to replace the broken hawser. During the 18th, the tug used her syphon to pump the water out of the schooner, thus lightening her.

It is claimed by witnesses that the vessel was hard aground and was pounding heavily, so heavily that it was difficult to maintain one's footing. This does not impress me as probable, taking into consideration the location and extent of the shoal, the prevailing wind, and the surroundings as delineated upon the government chart in evidence. Nor does the physical condition of the schooner as shown by the examination of her bottom in the dry dock lend credence to such claim.

That the service rendered was a salvage service and one of merit there can be no question, but that any great risk of life or property was incurred I do not find. Nor do I find any display of heroism in its rendition. The work of the crew was arduous, and continued over the better part of three days; but the explanation of why it was decided to make the longer trip to Tampa, some 230 miles, to the dock where the schooner was left, than the shorter one of 40-odd to Key West, is not satisfactory.

The effects of the hurricane on the water had ceased before the discovery of the wreck by the Bailey, and there was ample water both in depth and extent to have taken the wreck into Key West. However, it might have been an error of judgment on the part of the master of the tug, and such error should not be visited upon the allowance to the libelant in this case. Nor do I think the increased time required to tow the wreck to Tampa, rather than to Key West, should be allowed to augment the amount as a salvage service.

The testimony of the officers of the tug does not impress me favorably. It impresses me that these witnesses systematically endeavored to

exaggerate the danger to the property salved as well as to the salving tug and salvors. I suppose this is natural, and is more or less apparent in salvage cases. Nor do I think the actions of the salvors, after the service was rendered, in delivering the salved property, to be commended. Certain of the ship's papers were delivered to the collector at Tampa, yet the vessel's log and charter party were retained by the master of the tug until the taking of testimony at Galveston, in January. Certain navigating instruments and books were taken from the schooner and retained until after the filing of claimant's answer charging such action. A small boat was taken from the schooner and placed on the Bailey, and carried by her to Port Arthur, and returned only after the filing of such answer, not to mention the disappearance of berth lamps and compass, canned goods from the stores, etc.

It is true the three officers testify that they knew nothing of the disappearance of these last-mentioned articles, but the explanation occurring to proctors for libelant that a fishing boat might have gone aboard and stolen the lamps, etc., does not impress me with its probability. The compass might have been taken by the crew when they abandoned the schooner, but certainly they would not have stopped to unscrew the berth lamps from the wall or take the barometer from the box. The writing on the wall, a copy of which was introduced in evidence by the libelants, shows that the crew left in too much hurry to stop to unscrew berth lamps and barometer boxes. Men who feel their lives in imminent peril would not stop for such matters. Had the wreck been boarded by another boat, the crew of the boarding boat would not have abandoned the opportunity of claiming salvage.

"Punctilious honesty is required of salvors. Embezzlement, however small in amount, whether at sea, in port or after the goods are in custody of the law, works a forfeiture of all salvage." "Embezzlement is ordinarily so secret and purely an individual act that its commission by one salvor, though a master, is held not to prejudice his cosalvors, or owner, who are innocent. It works a forfeiture of the guilty party only." Marvin, Wreck and Salvage, \$ 220.

"The merit is not in saving the property alone, but in saving it and restoring it to the owners. The compensation to be awarded, therefore, presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach, or under the control, of the salvors. Marvin, Wreck and Salvage, § 218.

[1] At the final hearing in this case libelants made a motion to amend their libel by claiming salvage on \$35,826.25 freight money paid to the shipowners at Mobile, before the sailing of the schooner on her voyage under the stipulation of the charter party produced by the captain of the tug at the taking of the testimony in Galveston in January. The amendment is contested by the claimants of the ship and cargo. As I understand the contention of proctors for libelants, it is that the amount of freight money paid should, to that amount, increase the value of the cargo, because that amount was paid under a charter party which provided:

"Prepaid freight earned and due when paid, and not returnable, vessel and/or cargo lost or not lost."

That the files and stipulation filed in this cause show that the vessel was repaired, cargo reloaded, and vessel proceeded on her voyage.

Admiralty is generous in allowing amendments, in order that full justice may be done in the case and the allegations of the libel made to correspond to the proofs adduced. In this case knowledge of the contents of the charter party must be charged against the libelants at least from the taking of testimony in Galveston in January, and notice of the motion was not served upon proctors of claimants until July 15th, the final hearing being on the 19th. No excuse is offered for the delay, and that is urged as an objection to the amendments; but, as I do not see how the claimants are injured by allowing it, I will

therefore grant the motion.

As I understand, the principles governing the allowance of salvage on freight money earned, where the voyage is interrupted, would not apply in this case. The effort is to increase by the amount of such prepaid freight the value of the cargo salvaged and delivered at Tampa. Does the fact that the charter party provided that "prepaid freight earned and due when paid and not returnable, vessel and/or cargo lost or not lost," and said freight was prepaid on a voyage to Alicante, Spain, increase the value of said cargo when the voyage was interrupted by a peril of the sea, at the port of Tampa? I fail to follow the course of reasoning by which the result is reached. It is admitted that the vessel is not benefited, or value thereby increased. On the contrary, it is admitted that it is rather a detriment to her, because she had to be repaired to complete her voyage, for which the freight money had been paid. To say that the value of a cargo of lumber, of the highest value by the witnesses of some \$16,000, is increased by payment of freight under the stipulation of the charter party to \$50,000, is going farther than I can follow. As I understand the law, the value of the cargo upon which salvage will be awarded is at Tampa, the port to which the salvors took it.

The Copperfield was a wooden, four-masted schooner of the value, in her wrecked condition, of \$34,000 or \$35,000. The cargo I find of the value of \$12,000, from which must be deducted the costs of unloading same, advanced by one of the libelants. The tug Senator Bail-

ey is an iron tug of the value of from \$150,000 to \$175,000.

[2] In finding the award in this case, I am laboring under the difficulty to understand why the officers should have taken the derelict something more than 200 miles, instead of to Key West, where the tug had been ordered to await the coming of the steamer Ligonier. In case the wreck had been taken to Key West, the salvage service would have been completed by the afternoon of the 17th, had the same rate of speed to Tampa been maintained. As it was, it was the afternoon of the 19th before delivery was made at Tampa. Therefore, in fixing the award, I shall consider the danger to the salved property and its value, the danger to the tug and its value, the labor of and danger to the crew in clearing the wreckage of spars, rigging, etc., from the hull of the schooner, and, in addition, the service for a reasonable time in delivering the salved property to a safe port.

The libelants in their libel ask for a percentage of the value of the

property salved. I understand that the rules for fixing salvage of abandoned or derelict property are not other or different from those for fixing salvage in any other case. I find the value of the salved property to be as follows:

Value of vessel Value of cargo		
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—less cost of unloading same. Considering the arduous labor of the crew in clearing masts, rigging, etc., from the vessel, and clearing her from the sand, the libelants should be liberally rewarded for this service, and I award the libelants the sum of \$12,000; for the service of towing the wreck from Half Moon Shoals to Tampa, the sum of \$1,200—making a total of \$13,200; this amount to be divided, two-thirds to the tug and one-third to the crew; this amount to be divided between the vessel and the cargo in proportion to the value of each as found above, the proportion allotted to the crew to be divided among them in proportion to the wages received by each.

In addition the Gulf Refining Company must be reimbursed the sums expended for pilotage from outside the bar to Tampa, for the vessel, \$114, and the cost of unloading the cargo from the wreck. The cost of moving the tug from Tampa to Port Tampa, is disallowed, as con-

stituting no part of the cost of the salvage service.

The question of the broken dolphin at Egmont Key presents a more difficult question. The testimony is not clear as to how the accident happened. I am unable to say it was faulty navigation on the part of the officers of the tug, or one of those accidents which might occur, however careful the navigation might have been. I have therefore divided the cost of replacing the dolphin between the salved property and the owners of the tug, and allow the Gulf Refining Company the sum of \$300.

The items of unloading cargo and insurance on same to be charged

to and paid by the cargo.

[3] Certain nautical instruments and books and a small boat were taken from the wreck, and the instruments, books, and papers were retained by the captain of the tug until after answer filed by the claimant, when the same were returned. The log, charter party, etc., were retained until the hearing had at Galveston, in January of this year. Such conduct must not receive the approval of a court of admiralty. Again, his conduct in carrying the schooner's boat to Port Arthur has not been satisfactorily explained, nor the reasons for taking the same on board the Bailey. When he left Tampa with his tow of oil barges,

it is taxing my credulity too much to believe that it was an oversight. To my mind it carries the impression that there was too little regard for the rights of the owners of the salved property. It was not that care of the property of others exacted of salvors, who are asking to be remunerated for saving same. While I do not think the evidence is such that I can visit this conduct upon the other salvors, it is necessary that the court should visit it upon the guilty party, and this I do by depriving the master of the tug of all participation in the salvage awarded the crew; the master's share to inure to the benefit of the claimants of the schooner and cargo, in proportion to the value of each as found above.

The libelants ask salvage for saving the boat, instruments, etc. For the reasons given above for forfeiting the tug master's share of the salvage awarded, such claim is disallowed.

A decree in accordance with the above will be made.

ROGERS et al. v. DESPORTES et al.

(District Court, E. D. South Carolina. July 31, 1920.)

 Habeas corpus = 117(1) —Order in excess of jurisdiction not binding on another court.

An order of a District Court of the United States in a habeas corpus proceeding, directing that petitioner, who is imprisoned under sentence of another District Court, be returned to the district of conviction for correction of the sentence by the court that imposed it, held of no binding effect on such court.

2. Habeas corpus \$\infty\$45(1)—Court without jurisdiction to review judgment of co-ordinate court.

A District Court of the United States is without jurisdiction on habeas corpus to review and adjudge invalid the judgment and sentence of another District Court, which had jurisdiction of the defendant and the subject-matter.

 Criminal law = 1218—Hard labor not requisite of sentence of federal convict to Atlanta.

The power of a federal court to direct imprisonment in the United States penitentiary at Atlanta of a defendant convicted of an infamous crime is not limited under present statutes to cases where hard labor is a part of the sentence imposed.

Habeas Corpus. Application by S. M. Rogers, F. M. Rogers, and O. B. Wells against H. S. Desportes and James L. Sims, United States Marshal for the Eastern District of South Carolina, to discharge applicants from further confinement. Writ denied.

Order affirmed 268 Fed. (C. C. A.) 308.

C. T. Graydon and Cole L. Blease, both of Columbia, S. C., for petitioners.

F. H. Weston, U. S. Dist. Atty., of Columbia, S. C., for the United

SMITH, District Judge. This is an application for a writ of habeas corpus to discharge the petitioners from further confinement. The

facts appear to be as follows:

On the 22d day of January, 1920, the above-named petitioners were convicted in the District Court of the United States for the Eastern District of South Carolina, after a trial in which they were represented by counsel, of the violation of sections 3258, 3281, and 3279 of the United States Revised Statutes (Comp. St. §§ 5994, 6021, 6019). Thereupon they were sentenced by the court to each pay a fine of \$500, with the costs of prosecution, and be each confined for one year in the United States penitentiary at Atlanta. No application of any kind was made for a writ of error to the judgment and the sentence thereon. On the 2d day of February, 1920, the petitioners were by the United States marshal for the Eastern district of South Carolina transported to the United States penitentiary at Atlanta, and there committed to perform their sentences.

Subsequently a writ of habeas corpus was sued out on behalf of these petitioners before Hon. Samuel H. Sibley, the judge of the District Court of the United States for the Northern District of Georgia, who, on the 9th of June, 1920, adjudged that a sentence for one year, not at hard labor, cannot be executed in a federal penitentiary, and that the detention of the petitioners in the United States penitentiary at Atlanta was unlawful, and further, on the 2d of July, 1920, ordered the United States marshal for the Northern district of Georgia to transport the petitioners to Columbia, S. C., and there deliver them to the United States marshal for the Eastern district of South Carolina, to the end that such correction as may be lawful may be made in the sentence imposed upon them. In pursuance of this order, the United States marshal for the Northern district of Georgia transported the petitioners to Columbia, S. C., and there committed them to the custody of the jailer of the county jail for Richland county, where they now are.

This application is now made for a writ of habeas corpus to obtain their release, upon the hypothesis that, the original sentence having been adjudged by Judge Sibley to be void, it follows that any deten-

tion of the prisoners is unlawful.

[1] The first question for consideration is as to the effect of Judge Sibley's order as an adjudication binding on the District Court of the United States for the Eastern District of South Carolina. Judge Sibley is the District Judge of the United States for the Northern District of Georgia. The United States penitentiary at Atlanta is situated in the Northern district of Georgia. The bodies of these prisoners being within the territorial jurisdiction of the District Court for the Northern District of Georgia, an application for a release under a writ of habeas corpus would naturally lie to the judge of that court; he having physical jurisdiction of the persons both of the party detained and his custodian. On the hearing of that application, however, he has no jurisdiction or power beyond that possessed by any other court of primary jurisdiction of powers and jurisdiction similar to his own. He has no right or power to sit as a court of appeal to correct the errors of any other court or judge of equal primary jurisdiction.

The District Court for the Eastern District of South Carolina is a court of similar jurisdiction and powers in all respects with that of the District Court for the Northern District of Georgia. The tribunals of an appellate character for the correction of errors in the District Court for the Eastern District of South Carolina are the United States Circuit Court of Appeals for the Fourth Circuit and the Supreme Court of the United States. In all cases whereof the District Court of the United States for the Eastern District of South Carolina possessed jurisdiction of the persons and the subject-matter, its decrees, judgments, and sentences in the cause are absolute and binding upon all other courts, save only the appellate tribunals empowered by law to correct its errors. In the present case, the District Court for the Eastern District of South Carolina undoubtedly originally possessed jurisdiction of the persons of the petitioners and of the subject-matter of the indictments under which they were tried. Upon conviction of the defendants under those indictments, it pronounced judgment and sentence as upon consideration it found proper under the law of the case. To this judgment and sentence no exception was made or writ of error taken.

Upon hearing the application for habeas corpus before him, the judge of the District Court of the United States for the Northern District of Georgia came to the conclusion that the judge of the District Court for the Eastern District of South Carolina had committed an error in the judgment and sentence in these cases, and thereupon ordered the prisoners to be transported back to the Eastern district of South Carolina for the District Court of that district to correct its judgment and sentence, so as to conform to the opinion of the judge of the District Court

for the Northern District of Georgia.

In so doing, the learned judge for the Northern district of Georgia apparently followed the practice indicated in the case of Bryant v. United States, 214 Fed. 51, 130 C. C. A. 491. There a defendant was convicted in the District Court for the District of Oklahoma of a violation of section 5392, U. S. R. S. (Comp. St. § 10295). That section provided as the punishment for perjury a penalty of not more than \$2,000 and imprisonment at hard labor for not more than five years. This section was repealed by section 341 of the Criminal Code (Comp. St. § 10515), enacted March 4, 1909, and section 125 of the Criminal Code substituted (section 10295), whereby the penalty was not more than \$2,000 and imprisonment for not more than five years; the provision for hard labor being omitted. The District Judge for the District of Oklahoma sentenced the convicted prisoner to confinement in the penitentiary at Ft. Leavenworth, in the district of Kansas, for one year. He was later taken before the District Court of the United States for the District of Kansas, which ordered him released from the custody of the warden of the penitentiary, on the ground that the sentence was void, and to be delivered to the court in Oklahoma for the judgment of that court.

The District Judge of the court in Oklahoma seems to have admitted he was in error in his sentence and resentenced the prisoner. Apparently the ground on which the sentence was adjudged void was that it did not indicate the requirement of hard labor, and presumably, therefore, the prisoner was convicted of a crime committed under the section as it stood before its amendment in 1909. The Circuit Court of Appeals for the Eighth Circuit, on appeal in habeas corpus, held the resentence valid. The courts in this case seem to have acted upon the assumption that one District Court of the United States has the authority on habeas corpus to supervise the action of another District Court of like authority, and, if it found its judgment erroneous, to send the prisoner back to have the trial court correct its judgment to conform to the views of the District Judge who heard the habeas corpus, thus undertaking to act as a court for the correction of the error of another court.

This position appears manifestly unsustainable. The District Court of the United States for the Northern District of Georgia is a court of primary jurisdiction, in exactly the same class as the District Court of the United States for the Eastern District of South Carolina. It has no greater powers or jurisdiction. Certainly it is entirely devoid of any appellate or supervising power over the latter court. Under the judicial system of the United States, the only courts possessing these powers over the District Court for the Eastern District of South Carolina are the Circuit Court of Appeals for the Fourth Circuit and the Supreme Court of the United States. The District Court for the Northern District of Georgia is in a different judicial circuit, and possesses no judicial connection with the District Court for the Eastern District of South Carolina. Yet the exercise of the jurisdiction to overrule the judgment and correct the assumed errors of the District Court for the Eastern District of South Carolina is precisely what the judge of the District Court for the Northern District of Georgia has attempted to do by his order in this matter. He has held that the well-considered judgment and sentence of the District Court for the Eastern District of South Carolina is erroneous, and has ordered the prisoners back to that court, that it may correct its judgment, so as to conform the sentence to the views of the judge of the District Court for the Northern District of Georgia.

Such action is wholly unwarranted by any provision of law and would be destructive of the method of the orderly correction of the errors of courts of primary jurisdiction through the courts of appropriate and authorized appellate jurisdiction. If the District Court for the Northern District of Georgia can arrogate to itself the power to supervise the action of the District Court of the Eastern District of South Carolina, all the other 90 (or more) districts in the United States may do the same.

It is true the Supreme Court of the United States, in In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149, held that a court which could on a writ of error send back the case to have the judgment corrected could also on proceedings in habeas corpus, when the sentence was unlawful, discharge the prisoner, subject to the right of the court having jurisdiction to reassume it and to impose a proper sentence. It did not, even in that case, direct that the prisoner be sent back to the court of original jurisdiction for resentence. It ordered only that the prisoner be discharged but without prejudice to the right of the Unit-

ed States to take any lawful measures to have the prisoner sentenced in accordance with law upon the verdict against him. The whole decision is to the effect that where a court could, on a writ of error, have remanded the cause for a resentence in accordance with the opinion of the court, the same court could or might, on proceedings in habeas corpus, without circumlocution, exercise the power it possessed in its ap-

pellate jurisdiction on a writ of error.

There is not a single sentence that would justify the inference that a wholly distinct and separate court of primary jurisdiction could, on a proceeding in habeas corpus, exercise appellate power, never conferred upon it, of compelling another court of primary jurisdiction to correct its judgment, so as to conform to the views of the judge before whom the habeas corpus was held. Even in the case of the Supreme Court, it was held in Ex parte Hung Hang, 108 U. S. 552, 2 Sup. Ct. 863, 27 L. Ed. 811, that under U. S. R. S. § 751 (Comp. St. § 1279) that court would issue the writ "but, except in cases affecting ambassadors, other public ministers, or consuls, and those in which a state is a party, it can only be done for a review of the judicial decision of some inferior officer or court."

[2] The next question is as to whether it was within the jurisdiction of the judge of the District Court for the Northern District of Georgia, even on habeas corpus, to review the judgment of the District Court for the Eastern District of South Carolina. It is to be borne in mind that, so far as their respective jurisdictions are concerned, the District Court for the Eastern District of South Carolina is as distinct and separate from the District Court for the Northern District of Georgia as any court of a state may be. The Supreme Court of the United States on questions within its jurisdiction has appellate jurisdiction over both federal and state courts, and whether on a writ of error or on proceedings in habeas corpus, has power to supervise the conclusions of all inferior courts, whether state or federal. But between federal courts of primary jurisdiction, in separate districts, there is no such nexus or control.

In Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, as construed in In re Frederich, 149 U. S. 77, 13 Sup. Ct. 793, 37 L. Ed. 653, it was held that, after a prisoner was convicted of a crime in the highest court of a state, two remedies are open to him for relief in the federal courts: He may either take his writ of error from the United States Supreme Court under section 709 of the Revised Statutes (Comp. St. § 1214), or he may apply for a writ of habeas corpus to be discharged from custody under such conviction, on the ground that the state court has no jurisdiction of either his person or the offense charged against him, or had for some reason lost or exceeded its jurisdiction, so as to render its judgment a nullity, in which latter proceeding the federal courts could not review the action or rulings of the state court which could be reviewed by this court upon a writ of error.

"The reason of this rule lies in the fact that a habeas corpus proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should therefore be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason

of the court's having exceeded its jurisdiction in the premises." In re Frederick, 149 U. S. 76, 6 Sup. Ct. 734, 29 L. Ed. 868.

There have been a number of decisions on the question, but we may take as controlling the two latest of the Supreme Court of the United States. In Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, it is held:

"It is the settled doctrine of this court, often affirmed, that the writ of habeas corpus cannot be used for the purpose of proceedings in error, and that the jurisdiction under that writ is confined to an examination of the record, with a view to determining whether the person restrained of his liberty is detained without authority of law," and "where collateral attacks have been sustained through the medium of a writ of habeas corpus, the grounds were such as attacked the validity of the judgments, and the objections sustained were such as rendered the judgment not merely erroneous, but void," and "upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions."

In Ex parte Spencer, 228 U. S. 652, 33 Sup. Ct. 709, 57 L. Ed. 1010, the Supreme Court held that where the sentence of a lower court is partly legal and partly illegal, and can on appeal be modified by striking therefrom the illegal part, such sentence is erroneous and not void, and the proper practice is to review the sentence on appeal.

"The sentences imposed on petitioner were therefore not void, but erroneous only, and subject to change or modification by the Supreme Court, or reversal, and petitioners subject to resentence, and Ex parte Lange does not apply. In In re Lincoln, 202 U. S. 178, habeas corpus was denied because there was an appeal from the judgment attacked, which could have been taken to the Circuit Court of Appeals, applying the rule, which we have so often expressed, that the writ of habeas corpus is not to be used as a writ of error. And the reason is manifest. When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts, and if the judgment be excessive or illegal, it may be modified or changed, and complete justice done, as we have said, to the prisoner, and the penalties of the law satisfied as well."

It is manifest, therefore, that the District Judge for the Northern District of Georgia exceeded his powers and jurisdiction in directing the prisoners to be transported back to the Eastern district of South Carolina, to be resentenced, because:

(1) He had no supervisory powers of any kind over the judgments of the District Court for the Eastern District of South Carolina.

(2) He had no right, upon the hearing of a habeas corpus before him, to use that proceeding to inquire into and determine the alleged erroneous character of the judgment and sentence of a court of equal jurisdiction, which erroneous judgment could have been corrected by an appeal to the proper appellate court.

[3] Lastly. Was the sentence imposed by the District Court for the Eastern District of South Carolina even erroneous? There is no doubt that that court had jurisdiction of the subject-matter of the prosecution and the person of the prisoner. The prisoner was indicted for an offense under the statutes of the United States committed within the territorial limits of the Eastern district of South Carolina. The crime for which he was indicted involved a penalty under each of sec-

tions 3258 and 3281 of not exceeding imprisonment for two years and a fine of not exceeding \$5,000. It was therefore an infamous crime.

In Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89, it was said that, in determining whether a crime was infamous within the meaning of the Constitution, the question is whether it "is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one." And in Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909, the court said:

"We cannot doubt that at the present day imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment."

So also:

"A crime which might have been punished by imprisonment in a penitentiary is an infamous crime, even if the sentence actually pronounced is of a small fine only." The Paquete Habana, 175 U. S. 682, 20 Sup. Ct. 290, 44 L. Ed. 320.

The offense of which the prisoner was convicted, being therefore one for which he could be punished with imprisonment for two years, rendered the offense an infamous one, for which he could receive an infamous punishment, whether or not the sentence was actually for imprisonment for less than two years, and which as an infamous punishment could include confinement in a penitentiary.

In 1891 the statutory provisons for the sentencing of prisoners included: R. S. U. S. § 5537 (Comp. St. § 10521), which provided that confinement under sentence of an United States court could be had in any jail or penitentiary in the state, when such imprisonment therein was allowed by the state; also R. S. U. S. § 5541 (section 10527), which provided that where any person was convicted of an offense against the United States, and sentenced to imprisonment for more than one year, the same could be executed in any state jail or penitentiary within the state, the use of which was allowed by the Legislature for that purpose; also R. S. U. S. § 5542 (section 10528), which provided that, where any criminal convicted of any offense against the United States was sentenced to imprisonment and confinement to hard labor, the sentence could be executed in any state jail or penitentiary in the state, the use of which was allowed by the state Legislature for that purpose.

Under these statutory provisions, it was held by the Supreme Court in 1889, in In re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107, that a person convicted in an United States court could not be sentenced to confinement in a state penitentiary, unless the sentence was for more than a year, or was also "at hard labor"; i. e., if the sentence included hard labor, he could be sentenced to a state penitentiary for a year, or less than a year, or more than a year. If the sentence did not include hard labor, he could not be sentenced to a state penitentiary unless the sentence was for more than a year. In re Bonner, 151 U. S.

242, 14 Sup. Ct. 323, 38 L. Ed. 149.

It will be noted that these statutes (sections 5541 and 5542) apply only to state penitentiaries, and not to federal penitentiaries, of which there were none then in existence. In March, 1891, an act was passed

"for the erection of United States prisons and for the imprisonment of United States prisoners and for other purposes" (U. S. Statutes at Large, vol. 26, p. 839 [Comp. St. §§ 10552–10560]), directing the Attorney General and Secretary of the Interior to purchase three sites, "and cause to be erected thereon suitable buildings for the confinement of all persons convicted of any crime whose term of imprisonment is one year or more at hard labor by any court of the United States." Under this statute, the places of confinement at McNeill's Island, Atlanta, and Ft. Leavenworth were constructed.

It will be noted that in the act they are not styled penitentiaries, but "buildings for the confinement," although in later acts they are referred to as penitentiaries, viz.: Act March 2, 1895 (Comp. St. § 10561), referring to Ft. Leavenworth, and Act March 3, 1901 (Comp. St. § 10563), referring to Atlanta. In the case of Ft. Leavenworth, an act was passed on March 2, 1895, which provided for the transfer of the military prison at Ft. Leavenworth to the Department of Justice, to be known as the United States penitentiary, to be used for the confinement of persons convicted in United States courts, and sentenced to imprisonment in a penitentiary; and in O'Brien v. McClaughry, 209 Fed. 816, 126 C. C. A. 540 (December 2, 1913), this was held by the Circuit Court of Appeals for the Eighth Circuit to strike out the requirement as to Ft. Leavenworth in the act of 1891, that the sentence must be for "one year of more at hard labor." Whether that provision was still in existence as to the Atlanta penitentiary, and the one at McNeill's Island, says the court, "no opinion is ventured."

This question was considered by the District Court for the Eastern District of South Carolina before the sentence of the present prisoners, and it came to the conclusion that the words "at hard labor" were no longer in existence as regards the United States penitentiary at Atlanta, but a prisoner sentenced to confinement for one year could be confined therein. At the time of the passing of the act of March 3, 1891, there were a number of statutory provisions prescribing hard labor as a part of the punishment for the infraction of those statutes. On March 4, 1909, the codification called the United States Criminal Code was enacted. In that Code, all the criminal statutes of the United States of a general nature, not connected with the internal revenue laws, were codified and re-enacted, and in every case where "hard labor" had been theretofore imposed as part of the sentence those words were struck out and the punishment reduced to imprisonment. In section 338 of the Criminal Code (Comp. St. § 10512) it is provided that:

"The omission of the words 'hard labor' from the provisions prescribing the punishment in the various sections of this act shall not be construed as depriving the court of the power to impose hard labor as a part of the punishment in any case where such power now exists."

This section is simply permissive, not obligatory, and leaves the matter open for discussion whether, in those cases where the Criminal Code, in its penal sections, varies in the language used from the statutes in force prior to 1909, the punishment of hard labor could be inflicted. In most, if not all, of the important criminal statutes passed since the Criminal Code, no provision for hard labor is included. The White

Slave Act, the theft of articles in interstate commerce, the Pernicious Drug Act, the Pure Food Act, the late Prohibition Act, and sundry other acts which provide very severe punishments, in cases even imprisonment for 10 years, do not include any provision for hard labor. Even so important an act as the Espionage Act of June 15, 1917, which in section 2¹ provides for the punishment of death or imprisonment not exceeding 30 years, and the act of April 20, 1918, section 2² of which provides for an imprisonment of not exceeding 30 years, do nei-

ther provide for the imposition of hard labor.

By Act June 25, 1910 (36 Stat. 819 [Comp. St. §§ 10535-10544]) provision is made for the parole of any prisoners confined in any United States penitentiary for a term of over one year, impliedly recognizing that then many other prisoners were so confined for a lesser term, and in Act March 3, 1901 (31 Stat. 1185), it is provided that the Attorney General may in his discretion transport to the United States penitentiary at Atlanta such persons now undergoing sentences of imprisonment imposed by the United States court in other institutions as can conveniently be accommodated therein. The act further provides for the employment in certain specified ways of labor of all convicts in the United States penitentiary at Atlanta.

It makes no mention of any limitations of the confinement therein of persons alone who have been sentenced to "hard labor." In fact, if "hard labor" is still, as provided in Act March 3, 1891, an indispensable prerequisite to confinement in Atlanta, there is scarcely an existing criminal statute under which any convict could be imprisoned in the United States penitentiary at Atlanta. Indeed, without venturing to say that there is no existing statute enacted since the Judicial Code of 1909 which permits the inclusion in the sentence of the words "hard labor," it can be said that a fairly careful search has not found one. The inference is that Congress has relied on the provisions of Act March 3, 1901, that any and all prisoners confined in the penitentiary at Atlanta may be put to labor in the manner and on the special character of labor therein specified. The only rational conclusion would be that in the case of Atlanta, as in that of Ft. Leavenworth, the words "at hard labor" in the act of March, 1891, have been impliedly repealed, and that any person convicted in an United States court and sentenced to imprisonment for a year or more may be sentenced to imprisonment in Atlanta, and employed at labor as designated in the act of March 3, 1901. In the case of Ft. Leavenworth, under O'Brien v. Mc-Claughry, a prisoner may be confined there under a sentence of less than a year.

"An interpretation of the law should be sought which will permit the courts charged with the practical execution of the criminal law to administer it, not only with a due regard for the interests of the public, but for the benefit of the criminal as well. Every reasonable construction should be adopted which enables the courts to send convicted criminals to the penitentiaries, where they are taught habits of industry and are surrounded by salutary influences, rather than to those hotheds of idleness and crime, the county jails." Exparte Friday (D. C.) 43 Fed. 921.

Inasmuch as the District Court for the Eastern District of South Carolina had jurisdiction of the prisoner and of the cause, and had

Comp. St. 1918, Comp. St. Ann. Supp. 1919, \$ 10212b.
 Comp. St. 1918, Comp. St. Supp. 1919, \$ 10212h/4.

power to sentence for not exceeding two years, its sentence for one year was clearly valid and within its power. The alleged error is the place of confinement, viz. Atlanta. The prisoner could without doubt be imprisoned for one year. The judge of the District Court for the Northern District of Georgia thinks he cannot be imprisoned at Atlanta. The judge of the District Court of the Eastern District of South Carolina thinks he can. The sentence in any event is only partly illegal, viz. in the place of imprisonment; and that error could have been corrected on writ of error by the Circuit Court of Appeals for the Fourth Circuit, or by the Supreme Court of the United States, but not by the District Judge for the Northern District of Georgia.

As was said by Judge Coxe, in Ex parte Friday (D. C.) 43 Fed. 916, where the question was whether a sentence for only a year's confinement in a state penitentiary was void:

"Assuming, for a moment, that the doctrine of the Mills Case is applicable, it is thought that the first judgment was not absolutely void. It was irregular, but it was not a nullity. A wrong place of imprisonment was designated. But this was not necessarily a part of the sentence. * * * "

Apparently the judge for the Northern district of Georgia thinks his conclusion sustained by the cases of In re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107, and In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149. In the first case, decided in 1890, the court held that under the provisions of R. S. U. S. §§ 5541 and 5542, a sentence for imprisonment not longer than a year and not at hard labor in a state penitentiary was not lawful, and was in excess of the powers of the court. So in the second case of In re Bonner, decided in January, 1894, the court again held that, under sections 5541 and 5542, a sentence for one year only in a state penitentiary was not lawful, but in excess of the trial court's powers, and that the prisoner should be released, but without prejudice to the right of the United States to take measures to have the prisoner resentenced.

In both of these cases it is to be noted that the Supreme Court, before which the habeas corpus proceedings were had, had at that time supervisory appellate powers over the courts that imposed the sentences. However that may be, the present case is controlled by the later cases of Dimmick v. Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110 (1903); Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101 (1910); In re Spencer, 228 U. S. 652, 33 Sup. Ct. 709, 57 L. Ed. 1010 (1913). In these cases it is held that, where the sentence below is partly legal and partly illegal, and errs in the matter only of excess, it is erroneous, and not wholly void, and should be corrected by writ of error, and not by habeas corpus, a fortiori not by habeas corpus from a separate court of primary and similar jurisdiction. In the language of the Supreme Court in Ex parte Spencer, 228 U. S. 652, 33 Sup. Ct. 709, 57 L. Ed. 1010:

"The reason is manifest. When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts, and if the judgment be excessive or illegal it may be modified or changed and complete justice done."

These applicants are in the anomalous and unfortunate position of being confined in a jail in the Eastern district of South Carolina, without there being any outstanding warrant of any kind enforceable in that district for their arrest and detention. They are being so held and confined solely on the order of the District Judge of the Northern District of Georgia, without there being, so far as appears, any authority on the part of that judge to direct the commitment of a prisoner to a jail outside of the district of Northern Georgia. Request has been made by the judge of the Eastern district of South Carolina to the judge of the Northern district of Georgia to have this position ended by directing the marshal of the latter district to again bring these prisoners before him under the writ of habeas corpus, to be released or recommitted as his judicial conscience may find proper. To this request he has not acceded, and the prisoners have now applied to this court for a writ of habeas corpus in the Eastern district of South Carolina to be wholly released from further confinement. That is impossible. They have been duly convicted of the commission of crime, and should perform the sentence imposed by the law, and not escape unpunished, whether or not the District Court of the Northern District of Georgia erred in sending them back to this district.

The judge of the District Court of the United States for the Northern District of Georgia having therefore, as it appears, exceeded his powers and jurisdiction in undertaking to send these prisoners back to the Eastern district of South Carolina, to be resentenced according to his views, and it appearing to this court that the original sentence of this court was entirely legal and proper, it is ordered that the marshal of this court do return each of the said prisoners to the custody of the warden of the United States penitentiary at Atlanta, Ga., to perform

his sentence.

EARLES v. HOWARD.

(District Court, D. Maine. October 5, 1920.)

No. 590.

Admiralty 21—Can entertain proceedings to recover for death under right given by state statute.

A court of admiralty can entertain a libel in personam to recover for instantaneous death resulting from a maritime tort, where the statute of the state in which the tort occurred created a right of recovery for such death, though no such right previously existed in admiralty.

In Admiralty. Libel by Catherine Earles, as administratrix of the estate of George W. Cartledge, against Frank A. Howard. On motion to dismiss libel. Denied.

Paul E. Donahue and Nathan W. Thompson, both of Portland, Me., for libelant.

Hinckley & Hinckley, of Portland, Me., for respondent

HALE, District Judge. This case is now before me upon the respondent's motion to dismiss the libel: First, because, at the time of the injury set forth in the libel, there was no right of recovery in a court of admiralty of damages resulting from the instantaneous death of a person; second, that the libel claims the right of the libelant to recover against the defendant for the instantaneous death of the intestate, by virtue of a statute of Maine; that the libelant relies solely upon this statute of Maine; and the respondent says that the admiralty law is not changed by virtue of the law of Maine; and therefore that no case is stated of which the federal court in admiralty can take cognizance.

The libel is brought by force of the Revised Statutes of Maine, c. 92, §§ 9 and 10, for the instantaneous death of the intestate, while employed on a steamship in Portland Harbor; said death being occasioned by the alleged negligence of the respondent. The libel states a maritime claim, based upon a local law of Maine, and seeks to enforce

same in this court.

In The H. E. Willard (C. C.) 52 Fed. 387, 389, Mr. Justice Gray, of the Supreme Court, sitting as Circuit Justice in the Circuit Court in the Maine District in 1892, said:

"When a right, maritime in its nature, has been created by the local law, the admiralty courts of the United States may doubtless enforce that right, according to their own rules of procedure. * * * But no state legislation can bring within the jurisdiction of those courts a subject not maritime in its nature"—citing, among other cases, The Corsair, 145 U. S. 335, 347, 12 Sup. Ct. 949, 36 L. Ed. 727; The Lottawanna, 21 Wall. 558, 575, 576, 580, 22 L. Ed. 654; The Orleans, 11 Pet. 175, 184, 9 L. Ed. 677; People's Ferry Co. v. Beers, 20 How. 393, 15 L. Ed. 961.

In Sherlock et al. v. Alling, Administrator, 93 U. S. 99, 104, 23 L. Ed. 819, the question arose on writ of error to a judgment in the state court of Indiana, and the action was based upon a statute sim-

ilar to the statute of Maine now in question. In speaking for the Supreme Court, Mr. Justice Field said:

"But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the state govern, * * * Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of the opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress."

In the City of Norwalk (D. C.) 55 Fed. 98, 103, 105, 106, Judge Addison Brown, of the New York District Court, discussed the question with great learning, citing the above cases and many others. Judge Brown's conclusion is that, although Congress is the competent body to make any needed changes in the general rules of the maritime law, this does not exclude state legislation upon matters of local concern of a maritime nature, and does not forbid general legislation by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law.

In The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, an admiralty proceeding, effect was given as against a ship registered in Delaware, to a statute of that state which permitted recovery by an ordinary action for fatal injuries; the power of a state to supplement the maritime law to that extent was recognized; and it was said that, while the admiralty might not give a proceeding in rem, in such a case, it would give a proceeding in personam. This would not produce a lack of uniformity, for "courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit." And the court cited The Corsair and other cases which I have above cited.

The respondent relies upon a recent decision of the Supreme Court of the United States, in Knickerbocker Ice Co. v. Lillian E. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, decided in May, 1920. The matter presented to the Supreme Court in that case was this: William M. Stewart fell into the Hudson river, and drowned, August 3, 1918. His widow, defendant in error, claimed under the Workmen's Compensation Law of New York (Consol. Laws, c. 67); the Industrial Commission granted an award against the company for her and her minor children; and both the Appellate Division and the Court of Appeals approved it. Stewart v. Knickerbocker Ice Co., 226 N. Y. 302, 123 N. E. 382. The latter concluded that the reasons which constrained the court to hold the Compensation Law inapplicable to an employé engaged in maritime work (Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900) had been extinguished by "An act to amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the District Courts, so as to save to claimants the rights and remedies approved under the Workmen's Compensation Law of any state," approved October 6, 1917—chapter 97, 40 Stat. 395 (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 991 [3], 1233). The Supreme Court reversed the judgment of the Court of Appeals of New York state, on the ground that the "enactment [of New York state] prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court"-citing N. Y. Cent. R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; N. Y. Cent. R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; Southern Pacific Co. v. Jensen, supra. And the court stated that the doctrine of The Hamilton could not be extended to the situation then before the court. It is evident that the Supreme Court did not intend to overrule the cases upon which The Hamilton was based.

There can be no question but that, when a maritime right has been created by a state law, the admiralty courts of the United States may

enforce such right.

In the case before me, the libelant has stated a maritime case, arising under a statute of Maine, which may be enforced in a court of admiralty.

The motion to dismiss the libel is denied, but without costs.

MUIR v. MORKIS et al.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1920.)

No. 3467.

Judgment \$\iff 28(1)\$—At law on merits bar to subsequent suit in equity on same facts.

A suit in equity in a federal court *held* barred by judgment of a state court, affirmed by the Supreme Court of the state, in an action at law between the same parties based on the same facts, and where the evidence was substantially the same.

Appeal from the District Court of the United States for the District

of Oregon; Charles E. Wolverton, Judge.

Suit in equity by Jane W. Muir, executrix of the will of William T. Muir, deceased, against James H. Morris and Fred S. Morris, partners as Morris Bros., James H. Morris, and Fred S. Morris. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 257 Fed. 150.

Wm. D. Fenton and James E. Fenton, both of Portland, Or., for appellant.

Teal, Minor & Winfree, Dolph, Mallory, Simon & Gearin, and W. C.

Bristol, all of Portland, Or., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appellant sought by this suit a decree declaring that in and prior to the month of June, 1905, the appellees held the legal title to 1,000 shares of the capital stock of the Oregon Water Power & Railway Company, in trust for the appellant's testate, William T. Muir, and continued to hold the stock for the latter and his successors in interest until about April 27, 1906, when they sold all of the stock of the power and railway company, including the 1,000 shares so held in trust by them, at the price of \$65 a share, and that after such sale the appellees held the sum of \$65,000 for Muir until his death on the 4th day of November, 1911, and that ever since the date last mentioned the appellees have held and now hold the said money in trust for the appellant herein as representative of said William T. Muir, deceased, for which amount, with interest and costs of suit, the appellant prayed judgment.

The defendants to the suit interposed various defenses, among which was one setting up in bar an action brought by Muir June 24, 1911, in a state court of Oregon, in which action the present appellant was substituted as executrix of the estate of the deceased, Muir, which action resulted in a judgment of the trial court granting a motion made by the defendants thereto (who are the present appellees) for a nonsuit and dismissing the action, which judgment was subsequently affirmed by the Supreme Court of the state on appeal thereto. Muir v. Morris, 80 Or. 378, 154 Pac. 117, 157 Pac. 785. Thereafter a petition for a rehearing of the case was presented to the court in banc

on consideration of which petition the court states (80 Or. at page 393, 157 Pac. 785) that—

"In response to an urgent petition for a rehearing the entire record has again been examined."

Such re-examination resulted in a further statement by that court of the facts of the case (which appear to have been also quite fully stated in its original opinion), and in a further opinion of the court denying the rehearing and again affirming the judgment of the trial court dismissing the action. It clearly appears from those opinions that the merits of the case were involved in the motion for a nonsuit made by the defendants at the close of the testimony for the plaintiff at the trial.

That case was, as has been said, begun by William T. Muir, and, he having died within a few months thereafter, the present appellant was substituted in his stead in the action in the state court. The facts calling for and receiving the judgment of the state courts, as well as the pleadings in those courts, were thus stated by the Supreme Court of the state on the petition for rehearing (80 Or. 393, 157 Pac. 785):

"Morris & Whitehead, Bankers, was a corporation which owned and had control of several other corporations, including the Oregon General Electric Company, which was incorporated on December 6, 1901, with a capital stock of \$2,000,000, divided into 20,000 shares. W. T. Muir and three others each subscribed for one share of the stock of the Oregon General Electric Company, and the balance of the stock was subscribed by Fred S. Morris, who held the stock, however, as the property of Morris & Whitehead, Bankers. On June 7, 1902, the name of the Oregon General Electric Company was changed to the Oregon Water Power & Railway Company. On November 24, 1902, Julius Christensen and the defendants James H. Morris and Fred S. Morris formed a partnership under the name of Morris Bros. & Christensen, and succeeded to all the assets and business of Morris & Whitehead, Bankers. The capital stock of the Oregon Water Power & Railway Company was transferred from the corporation of Morris & Whitehead, Bankers, to the partnership of Morris Bros. & Christensen; the partnership agreement making James H. Morris and Fred S. Morris each the owner of two-fifths, and Julius Christensen the owner of one-fifth, of the stock so transferred. In June, 1905, the partnership of Morris Bros. & Christensen was dissolved, and about the same time James H. Morris and Fred S. Morris formed a partnership under the name of Morris Bros. When the firm of Morris Bros. & Christensen was dissolved, all the assets, including stock in the Oregon Water Power & Railway Company, which were apportioned to James H. Morris and Fred S. Morris, were taken over by the partnership of Morris Bros. In April, 1906, Morris Bros. sold all their stock in the Oregon Water Power & Railway Company for \$65 per share. W. T. Muir, an attorney, who occupied a high position in the profession, entered the service of Morris & Whitehead, Bankers, on February 15, 1901, and his employment was continued by his successors in interest until April, 1906, when Morris Bros, sold all their Oregon Water Power & Railway Company stock. Mr. Muir received an agreed salary of \$200 per month until April, 1902; pursuant to an agreement made in advance the amount was \$275 per month from April, 1902, to December 31, 1902; during 1903 the agreed salary was \$400 per month; on January 1, 1904, the salary was arbitrarily reduced by the employer to \$275 per month, and while Mr. Muir did not formally agree to the reduction, he continued to receive \$275 per month without objection during the remaining period of his service.

"The amended complaint alleges that W. T. Muir 'entered into the service and employment of the said Morris & Whitehead, Bankers, for an agreed salary as the attorney and counsel of said Morris & Whitehead, Bankers,'

and it was agreed that he would act as legal adviser for that corporation and for other corporations then owned and controlled by Morris & Whitehead, Bankers; that acting through its representative, Fred S. Morris, the employer, Morris & Whitehead, Bankers, agreed with W. T. Muir that he was inadequately compensated for the services he was then performing, and that if he would continue in the service for such salary, and devote his best energies to the success of the corporation, he would receive additional compensation for his services, and that such additional compensation would be 'an interest in the property, shares of stock, profits, and business of the said Oregon Water Power & Railway Company and of the other said corporations then owned, promoted, and operated by the said Morris & Whitehead, Bankers; that at said time the amount and extent of the interest of the property, shares of stock, profits, and business in the said Oregon Water Power & Railway Company, and said other corporations which the said William T. Muir under said agreement was to receive as additional compensation which was not then and there fixed or determined, but the amount of such interest in the property, shares of stock, profits, and business of the said Oregon Water Power & Railway Company, and said other corporations, which the said William T. Muir was to receive, as aforesaid, was to be thereafter fixed and determined as soon as the business of the said Oregon Water Power & Railway Company, and the said other corporations, and the business of the said Morris & Whitehead, Bankers, should be made and become successful and profitable. It is then alleged that the partnership of Morris Bros. & Christensen assumed and agreed to pay all the liabilities of the corporation called Morris & Whitehead, Bankers, and that the partnership agreed that W. T. Muir was inadequately paid, and that if he would devote his best energies to the properties of his employers he would receive as additional compensation 'an interest in the property, shares of stock, profits, and business' of the corporations operated by Morris Bros. & Christensen, the extent of such additional compensation to be determined afterward.

"The plaintiff continues the narrative by averring that on or about November 7, 1904, in accordance with the agreements made with Morris & Whitehead, Bankers, and Morris Bros. & Christensen, relative to additional compensation, the partners in the firm of Morris Bros. & Christensen agreed among themselves that the amount, character, and manner of payment of the additional compensation which W. T. Muir was to receive would be 1,000 shares of the capital stock of the Oregon Water Power & Railway Company, but that the stock was not issued to him. The pleading proceeds by alleging that when the partnership of Morris Bros. & Christensen was dissolved, and as a part of the dissolution agreement, the dissolving partners agreed that the 1,000 shares of the Oregon Water Power & Railway Company stock which the partnership had in November, 1904, determined to issue to Muir would be and was his property, and that he was entitled to the stock as additional compensation, and that it was agreed between 'Julius Christensen, on the one hand, and the said James H. Morris and Fred S. Morris, on the other hand,' that James H. Morris and Fred S. Morris would deliver to W. T. Muir, immediately after the dissolution of the agreement, 1,000 shares of the capital stock of the Oregon Water Power & Railway Company, and 'that in furtherance and in part performance of the said agreement of dissolution of the said partnership of Morris Bros. & Christensen made between the said members thereof as aforesaid, the said Julius Christensen then and there assigned, turned over, and delivered unto the said James H. Morris and Fred S. Morris all of the capital stock of the said Oregon Water Power & Railway Company then owned by the said Julius Christensen, and all of his interest in the said Oregon Water Power & Railway Company.'

"The complaint concludes by averring that Morris Bros. sold the capital stock of the Oregon Water Power & Railway Company, including the 1,000 shares which should have been delivered to W. T. Muir, for \$65 per share, on account of which it is alleged that the defendants are indebted to the plaintiff in the sum of \$65,000. The defendants deny that they or any of their predecessors ever agreed to pay W. T. Muir additional compensation,

and they likewise deny that they or any of their predecessors agreed to issue stock to W. T. Muir."

A comparison of the foregoing facts with the record upon the present appeal shows, in our opinion, that the substantial and controlling facts in the two cases are precisely the same; and it is in effect, we think, so stated in this excerpt from the opinion of the court below (257 Fed. 153):

"The very crux of this case was presented to the Supreme Court, as it is here, namely, that the members of the firm of Morris Bros. & Christensen, on or prior to June 26, 1905, set aside to Muir 1,000 shares of the capital stock of the Oregon Water Power & Railway Company to be held for his use and benefit, and it was held in effect that the negotiations of the parties in that respect, whatever they were, were merged into and became a part of the written agreements for dissolution of the firm, and that Muir could not be permitted to establish otherwise the alleged agreement upon which he relied for recovery. However, by reason of the very strong contention of counsel that the alleged setting apart of the 1,000 shares of the power company stock to Morris Bros. for the use of Muir was an independent arrangement and agreement by and between the members of the firm of Morris Bros. & Christensen, and wholly aside from any of the agreements entered into looking to the dissolution of the firm, I am impelled to consider the case on that theory, but without deciding that the alleged independent agreement is not merged in the written agreements for dissolution."

The court below proceeded to consider the alleged arrangement regarding the setting aside of the 1,000 shares of the power company stock to Morris Bros., for William T. Muir as an independent agreement, and, without undertaking to decide whether or not it was merged in the written agreements of the parties, held that the evidence did not sustain the contention of the complainant. That the alleged independent agreements were so merged, however, was expressly decided in the former action.

We have, therefore, the identical questions presented on this appeal that were contested on the merits between the same parties in the former action in the state court of Oregon. Speaking of a similar condition the Supreme Court of that state said in Stager v. Troy Laundry Co., 41 Or. 141, 68 Pac. 405:

"It is practically conceded by counsel for both parties that the evidence adduced at the trial, up to the time of the interposition of the motion for a nonsuit, is in all material respects the same as that adduced up to the time of making a like motion at the former trial. We have therefore the identical question presented on this appeal that was contested and disposed of on the former. Stager v. Troy Laundry Co., 38 Or. 480, 63 Pac. 645, 53 L. R. A. 459. We then concluded, after a careful inspection of the evidence, that the nonsuit was properly denied by the trial court. That view of the question has become the law of the case, and it is not subject to review on a second appeal. The rule has long been established, and is uniformly adhered to, that an appellate court will not revise or reverse its former decisions, made in the same cause and upon the same state of facts, and this for two reasons: (1) They stand as precedents and authority, as if made in any other case upon a like state of facts; and (2) as adjudications between the same parties. The policy of the law and the practical administration of justice require that there should be an end of litigation, and the rule has grown up to meet this requirement."

In White v. Ladd, in the same volume (41 Or. 332, 68 Pac. 739, 93 Am. St. Rep. 732), the same court further said:

"The potency of a judgment as an estoppel concludes every fact necessary to uphold it, and extends, not only to matters actually determined, but to every other matter which the parties might have litigated, and have decided as incident to and essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to the matters of claim and defense, and a default judgment, or one confessed, is attended with the same legal consequences, as there exist no tenable grounds of distinction between a title confessed and one tried and determined. Barret v. Failing, 8 Or. 152; Neil v. Tolman, 12 Or. 289, 17 Pac. 103; Glenn v. Savage, 14 Or. 567, 13 Pac. 442; Harris v. Harris, 36 Barb. 88; Hanson v. Manley, 72 Iowa, 48, 33 N. W. 357; Hobby v. Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301; Cromwell v. Sac County, 94 U. S. 351. This applies where a subsequent action is sought to be maintained upon the same claim or demand. But, if the second action is upon a different claim, the former judgment will only operate as an estoppel against the matters actually litigated, or as to facts distinctly in issue in that action. Appelgate v. Dowell, 15 Or. 513, 16 Pac. 651; Cromwell v. Sac County, 94 U. S. 351.

The case of Carroll v. Grande Bonde Electric Co., 49 Or. 477, 90 Pac. 903, relied on by the appellant, was an action by the administrator of the estate of one Leonard Carroll to recover damages alleged to have been caused by the negligence of the defendant company, the answer of which denied such negligence, and also set up contributory negligence on the part of the deceased. The action was tried with a jury, and after the plaintiff had introduced her testimony, and rested, the defendant moved for a nonsuit, on the ground, among others, that the death of her intestate was caused by his own negligence. The motion was granted—the record reciting:

"That the plaintiff's intestate, Leonard Carroll, at the time of the accident complained of, resulting in his death, was guilty of contributory negligence, which was the proximate and direct cause of the injury resulting in his death."

The judgment in that action was subsequently affirmed on appeal, and thereafter another action was brought for the same cause by the same plaintiff against the same defendant, to which the defendant pleaded the judgment in the former one as a bar. The statute of the state authorized a judgment of nonsuit in such a case against the plaintiff on motion of the defendant, when upon the trial the plaintiff fails to prove a case sufficient for submission to the jury, and that when such judgment is given the action is dismissed, but that such dismissal shall not have the effect to bar another action for the same cause. Sections 182, 184, B. & C. Comp. In holding the former action no bar in that case, the Supreme Court of the state said:

"The statute would seem to leave no room for argument as to the effect of an involuntary judgment of nonsuit."

But Mr. Chief Justice Bean, who delivered the opinion of the court, proceeded to say that—

"On a motion for a nonsuit, the court has no jurisdiction or authority to pass upon the merits or adjudicate the rights of the parties, and an attempt to do so is a nullity."

It is obvious that that statement was not necessary to the decision, since the court had already practically decided the question upon and

in accordance with the express declaration of the state statutes; but, if it can be properly regarded as an essential part of the decision, we are unable to see how it can be reconciled with the subsequent decision of the court in the subsequent case of Muir v. Morris, 80 Or. 378, 404, 154 Pac. 117, 157 Pac. 785, hereinbefore referred to, in which the same court, in an action where a motion for a nonsuit was made by the defendant and granted, twice fully considered and decided the case upon the merits. That being so, and the two suits of Muir v. Morris being between the same parties, and the evidence being practically the same in each, we see no escape from the conclusion that the former judgment is a bar to the present suit, notwithstanding the contention on the part of the appellant that the bill in the present case contains various allegations not contained in the complaint in the law action.

The judgment is affirmed.

SCHOONMAKER CONNERS CO., Inc., v. LAMBERT TRANSP. CO. et al.

(Circuit Court of Appeals, Second Circuit. July 3, 1920.)

No. 206.

1. Shipping \$\infty\$58(2)—Charterer by demise prima facie liable for damage to seew.

Where a scow without motive power, demised to a charterer, was received in good condition and was to be returned in like condition, but was returned in bad condition, it is incumbent on the charterer to show (1) how the damage occurred, and (2) that it was not caused through its negligence, or through the negligence of any one to whom it had intrusted the boat.

2. Shipping 54—In absence of covenant to return in good condition, charterer liable only for negligence.

Where a charter party contains no covenant for the return of the vessel in good order and condition, there is no liability for injury to the vessel without proof of negligence.

3. Shipping 58(2)—Negligence of charterer, causing damage to scow, shown by evidence.

A finding that damage to a scow was caused by negligence of a subcharterer held sustained by evidence showing that it placed 1,200 drums of caustic soda on the scow's deck, where it remained uncovered for 50 days, that under such conditions some of the soda would leak from the drums, that the deck and sides of the scow were eaten and decayed, and that similar effects on wood had previously resulted from like cause.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Schoonmaker Conners Company, Incorporated, against the Lambert Transportation Company, with the Acme Steamship Corporation, impleaded. Decree for libelant against both respondents, and the Acme Steamship Corporation appeals. Affirmed.

The libelant and respondent are corporations organized and existing under the laws of the state of New York and having their respective offices in the city of New York. On December 24, 1917, the libelant chartered to respondent its scow, Kaaterskill No. 4, which at the time is alleged to have been tight,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

staunch, and strong and in every respect seaworthy. The charter was to commence on December 25, 1917, and was to continue until the scow was returned to libelant in the towing limits of New York Harbor, at a place designated by libelant, in the same condition as when she entered upon the charter, less ordinary wear and tear. The rate to be paid by respondent for the use of the scow was \$12 per day. The libel contains, among others, the following allegations:

"Seventh. That the said scow Kaaterskill No. 4 was a boat without motive power, and the charter of the said scow by the libelant to the respondent

amounted in law to a demise of said scow to the respondent.

"Eighth. That the respondent failed and neglected to return the said boat to the libelant in the same condition as when she entered upon the said charter, less ordinary wear and tear, but loaded or caused and allowed the said vessel to be loaded with a cargo of caustic acid, which was a dangerous cargo, and a cargo likely to cause damage by eating away the structure of said scow, despite the protest of the libelant, made to the respondent at the time.

"Ninth. That thereafter, and on or about April 11, 1918, the respondent returned the said scow to the libelant in a damaged condition, owing to the loading and carrying of the said cargo, and failed and neglected to return the said boat in the same condition as when delivered to the respondent, less ordinary wear and tear.

"Tenth. That the said damage to said boat was not caused by ordinary

wear, and tear.

"Eleventh. That by reason of the premises, the libelant has been damaged in the making of the repairs, towing, survey fees, demurrage, etc., in approximately the sum of five thousand (\$5,000.00) dollars."

The answer denied the allegations contained in all the above paragraphs,

except the seventh, which it admitted.

The Lambert Transportation Company, Incorporated, having answered, then filed a petition, in which it declared that it had chartered the scow Kaaterskill No. 4 to the Acme Steamship Corporation, and that the latter had used the said scow and had loaded the same with a cargo of caustic acid, and had failed to cover the cargo, and failed to take the ordinary precautions in handling the acid, and in fact had used the scow for the purpose of lightering caustic acid in the face of the protests of the petitioner; and it further alleged that any damage done to the scow as alleged in the libel was caused, not by the petitioner, but by the fault, neglect, and carelessness of the Acme Steamship Corporation. It prayed that the latter might be cited to appear and answer on oath, and be held solely liable for any damage that had been caused to the Kaaterskill.

The Acme Steamship Corporation, being thus impleaded, filed an answer, in which it denied the various allegations contained in the libel, admitting, however, that the scow was a boat without motor power. The court below has entered a decree against the Acme Steamship Corporation and the Lambert Transportation Company, with process first against the Acme Steamship Corporation, and, if they should not respond, against the Lambert Transportation Company. The final decree, including interest and cost as taxed, is in the sum of \$5,072.89.

Alexander S. Bacon, of New York City (Charles Podsenick, of New York City, of counsel), for respondent appellant.

Macklin, Brown, Purdy & Van Wyck, of New York City (William F. Purdy, of New York City, of counsel), for libelant appellee.

Edward Brown, of New York City, for respondent appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] It appears, and indeed is conceded, that when the Kaaterskill was char-

tered to the Lambert Transportation Company, respondent herein, she was in good condition, and that when the boat was returned she was in bad condition. It was therefore incumbent upon the aforesaid respondent to show: (1) How the damage occurred; and (2) that it was not caused through its negligence, or through the negligence of any one to whom the respondent had intrusted the boat. White v. Upper Hudson Stone Co., 248 Fed. 893, 160 C. C. A. 651; Terry & Trench v. Merritt & Chapman Derrick & Wrecking Co., 168 Fed. 533, 93 C. C. A. 613.

That the libelant is entitled to a decree is admitted by the Lambert Transportation Company, Incorporated, the respondent. The real matter in issue, therefore, is as to the liability of the Acme Steamship Corporation, which is impleaded. It is admitted that, when the scow was returned to the libelant, she was not only not in the same condition she was in when she was taken over, but that she was indeed in a very bad condition. As the charter party contained a covenant wherein it was agreed that the scow was to be returned in like condition as on delivery, reasonable wear and tear excepted, the liability of the respondent is of course beyond any question.

- [2] The difficulty in the case arises over the relation of the Acme Steamship Corporation to the matter, and is due to the fact that, after the respondent took over the scow under its charter with the libelant, it in turn subchartered her to the Acme Steamship Corporation, and in doing so failed through carelessness to exact of the latter a covenant for the return of the boat in the same condition as she was in on delivery, reasonable wear and tear excepted. It is settled law that, where a charter party contains no covenant for the return of a vessel in good order and condition, there is no liability for injury to the vessel without proof of negligence. C. F. Harms Co. v. Upper Hudson Stone Co., 234 Fed. 859, 148 C. C. A. 457. The liability of a charterer depends upon the terms of the charter party, and if the injuries complained of are not within the terms of the charter party then liability will turn upon whether the damages are attributable to the charterer's negligence. Worrall v. Davis Coal & Coke Co., 122 Fed. 436, 58 C. C. A. 418; W. H. Beard Dredging Co. v. Hughes (D. C.) 133 Fed. 680.
- [3] In determining the question of negligence it becomes necessary to examine into the facts as they are disclosed upon the record. When the boat was chartered to the Lambert Transportation Company she was, as we have said, in good condition; and the record discloses that she was in good condition when the Lambert Transportation Company subchartered her to the Acme Steamship Corporation. When she was returned by the latter, her decks had been eaten away and badly damaged. The court below found that the damage was caused by the negligence of the Acme Transportation Corporation in loading a cargo of caustic soda upon the boat and leaving the cargo uncovered in the rain and weather, so that the rain, by dissolving some of the cargo, which leaked from the drums in which it was contained, produced a chemical change upon the resinous material in the planking of the deck of the boat, causing the condition complained of. But this condition was not confined to the deck. The same character of injury which appeared on

the deck appeared also on her sides and to a lesser extent on her bottom and along inside the skin of the barge. There had been placed on the deck 1,200 drums of caustic soda, and some of these drums had been there for a period of 50 days, exposed to the rain and snow.

There is a conflict in the testimony. The vice president of the Acme Company, who stated that he had been engaged in dealing in woods for 34 years, and who had owned, built, bought, and sold scows, and who saw the deck of the Kaaterskill before and after she was loaded with the caustic soda, and who was asked what the condition of the deck was after the caustic soda was removed, answered that he saw no change in its condition. The following are excerpts from his testimony:

"Q. Have you had any experience with caustic soda? A. Yes sir.

"Q. What was it? A. For the last four years I've been handling general cargo to Italy and French ports, but principally to Italian ports, and I've handled 15,000 drums approximately of caustic soda, probably as many as 20,000 drums.

"Q. What was the effect of the caustic soda on the ships, or on wood?

"Mr. Hull: I object to that. (Objection sustained.)

"Q. What did you actually see? A. I have handled it on the dock and on open barges. I have had it stored on the wooden dock for as long as 7 months at a time. The caustic soda would sometimes get out of the drums, by reason of the holes being in the drum-hooks where the stevedores stick them in the side of the drum, and caused a little to come out—and that would get on the wood. I had it for 7 months on Pier 63, North River, on the wood, and no hurt to it at all.

"Q. What was the wood on Pier 63? A. Pine.

"Q. What was the effect of the caustic soda on the wood of Pier 63? A. None.

"Q. Was that out, exposed to the air? A. Partly so, and partly not; most of it was uncovered.

"Mr. Hull: Then I ask that the answer be stricken out, because he said it was partly uncovered.

"Witness: Part of it was under cover, where it was under the shedded por-

tion of the dock. (Motion denied.)

"Q. In relation to that part which was exposed, not under cover, how long would it be there at a time? A. It was there as long as 7 months.

"Q. Was it during that time exposed to the rain? A. Right out in the

open.

"Q. And part of the caustic soda was out of the drums, out on the wood? A. Yes, sir. And the same on Pier 2, Empire Stores, and we had the same thing over there, 2,300 drums, and part of it was under cover, and where the covered space was filled up we put it right out in the open.

"Q. Would exposure to water and air alone cause Oregon pine, or yellow pine, to become rotten, to get into sliver? A. The exposure to sun and to water or rain alternately would cause decay to set in very quicky. If the wood was kept wet, and saturated with water at all times, it would not decay at all; but the alternate action of the sun and the water would cause it to decay more rapidly than if kept perfectly dry or perfectly wet.

"Q. Did you ever hear of such a thing as caustic acid? A. I never have."

An analytical consulting chemist, who had worked with caustic soda in the laboratory and inspected and handled it in warehouses and docks for a period of 8 years, testified on behalf of the Acme Steamship Corporation. The following are excerpts from his testimony:

"Q. How is caustic soda usually wrapped? In what container? A. Caustic soda is usually wrapped in iron drums. The drum is made so that it has one

opening, and that is usually closed by a friction top container, like a friction top can. The caustic soda is placed in the drum, where it is fused in the manufacture, and poured into the drum in the fused state, so that after it cools down it becomes one solid mass in the drum.

"Q. That is to say, the caustic soda of commerce, as prepared for transportation, when cooled, is a solid mass inside of this iron drum? A. It is.

"Q. What is the effect of water upon caustic soda? A. Water will dissolve caustic soda.

"Q. Does it produce an acid? A. No.

"Q. Is there such a thing as caustic acid? A. No.

"Q. Caustic soda is an alkali? A. It is.

*

"Q. And what is the effect of alkali on acid? A. Alkali neutralizes acid, and forms a salt.

"Q. They are diametrically opposed? A. They are.

- * "Q. What is the effect of caustic soda in the presence of water on wood? A. I have never seen it have any effect.
- "Q. Do you know the action of caustic soda, in the presence of water, on wood? A. I have never seen any deleterious effect of caustic soda and water upon wood."

This same witness, however, testified as follows:

"The pine oils, or the pine tars, usually contain a small percentage of rosin. Turpentine is made by the distillation of the sap from the tree, and the residue is rosin, and rosin is approximately 75 per cent. of rosin acids, and they saponify, so that in the pine oil there is usually a small percentage of these rosins, and they are acted upon by the caustic soda, so that there is some action of soda on the oil."

Thereupon the court said:

"You probably are aware of the bearing it has in my mind, but this is the conclusion I am tempted to make from what you say. You have heard the evidence, and you know the contentions of the parties, and I treat you more as an aid of the court than as a partisan witness. It suggests itself to me that, as this caustic soda was on the deck of this boat for a period of nearly 2 months, 50 days, it is very likely that the condition of the deck afterwards was caused by just the reaction you mention, saponification of the resinous acids in the sap of the pine with the caustic soda, because the condition of the deck afterwards seemed to be exactly what might result if the gummy sap had been removed from the surface of the deck. In other words, it pulled loose without any adhesive. Would that be chemically a possible reaction?"

To this question the witness replied:

"That would be possible, assuming that the caustic remained as caustic."

The following excerpt is from the record of what passed between the court and this same witness:

"The Court: If you should suppose that this caustic soda had fallen out, in a small heap, an inch thick, or something of that sort, the part below the bottom would remain caustic soda?

"Witness: It would.

"Witness: It would.
"The Court: And when that was wetted it might, if it lay there, have action on the resinous acids?

"Witness: Yes, sir.

"The Court: And you are not prepared to say that even the sodium carbonate would not also have an action, if long enough prolonged?

"Witness: If long enough prolonged-I am not ready to say anything about that."

A witness called on behalf of the superintendent of the Hunters Point Dry Dock Company, a repair yard in the city of New York, who had 20 years' experience in the repair of barges and scows, and who made the repairs on the Kaaterskill, testified as to her condition as follows:

"I found that the planking was curled up, and sort of strips like, in ribbon pieces, and the pieces we took hold of were very brittle, and the deck had turned a reddish tone in a number of places, and where this acid had run through the scupper hole, down over the side, under the rail, it had burned, or eaten away, on the timbers, so that you could grab some pieces up in your hands into flakes and pieces.

"Q. It had made the timber so that the fiber seemed to be disintegrated?

A. As though it had decayed it, just as though it was rotten.'

The following is a further excerpt from his testimony:

"Q. Have you, during your experience, had occasion to survey damage upon boats which had carried caustic soda before this one, or since this one? A. Yes, sir.

"Q. Upon how many? A. Two others that I remember.

"Q. Both those boats had carried caustic soda? A. Yes, sir.

"Q. Was there any damage done on those boats? A. Yes, sir. The decks were badly scarred, and the wood was as though it had been decayed, and it seemed as though layers lifted out became brittle.

"Q. Was that in a general way about the same damage you saw on this boat?

A. Yes, sir."

The learned District Judge has written a very carefully prepared and discriminating opinion in this case, in which he has reached the conclusion that the damage was caused by the presence of the soda. There is evidence which showed to his satisfaction, and which shows to our satisfaction, that the kind of damage herein complained of had occurred in the past, from a like cause. It was not an unknown injury, although it may have been unknown to the Acme Steamship Corporation. The fact that it was unknown to that company does not absolve from liability, if they were handling a substance which in other instances had caused damages. Within a few days of the time when the scow was turned over to the Acme Steamship Corporation, the latter's attention was called to the dangerous character of the cargo. The libelant notified the Lambert Transportation Company, and that company notified the Acme Company by telephone, and also by letter. The treasurer of the Lambert Company testified:

"Schoonmaker-Conners notified us about a dangerous cargo being on that boat, and immediately I got in touch with Mr. Pendleton and told him that there was caustic soda on there, and it would eat the planks of the tug, and there would be serious damage there unless he covered the cargo. He said he was sending to Twenty-Ninth street, Brooklyn, for cover, and that he would cover up that cargo."

The covers were not put on the cargo, and the Acme Company must answer for the loss occasioned by its negligence. If one having charge of a wooden vessel puts a substance on her deck, which eats the deck up or destroys its strength, such act is negligence. That the Acme Company did put the caustic sode on the deck, and did leave it unprotected from the weather, is not denied.

The court below, having reached the conclusion that the Acme Steamship Corporation was liable in damages for the injuries complained of, referred the matter to a commissioner to ascertain and compute the amount of the damages and report the same to the court. Testimony was accordingly taken, and in due time the commissioner reported, and, no exceptions having been taken thereto, the court confirmed it and entered a decree accordingly. When the matter got into this court on an appeal from the interlocutory and final decrees, the Acme Steamship Corporation complained of the amount of the damages as awarded; but that question we must ignore, as no exceptions had been taken to the commissioner's report.

Decree affirmed.

In re B. SOLOMON & CO. Petition of KAHN.

(Circuit Court of Appeals, Second Circuit. July 3, 1920.)

No. 207.

 Bankruptcy = 140(3)—Purchaser through bankrupt stockbroker may reclaim stock of same kind.

Where a stockbroker at the time of his bankruptcy had in his possession certificates of stock of the same kind as that bought for a customer, the customer is entitled to reclaim such certificates, whether or not they are the identical ones bought for him.

 Brokers ⇐=31—Cannot buy from or sell to customer.
 A stockbroker employed by a customer cannot, without the knowledge and consent of the customer, fill the order with stock owned by him-

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of B. Solomon & Co., bankrupt. On petition of Leo Kahn to revise an order of the District Court. Affirmed.

Leo Kahn filed a petition in the court below in which he alleged: That Benjamin Solomon, Joseph H. Sugarman, and Philip Kastel were partners in business under the name of B. Solomon & Co., and were engaged as brokers for the purchase and sale of stocks and other securities, with an office in the city of New York. That prior to July 25, 1918, Leo Kahn directed the above firm to keep for him and credit his account with 11,500 shares of Tuxpam Star Oil Corporation stock. That prior to July 24, 1918, he (Kahn) had been notified by B. Solomon & Co. that they had purchased and held for his account 11,500 shares of stock in the Tuxpam Star Oil Corporation. That the stock was fully paid for, and that no lien existed against it in favor of B. Solomon & Co. That prior to the said July 24, 1918, he (Kahn) had delivered to the aforesaid firm for safe-keeping 900 shares of the stock of the Keystone Oil Company, and that against this stock no lien or charge of any character existed in favor of B. Solomon & Co. That on July 25, 1918, a petition in bankruptcy was filed against B. Solomon & Co., and the firm was declared bankrupt, and a receiver was appointed. That thereafter, and on August, 1918, he (Kahn) made a demand upon the receiver for the delivery of the aforesaid stocks, and the demand was refused. That petitioner asked for an order directing the receiver to turn over to him (Kahn) the stocks above referred to.

The receiver admits that he received 900 shares of stock in the Keystone Oil

Company and 4,000 shares of the stock of the Tuxpam Star Oil Company. He claims that Kahn is indebted to the estate in the sum of \$1,101.60 upon a check dated July 24, 1918, which check he claims was given to the bankrupts by Kahn "in payment of the purchase price of certain stock." He also claims a lien on all the securities for the payment of the check, and therefore asks that the prayer of the petition be denied.

The question thus raised was referred to a special master, and he reported, recommending that the claimant, Kahn, should pay to the receiver the amount of \$1,101.60, with interest, and that thereupon the receiver be directed to surrender to the claimant the 900 shares of Keystone stock and the 4,000 shares of Tuxpam stock now in his (the receiver's) hands in full of all claims which

the said Kahn has against the said receiver.

Exceptions were taken to the report, and were overruled by the District Judge, who confirmed the special master's report.

Zalkin & Cohen, of New York City (Moses Cohen and Nathan Coplan, both of New York City, of counsel), for receiver.

Randolph M. Newman, of New York City (L. C. Whiton, of New York City, of counsel), for relator.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The petitioner is a third party, reclaiming his property from a receiver appointed in bankruptcy, so that the controversy is one arising in bankruptcy proceedings, and an appeal is the proper remedy, under section 24a of the Bankruptcy Act (Comp. St. § 9608).

While the petition alleges that the bankrupt firm had in its possession 11,500 shares of the Tuxpam stock belonging to claimant, the evidence discloses that only 11,000 shares were delivered to it. The special master did not think that the evidence showed the delivery of any of this stock. We do not agree with him in that conclusion. When the claimant was testifying as to this stock having been turned over, the counsel for the bankrupts interrupted and said:

"Mr. Referee, we acknowledge all those things. There is no issue as to that. All the stock was turned over. Why go to all this to find it out? We have practically acknowledged by our papers that the stuff was turned over to Solomon & Co., but we deny that it was in our possession."

It is true that his client, when testifying later, declared that he had never received "10,000 shares of Tuxpam Star Oil from Mr. Kahn." But the record contains a letter, written on the stationery of B. Solomon & Co., dated June 1, 1918, and signed by Kastel, who had authority to sign it for the firm, which says:

"I beg to confirm my recent conversation with you, stating the fact that I have become associated with the above-named firm, and have theretofore transferred all interests in the business heretofore conducted under the name of Kastel & Co. to this firm. Among the accounts thereby transferred is yours, consisting of 10,000 shares of Tuxpam."

There is another letter, dated June 4, 1918, in which receipt is acknowledged of 500 shares of Tuxpam oil. After Solomon testified that he had not received the 10,000 shares of Tuxpam stock, he was asked as follows:

"Q. Do you remember Mr. Kahn coming to your office, and, in the presence of Mr. Kastel and Mr. Kahn and myself, Mr. Kastel saying to you, 'Mr. Solo-

mon, will you kindly bring in out of the safe the 10,000 shares of Tuxpam Star Oil of Mr. Kahn's?' A. I do not.

"Q. Do you remember going to the safe and bringing 10,000 shares of Tuxpam Star Oil? A. I brought in more than 10,000 shares.

"Q. And did you hand them to Mr. Kastel? A. Mr. Kastel sent in the boy for Tuxpam, and I sent it in to him.

"Q. And were you in the room? A. In what room?
"Q. With Kahn and Kastel? A. I was not.
"Q. But you sent in the stock? A. I sent in the stock."

[1] It is reasonably clear that this stock got into Solomon's possession. Whatever became of the stock thereafter we are unable to say. We are also unable to say whether the 4,000 shares of Tuxpam stock, which the receiver admits he found when he took possession, were the identical shares which were originally turned over as the property of the claimant; but, as no one else is claiming them, it is not important whether they are or not.

In Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, the court declared that a certificate of stock is not the property itself, but the evidence of the property in the shares, and that, as one share of stock is not different in kind or quality from every other share of the same issue and company, the return of a different certificate, or the right to substitute one certificate for another of the same number of shares, is not a material change in the property right held by the broker for his customer. In Sexton v. Kessler, 225 U. S. 90, 97, 32 Sup. Ct. 657, 56 L. Ed. 995, the doctrine above stated was recognized, and it was said that if a broker had in possession the stock of a customer, which he disposes of to others, he may, when called upon to make delivery to that customer, satisfy the demand by delivering "any stock that he has on hand or that he buys when the time for delivery comes." And in Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, the court held that where the trustee of a bankrupt broker finds in the estate certificates for shares of a particular stock legally subject to the demand of the customer, for whom shares of that stock were bought by the bankrupt, the customer is entitled to the same, although the certificates may not be the identical ones purchased for him. In the recent case of Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, the court said that in dealings between brokers and customers stock certificates issued by the same corporation lack individuality; they are like receipts for coin, to be treated as indistinguishable tokens of actual values.

It is clear, therefore, that if the receiver has certificates for 4,000 shares of the stock, the claimant is entitled to obtain possession of them, after discharging his indebtedness to the bankrupts, if indebted he is. The petitioner in this proceeding is in this court assigning for error that the special master erroneously found that the check for \$1,101.60, and upon which the petitioner had stopped payment, was rightfully the property of the bankrupt firm, and should be paid to the receiver before the latter should be required to surrender the stocks which were found in his hands and which belonged to Kahn.

The claimant stopped payment on this check upon the ground that it represented the purchase price of certain stocks known as Lone Star

stocks, and other stocks which Kahn alleges were sold to him by the bankrupts upon fraudulent representations. The special master was unable to find any evidence of such fraudulent representations, made

by the bankrupts or by any one else in their behalf.

The evidence discloses that B. Solomon & Co., through Kastel, one of the firm, was engaged in "rigging the market" as respects the Lone Star stock. The counsel for the claimant was present in Kastel's private room in the firm's offices, although he testified that he did not go there as counsel for the claimant, but was there on his own business, and while there Kastel was using the telephone wire connected with the booth on the curb, and talking over it with regard to Lone Star stock, and was fixing the price of the stock. The following is an excerpt from his testimony:

- "Q. What did Mr. Kastel say over the wire as regards the price of Lone Star? A. He said, 'Make the market 22 cents.'
 - "Q. What next did he say? A. 'Make the market 23 cents.'
 "Q. What next did he say? A. 'Make the market 24 cents.'
 "Q. What next did he say? A. 'Make the market 25 cents;' 'Make the
- "Q. What next did he say? A. 'Make the market 25 cents;' 'Make the market 26 cents; 27 cents; 28 cents; 28½ cents: 27 cents; 27½ cents; forward and backward—28½.' After he had had the prices fixed up to about that figure, while Mr. Kahn was there, he said, 'You see I have put you now in at 27 cents,' although some of it was 27½ cents; 'I will let you have 4,000 shares at 27 as a favor to you and Mr. Newman, and we are going to have this stock go as high as a dol'ar, and you will make a good thing out of it. We took in yesterday \$50,000 worth of stock. We paid through our banks \$54,000 worth of checks yesterday, and to-day we are paying through the bank again about \$28,000 or \$30,000 for Lone Star stock. This is going to be the biggest thing we have ever handled. You will be able to get out of this stock shortly with a nice profit.'"

Then the claimant's counsel was asked and testified as follows:

- "Q. You knew he was rigging the market? A. I personally knew he was riging the market.
- "Q. And you told that to Mr. Kahn, did you? A. No; I didn't tell that to Mr. Kahn.
- "Q. What did you tell Mr. Kahn? A. I told Mr. Kahn that, from what I knew of Kastel, he should make a lot of money.
- "Q. Did you tell Mr. Kahn how Mr. Kastel was working this stock? A. I told Mr. Kahn that Mr. Kastel was working the market, and that in my opinion it was an effort to squeeze the bucket shops.
- "Q. You knew it was an effort to squeeze the bucket shops? A. That I believed that was what they were driving at."

It was for Lone Star stock bought at this interview, 4,000 shares bought at 27 cents, together with interest, that this check for \$1,101.60 was given. The check was given when the Lone Star stock was handed over to Kahn. That stock is still in the possession of the latter, and there is no testimony showing that he ever offered to turn back the stock to the bankrupt; and the question is whether Kahn, who gave the check in payment and then ordered the bank not to pay it, still owes to the bankrupt firm the amount which the check calls for. Payment of the above check was stopped by the maker on the ground, as has been stated, that it was given in payment of the Lone Star stocks, which it alleged were sold to him by the bankrupts upon fraudulent representations made by the latter to the former.

We have examined carefully the evidence in the record, and we are unable to discover that any fraudulent representations were made as alleged. On the contrary, the evidence shows that the claimant must have bought the stock with knowledge that the market was being "rigged," and artificial prices created. We must conclude that Kahn hoped to get in and get out before the bubble burst. He hoped that things would be so shaped that the price would go up. In that hope he had put into that stock \$1,050, and he expected that things would be so manipulated that he would be able to double the amount put in. The matter turned out differently, as is generally the case in such transactions. Kahn took the risk and lost. The result does not afford any justification for the claim that he was fraudulently imposed upon and is entitled to be released from his obligation to pay the amount called for in the check.

[2] Kahn also claims, however, that the 4,000 shares of the Lone Star stock for which this check was given were not purchased on the market by the bankrupts, but were shares which belonged to the bankrupt firm, and were sold to him without disclosure. If that were the case, there might be reason for repudiating the transaction. In Stiebel v. Lissberger, 166 App. Div. 164, 151 N. Y. Supp. 822, a customer directed his brokers to sell for his account certain stocks which the customer owned and which the brokers had in their possession. The brokers without the customer's knowledge became themselves the purchasers of the stocks, and credited him on their books with the proceeds of sale. They claimed that since the purchase was made at the market price on the day of sale the customer suffered no damage. The facts were not discovered by the customer until three years thereafter, when he tendered to the brokers the amount they reported they had sold the stock for and made a demand for the stock, which was refused. The refusal was treated as a conversion, and he was allowed to recover the market price of the stock at the time of the conversion. The principle upon which the case was decided was that a broker, in selling his customer's stocks, is in the position of a trustee, and the law will not allow of the temptation to fraud through the trustee becoming purchaser at his own sale.

If the broker cannot purchase his customer's stocks at a sale he has been authorized to make, can he sell his own stocks to a customer who has given him an order to purchase? If he cannot buy from his customer, has he any better right to sell to his customer? The relation existing between a broker and his customer is ordinarily regarded as one of special agency. Robertson v. Allen, 184 Fed. 372, 107 C. C. A. 254. It is not, however, everywhere regarded as a fiduciary relation. Furber v. Dane, 204 Mass. 416, 90 N. E. 859, 27 L. R. A. (N. S.) 808.

In 9 C. J. 528 it is said:

"If a broker, employed to purchase property, buys it for himself, he is considered a trustee for the principal. A broker, employed to sell property, cannot become buyer thereof, either directly or indirectly."

And we may concede, for the purposes of this case, that a broker who is employed to buy stocks for a customer cannot sell to his customer the broker's own stocks, without a disclosure of the fact that he is selling his own. The rule is well settled, and is stated in Dos Passos on Stockbrokers and Stock Exchanges, vol. 1 (2d Ed.) p. 365, where it is said that—

"The general rule of law which governs the relation of principal and agent is applicable to that existing between a stockbroker and his client; and it is well settled that an agent cannot, without the knowledge and consent of his principal, either sell to or buy from the latter. The principle is based upon the obvious reason that, the position of an agent being one of trust and confidence, many frauds and undue advantages would creep in if the law sanctioned his dealing with his principal in his own behalf. Such a transaction is therefore considered a breach of the agent's duty, and the contract is subject to rescission, irrespective of any question of intentional fraud or actual injury. The law rejects indiscriminately all transactions, whether purchases from or sales to the agent, and whether there is any evidence or intention of fraud or not."

It is, however, held that, if stockbrokers deal in securities on their own account, they may sell such bonds as vendors to their clients as vendees. The relation between them is then that of vendor and vendee, not that of principal and agent. Porter v. Wormser, 94 N. Y. 431, 442.

We should examine more fully into the rule of law above referred to in its application to brokers, if the facts in this case justified it. But the difficulty is that there is an utter failure on the part of the claimant to show that the 4,000 shares of stock under consideration belonged to the bankrupts. It does not appear from what source the stock was derived. Solomon testified that the stock was not the stock of the bankrupts. He stated that he was buying stock for a good many customers, and had none of his own; that what Kahn got was stock which had been bought for some one else, but was not Solomon's. It appears that Solomon bought from one Strasbourger 4,000 shares for account of Kahn, and that he never took that stock up, and never paid Strasbourger for it. If Solomon had owned 4,000 shares which he proposed to turn over to Kahn, he would hardly have contracted with Strasbourger for the 4,000 shares he bought or agreed to buy from him. Solomon may have testified falsely, and we admit that we are not very favorably impressed by his testimony throughout; but the fact remains that there is no testimony in this record which shows that the 4,000 shares which Solomon turned over to Kahn ever belonged to Solomon. In the absence of such testimony, and in the face of the positive testimony of Solomon that the stock was not his, and the acceptance of that testimony as true by the special master and the District Judge, we are unable to hold that what Solomon sold was his own stock; and it not being established that the stock was his own, or that any fraudulent misrepresentations of fact were made and were relied upon, we must conclude that no reason is shown which justified Kahn in stopping payment on this check.

Decree affirmed.

OSLEY et al. v. ADAMS.

(Circuit Court of Appeals, Fifth Circuit. October 13, 1920.)
No. 3454

 Bankruptcy \$\iff 303(3)\$—Evidence held to sustain findings that conveyances were fraudulent.

Evidence tending to show that conveyances by a voluntary bankrupt to his son and by the son to the bankrupt's wife were without consideration, and were made shortly before bankruptcy, though dated four years earlier, and that no change in possession of the property had occurred, held to sustain the findings of the master approved by the trial court that the conveyances were in fraud of the bankrupt's creditors.

 Appeal and error = 193(4)—Insufficiency of averment in petition must be objected to below.

An assignment of error based on insufficiency of averment in petition that plaintiff trustee in bankruptcy represented creditors who were such at the time of the execution of the conveyances attacked, does not require reversal of the decree, where the only objection before the master and the court was to the failure to prove the existence of such creditors, and there was sufficient proof to sustain the master's findings on that point.

 Trial ≡85—Objection to bankruptcy record must specify incompetent portions.

An objection to the reception in evidence, in a suit by a trustee in bankruptcy to set aside fraudulent conveyances, of the record in bankruptcy, much of which was admissible, is insufficient, where there was no particular objection to any portion of the record claimed to be inadmissible.

4. Evidence \Longrightarrow 591—Party not bound by conclusions of adverse party called as witness.

Even if a party to a suit in equity, who calls an adverse party as his witness, is bound by the testimony of such witness to the same extent as by the testimony of another witness, he is not bound by every statement or conclusion of the witness, so that statements that the conveyances were made for a valuable consideration are not binding, where the facts testified to showed the contrary.

5. Appeal and error \$\insigm\$1022(2)—Findings of master, supported by evidence and approved, almost controlling.

On appeal, the findings of the master, approved by the trial judge, are well-nigh controlling, where there is any evidence to sustain them.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Bill by A. C. Adams, as trustee in bankruptcy of J. J. Osley, against Patrick Osley and others, to set aside conveyances by the bankrupt as fraudulent. Decree for complainant (255 Fed. 117), and defendants appeal. Affirmed.

Stephen C. Upson, of Athens, Ga., for appellants. Horace M. Holden, of Athens, Ga., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On September 11, 1917, J. J. Osley filed his voluntary petition in bankruptcy in the United States District Court. The bankrupt's schedules set out \$1,096.05 of liabilities and no assets. A. C. Adams was appointed trustee of the bankrupt's estate.

Thereafter said trustee filed a bill in equity in said District Court against J. J. Osley, Patrick Osley, and Emma Osley, alleging on information and belief that the bankrupt on December 10, 1913, was the owner of a tract of land of 31½ acres in Hart county, Ga., to which he held title, and also had title to and was in possession of a certain tract of land in Madison county, Ga., of 380 acres; that Emma Osley was the wife, and Patrick Osley was the son, of J. J. Osley, and that these three persons entered into a conspiracy to defraud the creditors of J. J. Osley, by having said J. J. Osley convey and transfer his property away without consideration; that in furtherance of said scheme J. J. Osley executed to Patrick Osley a deed to said 31½ acres of land in Hart county, which purported to be executed on December 8, 1913, but which was not recorded until February 12, 1917, and said Patrick Osley in furtherance of said scheme made a deed to his mother, Emma Osley, purporting to be executed on December 19, 1913, but which was not recorded until February 12, 1917; that said J. J. Osley in furtherance of said scheme also transferred to said Patrick Osley a certain bond for title, executed to him by C. C. Boise, covering said 380 acres of land in Madison county, which said bond was by said Patrick Osley transferred to his mother, Emma Osley, said last-mentioned transfer being recorded on February 12, 1917; that all of said fransfers and conveyances between said J. J., Patrick, and Emma Osley were without consideration, were not made in good faith, and were made

to delay and defraud existing creditors of J. J. Osley.

The plaintiff, on information and belief, averred that all of said conveyances and said transfers were executed in the year 1917 and those dated in 1913 were dated back in furtherance of said scheme.

Plaintiff averred that certain creditors now existing and listed in the bankrupt's schedule were creditors of J. J. Osley on December 8, 1913. Plaintiff claimed the right to the possession of said land as constituting assets of the bankrupt's estate and as transferred in violation of the provisions of the Bankruptcy Act and of the Code of Georgia.

The bill prayed for a delivery of said deeds and bond for title, and that said deeds and the transfer of said bond be decreed to be void and be canceled, and that the title and right of possession of said real and personal property be vested in plaintiff and decreed to be assets of the beat want's centre.

the bankrupt's estate.

The defendant filed an answer, moving to dismiss said bill for failure to set out any good and sufficient cause of action; it being nowhere sufficiently alleged that the trustee represented any creditor whose

rights existed when said conveyances were made.

Said answer also averred that the conveyances were made on the dates and for the considerations stated therein, and were not made to delay or defraud creditors, and denied the charge of conspiracy. The case was referred to a special master, who heard the evidence and found in favor of the contentions of the trustee in bankruptcy.

Exceptions to the report were overruled by the court, and a decree

taken in favor of the trustee in bankruptcy.

[1] The evidence in the case fully sustains, if it does not require,

the findings of the master and the decree overruling the exceptions thereto. It appeared that the three Osleys, father, mother, and son, were living together; that J. J. Osley was in actual possession and control of the property in question at the time when the deeds and transfer in question were made by him; that the parties continued living and using the property after the time of such transfers as before, and that no outward evidence of any change of possession took place; that while the deeds and transfer purported to have been made in December, 1913, they were not recorded until February 12, 1917. There was evidence authorizing the master to find that the instruments were not in fact executed until some time between August, 1916, and February 12, 1917, and that no consideration was paid for the deeds or transfer; that a number of the creditors of the bankrupt were such at the time of the execution of said conveyances.

[2] Error is assigned that the court should have dismissed the plaintiff's bill, because the petition did not sufficiently aver that the trustee represented creditors who were such at the time of the execution of the conveyances attacked. It does not appear that any insistence was made on the sufficiency of the allegations of the bill, which averred that certain of the creditors as listed by the bankrupt in his schedules were such at the time of the conveyances. The insistence before the master and before the court, on exceptions to his report, was alone to the alleged failure to prove the existence of such creditors, and there was sufficient proof to sustain the master's findings on this point.

[3] The objection to the reception in evidence of the record in the bankruptcy proceedings is clearly without merit. No exception was taken to the report of the master on this ground. The report was admissible for a number of purposes. Much of it consisted of original evidences of debt, showing their dates. If any part of the record was

inadmissible, it should have been particularly objected to.

[4] Error is assigned on the ruling that the conveyances from J. J. Osley were without consideration, and made to delay, hinder, and defraud creditors, because the plaintiff introduced as witnesses J. J. Osley and Patrick Osley, who swore that the deeds were made for a valuable consideration, and that Patrick Osley went into possession thereunder, and that the plaintiff is bound by their testimony.

While it may be true that the plaintiff, by introducing adversary parties as his witnesses in an equity cause in the United States courts, is as much bound by their testimony as in the case of other witnesses, yet this does not mean that he is bound by every statement or conclusion of such witness, nor does it mean that he may not show that the witness is in error.

In this case, while the witnesses did testify generally that the deeds were made for a valuable consideration, their own testimony showed otherwise, and warranted the finding that the deeds were made without consideration, and that the actual possession of the property and its control remained at all times in J. J. Osley.

[5] The undisputed evidence was that the transfer of the bond for title from Boise was made at the same time as the deed. It was proven beyond dispute that the form on which the deed was drawn was print-

ed by the Bennett Printing House. The form bore a watermark "Courier Bond." The testimony of Bennett, a disinterested witness, was quite positive that he had not printed any forms on Courier Bond paper before August, 1916, and warranted the master in finding that the deed was in fact executed between August, 1916, and the time of its record, February 12, 1917. On appeal, the findings of the master, approved by the trial judge, are well-nigh controlling, where there is any evidence to sustain them. In re Schwab-Kepner Co., 203 Fed. 475, 121 C. C. A. 597; Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339.

The testimony in this case as a whole fully warranted the findings of the master, and the decree overruling the exceptions, and the decree in favor of the complainant is affirmed.

FERRY v. SPOKANE, P. & S. RY. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920.)

No. 3472.

 Dower \$\inser\u00e44\to Under Oregon statute nonresident widow not entitled to dower in lands conveyed by husband.

Under the Oregon Statute (L. O. L. § 7306), providing that "any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state of which her husband died seized," a wife, who was a nonresident of the state at the time of the conveyance of lands within the state by her husband in which she did not join, and also at the time of his death, is not entitled to dower in such lands.

Constitutional law 206(1)—Dower not a "privilege or immunity," within the Constitution.

A state statute, limiting the right of dower in case of nonresidents to lands of which the husband died seized, *hcld* not invalid, as abridging the privileges or immunities of citizens, within the meaning of Const. U. S. Amend. 14.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileges and Immunities.]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit in equity by Evelyn P. Ferry against the Spokane, Portland & Seattle Railway Company and the Central Trust Company of New York. Decree for defendants, and complainant appeals. Affirmed.

James G. Wilson and Geo. B. Guthrie, both of Portland, Or., and Charles Haldane, of New York City, for appellant.

Charles H. Carey, James B. Kerr, and Omar C. Spencer, all of Portland, Or., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant brought a suit to establish her alleged dower rights in certain real estate in the state of

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Oregon, the title to which had stood in the name of her former husband, but which he had sold and conveyed without her signature to the deeds. The court below sustained a motion to dismiss the bill.

[1] The appellant concedes that the bill shows that at the time of her husband's death, and at the time of the conveyances she was a nonresident of the state of Oregon. A statute of the state in force since 1854 provides:

"A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state of which her husband died seized." L. O. L. § 7306.

The statute was taken from the laws of Michigan, there adopted in 1846. In Pratt v. Tefft, 14 Mich. 191, the Supreme Court of Michigan, construing the statute, held that one of its purposes was to provide that a woman might bar her dower by nonresidence, and that a woman residing out of the state at the time of her husband's death was not entitled to dower of lands in the state of which he had been seized, but which he had conveyed without her joining in the deed. That construction was reaffirmed in Ligare v. Semple, 32 Mich. 438, and again in Stringer v. Dean, 61 Mich. 203, 27 N. W. 886. Wisconsin also adopted the Michigan statute, and in Bennett v. Harms, 51 Wis. 251, 8 N. W. 222, it was held that a woman who was not a resident of the state at the time of her husband's death was not entitled to dower in lands which he conveyed during the marriage without her signature, and that the nonresidence intended was a nonresidence at the time of the husband's death, and not at the time of his conveyance of the land. In Ekegren v. Marcotte, 159 Wis. 539, 150 N. W. 969, the former decision was modified, and it was held that the words "residing out of this state" referred, not to the time of the husband's death, but to the time of the conveyance. In Thornburn v. Doscher (C. C.) 32 Fed. 810, in construing the Oregon statute. Judge Deady followed the decisions of Michigan and Wisconsin, and held that a woman not a resident of the state was not entitled to dower in the lands therein of which her husband did not die seized. That construction was accepted by the Supreme Court of Oregon in Cunningham v. Friendly, 70 Or. 222, 139 Pac. 928, 140 Pac. 989. Nebraska also had adopted the statute, and it has there received the same construction as in the states before mentioned. Atkins v. Atkins, 18 Neb. 474, 25 N. W. 724; Miner v. Morgan, 83 Neb. 400, 119 N. W. 781; Burr v. Finch, 91 Neb. 417, 136 N. W. 72.

A statute of Kansas, creating an interest in the nature of dower, provided:

"That the wife shall not be entitled to any interest under the provisions of this section in any land to which the husband has made conveyance, when the wife, at the time of the conveyance is not or never has been a resident of this state."

In Buffington v. Grosvenor, 46 Kan. 730, 2 Pac. 137, 13 L. R. A. 282, the court followed the decisions in Michigan, Wisconsin, and Nebraska, and denied dower to a nonresident wife.

[2] But it is contended that the Oregon statute is unconstitutional, in that it is repugnant to section 2, art. 4, and the Fourteenth Amendment. Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230, is cited, in which it was said:

"The inquiry is: What are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."

The same constitutional objection was made in several of the decisions to which we have referred. In Bennett v. Harms it was held that a nonresident wife's expectancy of dower, being inchoate, was under the absolute control of the state Legislature, and that the Legislature was not prevented from discrimination against those who were not citizens or residents. In Buffington v. Grosvenor the court followed Conner v. Elliott, 18 How. 591, 15 L. Ed. 497, where it had been held that a statute of Louisiana which discriminated in favor of women who contracted marriage within the state, or who contracted marriage out of the state and afterwards went there to live, had no connection with the privileges and immunities provision of the Constitution.

The statute of Oregon was primarily a provision to regulate the conveyance of real estate within the then territory of Oregon, and we may assume that its adoption was inspired by a principle of public policy, having in view the vast distance between the territory and the Eastern States, whence immigration came, the difficulty of communication, the difficulty of ascertaining whether a resident of the territory had a wife "back in the States," and the difficulty of obtaining her signature in case she were known.

The appellant cites decisions from the state of California, such as In re Stanford's Estate, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, which hold that where a state imposes upon the citizens of another state a tax upon their right of inheritance which it does not impose upon its own citizens, the law is invalid under the provisions of the Fourteenth Amendment. It is contended that in principle such a discrimination is not distinguishable from that which is created by the Oregon statute in question here. But we think that the right of dower stands upon a different footing from the right of inheritance.

"Dower is not the result of any contract between the husband and the wife, either express or implied, but it is an institution of the state, founded upon public policy, and made by positive law an incident of the marriage relation." 19 C. J. 460.

During coverture the dower right is a mere inchoate right, which may be abridged or taken away at any time before the husband's death.

"It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away." Randall v. Kreiger, 23 Wall. 137, 23 L. Ed. 124.

On the other hand:

"The general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents." United States v. Perkins, 163 U. S. 625, 628, 16 Sup. Ct. 1073, 1074 (41 L. Ed. 287).

In Thornburn v. Doscher, Judge Deady said:

"It rests with the Legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether."

The Legislature having this power to give or withhold dower, it follows that it has the power to declare the manner in which the dower right may be barred, or the grounds upon which it may be forfeited, and, if so, it has the right to provide that it may be barred by the wife's nonresidence in the state.

This view of the main question leaves it unnecessary to consider the question of laches in bringing the suit.

The decree is affirmed.

FERRY v. CORBETT et al.

(Circuit Court of Appeals, Ninth Circuit. October 18, 1920.)

No. 3473.

Appeal from the District Court of the United States for the District of Oregon.

Suit in equity by Evelyn P. Ferry against Henry L. Corbett and others. Decree for defendants, and complainant appeals. Affirmed.

James G. Wilson and George B. Guthrie, both of Portland, Or., and Charles Haldane, of New York City, for appellant.

Joseph Simon and John M. Gearin, both of Portland, Or., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The questions involved in this case are identical with those which were presented in Ferry v. Spokane P. & S. Ry. Co., 268 Fed. 117, recently decided by this court, and upon the authorities therein cited the decree of the court below is affirmed.

WESTINGHOUSE ELECTRIC & MFG. CO. v. DIAMOND STATE FIBRE CO.

(District Court, D. Delaware. March 27, 1920.)

No. 378.

1. Injunction 63—Granted to restrain interference with contract.

One who induces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong, unless there is sufficient justification for the interference, and if such interference would result in irreparable injury, equity has jurisdiction to enjoin it, provided the contract is lawful.

Monopolies \$\insigm 12(2)\$—Contract requiring patent licensee to buy materials
of licensor not invalid, as creating a monopoly in a "line of commerce."

In a contract by which the owner of patents granted a license to manufacture the patented article, assuming the patents to be valid, a provision requiring the licensee to purchase the material used in such manufacture exclusively from the licensor or its licensees held not invalid, under Clayton Act, § 3 (Comp. St. § 8835c), as tending to create a monopoly in a "line of commerce."

In a suit to enjoin interference with a contract granting a license to manufacture under a patent by which the licensee is to pay complainant royalties, complainant makes a prima facie case on the issue of validity of the contract by proof that he is the owner of the patent and that it is valid on its face.

4. Torts \$\insigm12\$—Interference with contract by third person for his own profit not justified.

A defendant held not justified by the right of competition in inducing a licensee of complainant to purchase material from it in violation of the license contract, of which it had knowledge, by an offer of lower prices and a guaranty of protection from suit, nor by a belief it may have had that the contract would not be violated.

 Injunction = 136(2)—Preliminary injunction restraining interference with contracts.

Preliminary injunction granted, restraining defendant from interfering with contracts between complainant and its licensees under patents.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Diamond State Fibre Company. On motion to strike counterclaim and for preliminary injunction. Motion to strike denied, and for injunction granted.

Willard Saulsbury, of Wilmington, Del., and Kerr, Page, Cooper & Hayward, of New York City, for plaintiff.

Howson & Howson, of New York City, for defendant.

MORRIS, District Judge. The bill of complaint of the Westinghouse Electric & Manufacturing Company, plaintiff herein, alleges the existence of a contract between it and Eisemann Magneto Company (hereinafter referred to as the Eisemann Company); that the defendant, Diamond State Fibre Company, maliciously induced the Eisemann Company to break such contract; and that the plaintiff has similar contracts with numerous other persons, with which the defend-

ant is also threatening to interfere. The bill prays that the defendant be enjoined from any further violation of the plaintiff's rights in the

premises, for injunction pendente lite, and for an accounting.

This is an application for a preliminary injunction, which was heard upon ex parte affidavits and exhibits. The facts alleged in the bill are, in substance, that the plaintiff is the owner of letters patent of the United States No. 1,167,742, for improvement in gear wheels, and No. 1,167,743, for improvements in gears, granted to it July 11, 1916, as assignor of Frank Conrad; that the plaintiff manufactured and sold gears embodying the improvements covered by said patents and also manufactured the gear blanks and materials which it sold to the manufacturers of gears; that the demand for its products aforesaid was great and its business became large and profitable; that with a view of meeting the demand the plaintiff adopted a system of licensing both manufacturers and users of such gears, and under such plan it granted licenses identical in form and conditions to 80 gear manufacturers, among whom was the Eisemann Company: that the contract with the Eisemann Company, made on January 1, 1918, granted to it a license to manufacture and use or sell gears covered by said patents, and the plaintiff by the contract agreed to supply, either direct or through its licensed gear material manufacturers, to the Eisemann Company the material necessary for the manufacture of such gears; that the Eisemann Company on its part by said contract covenanted, among other things, to pay the plaintiff during the term of the license, which was unrevocable by the Eisemann Company, a certain royalty, and to purchase exclusively from the plaintiff, or its licensed gear material manufacturers, material or gear blanks used by it in the manufacture of gears covered by said patents; that the defendant, knowing the contract relations between the plaintiff and the Eisemann Company, and with a view of appropriating to itself the profits and advantages accruing to the plaintiff from its contract aforesaid, induced the Eisemann Company to violate its contract with the plaintiff and to purchase from it, the defendant, the material and blanks employed by it in the manufacture of gears covered by said patents, guaranteeing to the Eisemann Company deliveries of such material and protection from infringement of plaintiff's patents and from liability by reason of the breach of its contract with the plaintiff; that by reason thereof the Eisemann Company has purchased and is now purchasing its gear material from the defendant, to defendant's great profit; and that defendant has been and now is endeavoring, and threatens to continue to endeavor, to induce others of plaintiff's licensees to violate their license agreements in the same manner, to the irreparable injury of the plaintiff.

The defendant's answer, among other things, sets up the invalidity of the patents; charges that the contract with the Eisemann Company and similar contracts, or at least the portion requiring the licensee to purchase its gear material from the plaintiff exclusively, is in violation of the anti-trust laws of the United States; denies that the defendant induced the Eisemann Company to violate its agreement with the plaintiff; denies that defendant guaranteed the Eisemann Company from liability by reason of any breach of contract with the plaintiff;

and denies that gears made from the materials furnished by the defend-

ant were or are gears covered by the letters patent.

[1] It will be observed that the bill is not a bill under the patent laws, but is a bill to enjoin interference by the defendant with the contract relations of the plaintiff. It would serve no useful purpose to repeat here the history of the doctrine of liability for inducing a breach of contract. Such history is recorded and the development of the doctrine shown in Nims on Unfair Business Competition, c. XIII, pp. 347-387; Elliott on Contracts, vol. 3, §§ 2685-2703; 15 R. C. L. 52-64. The principle of law now obtaining both in this country and in England may be stated to be that a person who induces a party to a contract to break it, intending thereby to injure another person, or to get a benefit for himself, commits an actionable wrong unless there is sufficient justification for the interference. See cases cited in note 20, 15 R. C. L. p. 54. If such interference would result in irreparable injury, equity will take jurisdiction, and by means of its injunction protect a party to the contract from malicious interference with the contract relations by third persons, provided, of course, that such contract is not in violation of law or contrary to public policy. Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201 (and note), 122 Am. St. Rep. 232, 11 Ann. Cas. 332.

The doctrine of interference with contracts is not an outgrowth of the patent law and is in no wise restricted to contracts concerning patents. It is obvious, therefore, that the primary and basic questions necessary to be considered are: What is the contract between the plaintiff and the Eisemann Company? Is it lawful? Was it broken? If broken, was its breach induced by the malicious interference of the defendant? And, lastly, should a preliminary injunction, under all the circumstances of law and fact, be granted or refused? All other ques-

tions are secondary and subordinate.

[2] What is the contract between the plaintiff and the Eisemann Company? The express provisions of the contract, so far as they are relevant to the motion under consideration, are as follows:

"Whereas, the licensor is engaged in the manufacture of a composite material adapted for use in the manufacture of gears and is the owner of United States letters patent Nos. 1,167,742 and 1,167,743, dated January 11, 1916, covering gears made from such material; and

"Whereas, the licensor proposes to grant licenses to others (hereinafter referred to as licensed gear material manufacturers) to manufacture and sell

said composite material for use in the manufacture of gears; and

"Whereas, the licensee is desirous of acquiring a license to manufacture and use or sell gears made from such composite material and covered by the said patents: * *

"(a) The licensor hereby gives and grants to the licensee a nonexclusive, nonassignable, and indivisible license, subject to the terms, limitations, and conditions hereinafter set forth, to manufacture and use or sell gears covered by the aforesaid patents throughout the United States, its territories, and dependencies. * * *

"(c) The licensee also covenants to purchase all material or blanks employed by it in the manufacture of gears covered by the said patents exclusively from either the licensor or from licensed gear material manufacturers whose names and addresses shall be supplied to the licensee by the licensor promptly after licenses shall have been granted thereto.

"(d) This license is granted on the express condition that the licensee's

prices, terms, and conditions of sale of gears covered by the aforesaid patents shall be those fixed from time to time and followed by the licensor in making its sales, and the licensee agrees to maintain such prices, terms, and, conditions of sale. * * *

"(f) The licensee admits the validity of and the title of the licensor to the aforesaid patents. * * *"

What gears are "covered by the said patents," within the meaning of paragraph (c) of the contract? Patent No. 1,167,742 relates to gear wheels, and particularly to such wheels as are composed of nonmetallic materials. The materials described in the patent as proper for making such gear wheels is stated in the specification to be:

"Any suitable fabric, such as paper, muslin, or other cloth, or fibrous or porous material of any kind. The fabric is first coated on one side, in any suitable manner, with an adhesive liquid material, for example, preferably a phenolic condensation product, such as bakelite, which is a condensation product of phenols and formaldehyde."

By a process described in the patent the fabric so coated is transformed into a hard, compact, and coherent mass forming the gear blanks. There are 14 claims, of which characteristic claims are:

"1. A self-sustaining gear, composed of fibrous material and a binder."
"3. A gear having a self-sustaining working body portion, composed of laminations of fibrous material and a binder comprising a phenolic condensa-

"7. A gear having a self-sustaining working body portion composed of fibrous material and a phenolic condensation product."

Patent No. 1,167,743 relates to gear wheels made of cloth fabrics, such as duck, muslin, and the like, united by means of an adhesive. There are five claims, some of which are

"1. A gear having a self-sustaining working body portion composed of laminations of cloth cemented together by means of an adhesive."

"3. A gear having a self-sustaining working body portion composed of laminatious of cloth and a phenolic condensation product."

As the Eisemann Company expressly admitted the validity of the patents, any gear coming within the scope of the claims of either of the patents, read in the light of the specifications, is prima facie a gear covered by said patents, and likewise a gear the material for which the Eisemann Company was by paragraph (c) of the contract under covenant to purchase exclusively from the plaintiff or its licensed gear material manufacturers. Whether a gear made of the material purchased by the Eisemann Company from the defendant is such a gear will be hereinafter considered.

Is the contract, or that portion thereof requiring the Eisemann Company to purchase all material or blanks employed by it in the manufacture of "gears covered by the said patents" exclusively from the plaintiff or its licensed gear material manufacturers unlawful or contrary to public policy? Legality of the contract is one of the issues in suits of this nature. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. The defendant in support of its contention of invalidity relies upon the anti-trust laws of the United States and more particularly upon section 3 of the so-called Clayton Act (38 Stat. 730 [Comp. St. § 8835c]), which provides:

"That it shall be unlawful for any person eugaged in commerce, in the course of such commerce, to lease or make a sale or contract for the sale of goods, wares, merchandise, * * * supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

It appears from the affidavits that 82 licenses identical in terms and conditions with the license to the Eisemann Company were granted by the plaintiff to gear manufacturers in the United States, and that this number constitutes more than a majority of the gear manufacturers of this country. It likewise appears that gears differing in composition and design, but supplying in whole or in part the want now filled by the Conrad gears, were being made and used in large numbers before the Conrad gears were put upon the market. The plaintiff's license agreement does not contain any condition that the licensee shall not make, use, or deal in the gears of any competitor or competitors of the plaintiff. The license agreement may not, therefore, be held unlawful as tending to create a monopoly in gears. If the Conrad gear has supplanted other gears, as to which there is no evidence, the cause for such supremacy lies outside the contract, and consequently does not bring the contract in conflict with either the statute or public policy.

Again, as the gear material is unpatented, it may be assumed that there was, prior to the grant of the Conrad patents, a "line of commerce" in such material; but, if the patents are valid, only of course for purposes other than for gears. Yet the license agreement contains no condition that the licensee may not make or deal in the materials for use as ingredients of articles other than gears or use or deal in such articles when made. The patents, if valid, added a new use for the material, but left the field of prior uses of the material and of articles other than gears made therefrom unaffected. The license agreement may not, therefore, if the patents are valid, be held unlawful as tending to create a monopoly or to substantially lessen competition in the line of commerce of making, using, or selling articles made of fibrous material and a binder or laminations of cloth, and a phenolic condensation product, and the like, or articles other than gears made from such material. A contrary result would probably follow if the patents are not valid.

But, assuming the patents to be valid, has the manufacture of gears under the Conrad patents created a new "line of commerce" within the meaning of the Clayton Act, namely, the supplying of material for making Conrad gears, and, if so, may the effect of paragraph (c) of the license agreement be to substantially lessen competition or tend to create a monopoly therein? Whether the making and sale of the materials to go into the Conrad gears is a "line of commerce" within the meaning of the Clayton Act is under the evidence before the court

not free from doubt and no opinion will now be expressed thereon. Assuming, however, that that would constitute such "line of commerce," and that the patents are valid, is the contract a lawful one? Revised Statutes, Sec. 4884 (Comp. St. § 9428) provides that:

"Every patent shall contain * * * grant to the patentee, his heirs, or assigns, for the term of 17 years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the territories thereof."

A patent gives to the patentee the right, not only to prevent others from making the patented article, but also to prevent others from making any ingredient or part of such patented article with intent that such ingredient or part shall be used in the patented article, for as a patentee may maintain a suit for infringement against a person making such patented article, so may he also maintain a suit for contributory infringement against a person making and selling the ingredients or parts for use in the patented article. The right to make the parts and material entering into the patented article, and to exclude others from making them, if such parts and material are unpatented as in this case, would seem to be an inevitable adjunct of the patent and a part of the patent monopoly. There is no evidence in this case that the patentee or his assignee, the plaintiff, ever surrendered this monopoly to the public. I do not see, therefore, that the effect of granting a license to manufacture the Conrad gears, but reserving to the licensor the right to continue to make the gear material, was to surrender to the public the licensor's monopoly to make the material entering into such gears, or to create a "line of commerce" within the meaning of the Clayton Act.

Nor do I see how the effect of reserving such right to the licensor may be to lessen competition that never existed or tend to create a monopoly that was complete in the licensor before the contract was made. This tentative conclusion is, I think, in accord with Wallace v. Holmes, 9 Blatch. 65, 29 Fed. Cas. 74, and not in conflict with Motion Picture Co. v. Universal Film Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959; for as I understand the latter case the question there decided is radically different from the one now under consideration. Furthermore, the trend of the Motion Picture Company Case is not manifest in U. S. v. United Shoe Mach. Co., 247 U. S. 32, 38 Sup. Ct. 473, 62 L. Ed. 968, and it is not clear that the latter case did not modify the former. It is thus seen that if the making and selling of material for Conrad gears is a "line of commerce," within the meaning of the Clayton Act, which is not decided, that the validity of the contract depends upon the validity of the patents,—not the admission of validity made by the licensee, but upon their actual validity.

[3] Are the patents valid? They have not been adjudicated. There is some evidence of public acquiescence, but probably not sufficient to warrant the issuance of a preliminary injunction, if this were a suit to enjoin infringement of the patents. But while I am not able to find from the evidence that special presumption of validity that lies at the foundation of a patentee's right to a preliminary injunction in an infringement suit, yet I am likewise unable to say from the evidence

that the patents are invalid. It must be borne in mind that the primary question with which we are now dealing is whether the contract between the plaintiff and the Eisemann Company is illegal and that the question of validity of the patents is subordinate thereto. If the view of the law as hereinbefore stated is correct, the plaintiff in a suit of this character makes out a prima facie case on the issue of legality of contract by showing that he is the owner of the patent covering the article as to which the license is granted and that the patent is valid on its face. The defendant here has not denied the ownership of the patents by the plaintiff, but has denied their validity. This denial is supported by expert testimony, in the form of an ex parte affidavit, referring to certain prior patents, but copies of the prior patents have not been introduced in evidence. The affidavits also state that vulcanized fiber gears were made for many years before the filing of the Conrad application. While these affidavits throw some doubt upon the validity of the Conrad patents, I am not prepared to hold that the Conrad patents have thereby been shown to be invalid, or that for the purposes of this motion the presumption of validity of the Eisemann contract has been overcome.

Was the contract broken? Upon this issue the patents are conclusively presumed to be valid, for, apart from the rule of law which prevents a licensee from disputing the validity of the patent, the Eisemann Company by the license agreement expressly admitted their validity. Whether the contract was broken depends, therefore, solely upon whether the gears made by the Eisemann Company from material purchased by it from the defendant fall within the scope of the patents. The superficial vulcanization of the cloth or fiber entering into defendant's gear blanks, which seems to be the main difference between the gear blanks of the defendant and those of the plaintiff, still leaves the defendant's blanks within the scope of the claims of the Conrad patents when read in the light of the specifications. Whether a thorough investigation of the prior state of the art will show that the claims of the Conrad patents should be limited to the precise materials set forth in the specifications cannot be determined from the exparte affidavits.

[4] If the contract was broken, was its breach maliciously induced by the defendant?

"Malice in this form of action does not mean actual malice, or ill will, but consists in the intentional doing of a wrongful act without legal justification or excuse." Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702,

It appears from the affidavits that the first gear material supplied in quantity to the Eisemann Company by the defendant was on June 25, 1919. It is not clear from the evidence that the defendant then had knowledge of the contract. It is clear, however, that after October 30, 1919, the defendant had such knowledge and that it thereafter continued to supply such material. What is the justification upon which the defendant relies? It is fourfold, viz.: The right of competition in trade; that it obtained the original orders for material from the Eisemann Company without improper inducement; that when it ac-

quired knowledge of the plaintiff's contract its relations with the Eisemann Company for supplying gear material had been established; and, lastly, that even if the gears made by the Eisemann Company from the material supplied by the defendant are in law and in fact covered by the Conrad patents, the defendant in good faith believed

they were not so covered.

The first two grounds of justification may be considered together. The correspondence between the Eisemann Company and the plaintiff, and between the Eisemann Company and the defendant, shows that for some time prior to June 25, 1919, the defendant was making efforts to sell gear material to the Eisemann Company; that the defendant knew the Eisemann Company was buying its material from the plaintiff, and that it was manufacturing therefrom gears which the plaintiff claimed to be covered by its patents. The necessary inference was that the Eisemann Company was operating under an agreement with the plaintiff. Yet the evidence does not disclose that the defendant made any effort to learn the terms of that agreement, but continued in its efforts to sell gear material to the Eisemann Company and eventually succeeded. What inducement did the defendant offer to the Eisemann Company? Lower prices and the protection set out in the following letter:

"May 9, 1919.

"Eisemann Magneto Company, 32 Bush Terminal Bldg., Brooklyn, N. Y.—Gentlemen: In reference to the matter of purchase of Condensite Celeron chemically treated fabric or paper base, we are willing to accept your orders for gear blanks produced by us in gear blank form, to be machined and cut by you into finished gears for use on magnetos or any other electrical apparatus where it is used as a gear, under the basis that, should the Westinghouse Company interfere legally with you relative to the infringement on their royalty patent which they have on this material, we will protect you in the matter of suit, and accept entire jurisdiction and settlement of such suit by our legal department and financial status in the matter of any action that the Westinghouse Company might bring against you specifically relative to royalty.

"This acceptance is covered by the fact that you intend to use about 100,000 of these gear blanks in your normal production for the year 1919, and our

responsibility is limited thereby. "Very truly yours,

"JMT.ES

Diamond State Fibre Company, J. M. Taylor, Vice President."

But apart from this letter I am inclined to agree with the court in Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702, that the right of competition does not justify a person in knowingly and deliberately, for his own benefit or advantage, inducing the breach of a contract by offering lower prices. It is true that it does not appear from the evidence that the defendant had actual knowledge of the contract before June 25, 1919, but it does appear that the defendant had actual knowledge thereof on or about October 30, 1919. So far as is disclosed by the evidence, the inducements were continuing inducements, and there is no evidence that they were withdrawn after October 30th. Under these circumstances, were the sales after October 30th justifiable, even though the defendant's relations had been theretofore established? As I now see it, the continuance of the inducements after knowledge of the contract was not

innocent (Menendez v. Holt, 128 U. S. 514, 523, 9 Sup. Ct. 143, 32 L. Ed. 526), and the previous relations, even if they were innocent, do not furnish a justification for the sales, under like inducements, after October 30th.

If the gears made by the Eisemann Company from the material supplied by the defendant are covered by the Conrad patents, is the defendant entitled to exoneration, if it in good faith believed that such gears were not covered by those patents? As this would not be a valid defense in an infringement suit, it is difficult to see upon what principle such belief would be a sufficient justification for interference with the contract relations of the plaintiff.

[5] Should a preliminary injunction, under the foregoing circumstances, be granted or refused? The general rules of law touching the granting of preliminary injunctions were well stated by Judge Bradford in Harriman v. Northern Securities Co. (C. C.) 132 Fed. 464, 475, thus:

"The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would on the contrary assumption be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought is the preservation of a fund in controversy, or the maintenance of the status quo, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant."

The relations of the Eisemann Company with the plaintiff having already been terminated or suspended, the plaintiff, should it ultimately prevail, would not sustain irreparable injury by a continuance of defendant's relations with the Eisemann Company until final decree. On

the other hand, the interruption of defendant's relations with the Eisemann Company by an injunction pendente lite, if the defendant should ultimately prevail, might result in great detriment to the defendant. But an interference during the pendency of this cause with the contract relations of the plaintiff and its licensees, other than the Eisemann Company, would, should the plaintiff ultimately prevail, result in greater injury and detriment to it than would, on the contrary assumption, be sustained by the defendant through the allowance of the preliminary injunction touching such contracts. As to these contracts I am of the opinion that the status quo should be maintained and a preliminary injunction allowed, but the decree should be so moulded as not to enjoin the defendant from supplying gear material to the Eisemann Company until the further order of the court.

The defendant by its answer set up a counterclaim based upon the alleged unlawfulness of the plaintiff's contracts. The plaintiff filed a motion that the counterclaim be stricken out. This motion and the motion for preliminary injunction were heard together. The questions raised by the motion to strike should not now be finally decided, but should be reserved until after final hearing.

An order denying the motion to strike and a decree for a preliminary injunction in accordance with this opinion may be prepared and submitted.

UNITED STATES, to Use of WENNEMER CONST. CO., Inc., v. ARNOLD et al.

(District Court, D. Connecticut. September 3, 1920.)

No. 2141.

United States \$\infty\$=67(3)—Final settlement made six months before action on contractor's bond.

A letter of the Bureau of Yards and Docks to a contractor, with other correspondence, held a final settlement as of the date of such letter, within Act Feb. 24, 1905 (Comp. St. § 6923), requiring government contractors to give bond, and providing that, if suit be not brought by the United States within six months from completion, then those supplying labor and materials may sue, notwithstanding correspondence by the architect, wherein he confused final payment and final settlement, and the further fact that a voucher and final release prepared by the architect was not signed by the bureau.

United States \$\infty\$=67(3)—"Final settlement" and "final payment" on government contracts distinguished.

Within Act Feb. 24, 1905 (Comp. St. § 6923), relating to actions on bonds of government contractors, the term "final settlement," which marks the beginning of the six-months period at the expiration of which materialmen, etc., may sue, refers to the administrative settlement, occurring when the department determines the amount due, and is entirely distinct from the "final payment."

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Final Payment; First and Second Series, Final Settlement.

3. United States \$\iiint 67(3)\$—Subsequent consideration of extras held not to affect final settlement.

In an action on a government contractor's bond, the time of final settlement made by the department, which started the running of the six-

months period that must elapse under Act Feb. 24, 1905 (Comp. St. § 6923), before materialmen can sue, was not affected by the fact that the department thereafter considered small claims for extras.

At Law. Action by the United States, for the use and benefit of the Wennemer Construction Company, Incorporated, against Ray H. Arnold, doing business as the R. H. Arnold Company, and another. On plea to the jurisdiction, asserting that the suit was premature. Plea overruled.

Tuttle, Gilman & Marks, for use plaintiff.

Lewis Sperry, of Hartford, Conn., and E. P. Morey and William Henry White, both of Washington, D. C., for defendants.

THOMAS, District Judge. This is a suit by subcontractors of defendant Arnold, who contracted to construct a building for the Navy Department at submarine base, New London, Conn., under direction of the Bureau of Yards and Docks and by authority of an act of Congress. Defendant Arnold gave a bond to the United States, with the Globe Indemnity Company, codefendant, as surety, as required by the Act of Congress of August 13, 1894 (28 Stat. 278), as amended by Act of February 24, 1905 (33 Stat. 811 [Comp. St. § 6923]).

The plea to the jurisdiction is upon the ground that the suit was pre-

maturely filed, and therein it is alleged that-

Company Garage

"There has been no 'final settlement' within the meaning of the act of Congress upon which the plaintiff's and intervening petitions are based" and "the period of six months allowed to the United States within which to bring suit upon the bond set out in the petition and intervening petitions has not yet begun to run."

The question, therefore, to be here decided, is whether or not six months prior to the bringing of these actions there was a "final settlement" within the meaning of the statute, and what is meant by the words "final settlement" as used in the act.

The parties have entered into a stipulation in action No. 3, in which stipulation the facts pertinent to the question here involved are set forth. Additionally, the parties have stipulated (as the facts in each of the three cases are substantially the same) that the decision made by this court in action No. 3 shall govern and control in each of the other actions. The facts discussed in this memorandum, however, are only the facts appearing in action No. 3.

This suit was brought on March 17, 1919. Plaintiff's petition, among

other things, alleges:

"* * And said contract and the work thereunder and said additional and extra work were duly completed and were accepted by the United States government and the Bureau of Yards and Docks, Navy Department, and final settlement thereof was dated on or about July 30, 1918. * * That no action or suit has been brought by the United States of America against the defendants, or either of them, within the six months immediately succeeding the completion and final settlement of the contract between Ray H. Arnold, doing business as Ray H. Arnold Co., and the United States government, nor has one year elapsed prior to the commencement of this action since the completion and final settlement of said contract."

If the facts therein alleged are true in fact and law, the plea must be overruled, and, if they are not, the plea must be sustained.

On October 20, 1917, the defendant Arnold entered into a written contract (No. 2538) with the United States, whereby Arnold agreed to construct and complete at the submarine base, New London, Conn., one building for use as officers' quarters in accordance with the provision of specification No. 2538, as contemplated by item 2, paragraph 290, thereof. The work was to be completed in 118 calendar days. The contract further provided as follows:

"(6) For and in consideration of the faithful performance of this contract, the party of the first part [contractor] shall be paid upon vouchers prepared, certified, and approved in the usual manner and payable through such Navy Pay Office as the party of the second part [United States] may elect, the sum of ninety-three thousand nine hundred ninety-one (\$93,991.00) dollars in the manner provided in the specification aforesaid."

Said contract was signed on behalf of the United States by the Acting Chief of the Bureau of Yards and Docks under the direction of the Secretary of the Navy. On October 20, 1917, the Globe Indemnity Company executed and delivered, and there was filed, a bond in the usual form for the sum of \$28,197.30. The obligation of the bond was for the payment by the contractor to all subcontractors, and for material, labor, etc. During the course of the work certain extra work was ordered by the United States.

On January 25, 1918, Wennemer Construction Company entered into a contract with the defendant Arnold to supply certain brick, lime, cement, etc., on the officers' quarters referred to, and in course of time it fulfilled its contract with the Arnold Company. All of the things required to be done by the Arnold Company under its contract with the government were done, and the work was completed and accepted, more than six months and less than one year prior to the institution of these proceedings, except as to a few minor items. The contention of the plaintiff is that "final settlement" was fixed by the bureau on July 30, 1918. The contention of the defendant is that there never was a "final settlement" within the meaning of the statute.

On July 30, 1918, the bureau wrote the architect as follows:

"Subject: Contract No. 2538, October 20, 1917, of R. H. Arnold Company, for Building for Officers' Quarters, Submarine Pase, New London.

"Reference: (A) Base Letter No. 2538, 7/24/18.

"1. For the purpose of determining the contractor's responsibility for delay, the contract will be regarded as complete as of July 22, 1918, when all the

work, except a few items of a minor character, were finished.

"2. The period of delay—February 26 to July 22—was accordingly 146 days. Of this period, 3 days were lost on account of delay in staking out the building, 22 days by reason of abnormal weather conditions, and 3 days owing to water shortage; these delays, amounting to 28 days, being regarded as unavoidable within the meaning of paragraph 14 of the general provisions of the contract. For the remainder of the delay, 118 days, the contractor appears, upon the facts at hand, to be responsible, and liquidated damages therefor, amounting, at the agreed rate of \$100 a day, to \$11,800, will accordingly be assessed."

The plaintiff claims that this letter, together with other correspondence, later referred to, administratively fixed July 30, 1918, as the date

of "final settlement," within the terms of the statute and the decisions

of the courts respecting its meaning.

On March 8, 1919, the bureau forwarded to attorneys for original plaintiffs herein certified copies of the contract and bond, which had been duly certified by the Treasury Department, where duplicate originals were filed. The letter of the bureau accompanying the same is as follows:

"Subject: Contract No. 2538, October 20, 1917, of R. H. Arnold Company, for Officers' Quarters Building, Submarine Base, New London, Conn.

"Inclosure: 1.

"Gentlemen: With reference to your letter of February 5, addressed to the Treasury Department, with which you inclosed affidavit in behalf of the Wennemer Construction Company, the bureau transmits herewith a copy of the above-mentioned contract and accompanying bond. These copies are certified by the Treasury Department, where the original documents are filed.

"Basis of settlement under this contract was approved by the bureau July

30, 1918."

This letter was evidently in reply to the attorneys' letter, dated February 5, 1919, inclosing an affidavit as required by the statute. Some time subsequent to August 6, 1918, there was prepared in the office of the architect a paper in the form of a statement, having no title or other name, but sometimes referred to in the department as a voucher; also a paper headed "Final Release." These papers were never signed by any one, nor was any other act ever done in relation thereto, except that they were sent by the architect to the contractor, Arnold, who received the same on or about August 15, 1919.

The voucher, Exhibit A, discloses that the "date of delivery or service" corresponds to the identical date of the letter written by the bureau to the architect, to wit, July 30, 1918, in which it was stated that "the contract will be regarded as complete as of July 22, 1918." This voucher is a carbon copy on a form approved by the Comptroller of the Treasury, refers to the contract under consideration here, and shows the total amount that the contractor has earned by virtue of the contract and the extras. Therein are deducted the previous gross estimates, the 10 per cent. reservation, and the liquidated damages, and the amount thereunder found due to the contractor, viz. \$390.12, is the amount due after deducting the reserve percentages and part of the claims of the government. The two final pages show the amounts of reserve percentages retained from all the earlier vouchers, and from that total there is deducted all liquidated damages, in accordance with the bureau's letter of July 30, 1918, not deducted in the earlier part of the voucher.

The "Final Release," which accompanied the above-described voucher, contains, among other things, the following recitals:

(a) "It is contemplated that final payment thereof shall not be made until the party of the first part shall have executed and delivered a final release of all claims or demands growing out of the contract."

(b) "Whereas, all the conditions, covenants, and provisions of the said contract have been performed and fulfilled by and on the part of the party of

the first part" (Arnold).

(c) "In consideration of \$82,103, * * being the full and entire sum due upon the completion of the work."

This release in full is signed.

[1] From the foregoing it is still further apparent that July 30, 1918, was the day regarded as the date of final settlement, that these later documents (the voucher and final release) recognized such a status, and that they had reference to the subsequent step of "final payment." That this conclusion must be correct is further apparent from the letter of the bureau, dated March 8, 1919, in which it is stated:

"Basis of settlement under this contract was approved by the bureau July 30, 1918."

It was then but natural that the voucher and final release should be sent to Arnold for his signature. That he failed to sign and return them is of no importance here. The vital point is that they were sent. The steps necessary to be taken according to the "routing slip" all had to do with "final payment"—not "final settlement."

But the defendant lays stress on the point that the Exhibits A and AA (the voucher and final release) were not signed by the bureau. It was not necessary that they should be. They were mailed to the defendant, and it was apparent that they awaited only the signature of Arnold, and there was no particular reason why the Public Works Office should sign the voucher until it had been returned by Arnold with his signature first attached.

The plaintiff contends that the date of "final settlement," for the purpose of fixing the time within which a suit could be properly brought by subcontractors, was July 30, 1918, and that hence this suit, brought March 17, 1919, was more than six months after the date of final settlement and less than one year, as provided in Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, which, so far as is here material, provides as follows:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the District in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his securities, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later."

The wording of the statute is clear and explicit. The act specifically provides that a subcontractor is entitled to a certified copy of the contract, bond, etc., only in the event that six months have elapsed from the completion and final settlement of the contract, and only in the event that within six months no suit has been brought by the United States. The circumstance that the Treasury Department has certified

the contract, specification, and bond and the Bureau of Yards and Docks forwarded same to plaintiff's attorneys, equally indicate that the Treasury Department and the Bureau of Yards and Docks have both concluded and determined that there had been a "final settlement" of the contract, within the meaning of the act, more than six months prior to the certification and dispatch of the certified copy to plaintiff's attorneys.

In view of these facts it hardly requires judicial interpretation to ascertain when "final settlement" was made, or what the words signify within the meaning of the act. It further appears that in his letter of August 6th, replying to Arnold's telegram asking for "immediate partial payment," the architect says:

"Subject: Contract No. 2538 for Officer's Quarters; Partial Payment Voucher.

"Gentlemen: Your telegram of August 6th, requesting immediate partial payment on the above contract, has just been received. You are advised that the bureau has authorized an assessment of damages due to a certain number of days' delay in completion. The preparation of final partial payment voucher and reservation voucher is being held up awaiting decision as to whether the assessment for liquidated damages will be at the rate of \$50 per day or \$100 per day. As soon as instructions on this point has been received, final partial payment and reservation vouchers on the above contract will be prepared immediately and forwarded to you."

From this it is apparent that the architect must have considered "final settlement" as fixed, and that the only matter unfinished was the "final partial payment voucher and reservation voucher," because the architect adds that, as soon as instructions were received as to exact amount to be deducted for liquidated damages, "final partial payment and reservation vouchers * * will be prepared immediately and forwarded you."

But the defendant contends that this is an erroneous conclusion, because of the contents of the architect's letter of October 17, 1918, which is as follows:

"Subject: Cont. 2538, for Officer's Quarters; Warranties and Completion of Items.

"Gentlemen: In line with previous request, you are reminded that final settlement cannot be made on the above contract until satisfactory ten-year warranty and bond for roofing have been submitted in accordance with par. 108 of the above specifications, and a satisfactory warranty for heating in accordance with par. 249 of the above specifications, to the effect that the contractor will repair or replace all work, materials, and equipment which may prove defective or insufficient within one year after the date of acceptance. You are further reminded that urinal basin to replace broken one, toilet partition rods, and curtain for Commander's shower bath have still not been supplied. The above items have been called to your attention repeatedly, and it is requested that they be complied with without further delay."

But, from a careful reading of that letter in the light of what preceded, it is apparent that what the architect meant when he used the words "final settlement" was not the "final settlement" as an administrative act, for the purpose of fixing the time within which suits by subcontractors could be brought, but "final payment," as had been requested by Arnold, and which had been the subject of the prior discussion. The fact is very apparent when we examine the letter and ascertain the

architect's reasons for declining to make final settlement. Bonds were necessary in connection with the roofing and heating clauses of the contract, and these Arnold had not furnished, and it was perfectly natural that "final payment" could not be made until these bonds were furnished.

That this conclusion must be correct is apparent from the tenor of the architect's letter, dated October 23, 1918, in answer to Arnold's "question" respecting the bonds, for the letter reads as follows:

"Subject: Cont. 2538 for Officers' Quarters; Warranty for Roofing.

"Gentlemen: 1. In answer to your question in regard to what kind of bond and warranty is desired, you are again referred to paragraph 108 of the specifications in which it is stated that: 'The contractor shall furnish a ten-year bond * * * in a sum equal to the value of the roofing work, warranting that for a period of ten years he will make at his own expense all repairs that become necessary to maintain the roofs in a waterproof condition, injury from any cause other than ordinary wear and tear of the elements being accepted.' The specifications would appear to be sufficiently clear on this point to answer your question."

Here again it appears that the furnishing of the bonds is all that stands in the way of "final payment," not "final settlement." The same conclusion is justified respecting the letter of the architect to Arnold, dated June 30, 1919, and it is not necessary to quote it.

[2] That there is this fundamental distinction to be drawn between "final settlement" and "final payment" appears from the opinion of the Supreme Court of the United States in Illinois Surety Co. v. United States, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, which case counsel on both sides cite and rely upon to establish their claim. Justice Hughes said (240 U. S. on pages 218, 219, 221, 222, 36 Sup. Ct. 323, 324, 60 L. Ed. 609):

"As such determinations are regularly made in the course of administration, nothing would seem to be gained by postponing the date, from which to reckon the six months, to the time of payment. Indeed, if an amount were found to be due from the contractor, and he was insolvent, there might be no payment, and, if payment were essential, there would be no date from which the time for the bringing of the creditors' action could be computed. The pivotal words are not 'final payment,' but 'final settlement,' and, in view of the significance of the latter term in administrative practice, it is hardly likely that it would have been used had it been intended to denote payment. We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination, when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months period runs. The time of the final administrative determination of the amount due is a definite time fixed by public record and readily ascertained. As an administrative matter, it does not depend upon the consent or agreement of the other party to the contract or account. The authority to make it may not be suspended, or held in abeyance, by refusal to agree. Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated, if properly raised in judicial proceedings; but this does not affect the running of the time for bringing action under the statutory provision. In the present case the construction of the building was in charge of the Secretary of the Treasury and under the general supervision of the Supervising Architect. The Secretary of the Treasury was authorized to remit the whole or any part of the stipulated liquidated damages as in his discretion might be just and equitable. Act

June 6, 1902, c. 1036, 32 Stat. 310, 326. On August 21, 1912, the Supervising Architect, having received the certificate of the chief of the technical division of the office that all work embraced in the contract had been satisfactorily completed, made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor, and that the proper voucher should be issued in favor of the contractor for the balance, to wit, \$3,999.01. And on the same date this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the 'final settlement' of the contract within the meaning of the act. We understand that the administrative construction of the act has been to the same effect. The regulation of the Treasury Department, as it appears from its circular issued for the information of persons interested in claims for material and labor supplied in the prosecution of work on buildings under the control of that department (Dept. Circ. No. 45, Sept. 12, 1912), is as follows: 'The department treats as the date of final settlement mentioned in said acts' (referring to the acts of 1894 and 1905 supra) 'the date on which the department approved the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly."

Thus it is apparent that clear distinction must be made between the words "final settlement" and "final payment," and that distinction is apparent in the instant case from the discussion supra. The concluding sentence of the court in the case just cited is finally confirmatory of the conclusion here reached, because the bureau in its letter of March 8, 1919, quoted in full supra, said in part:

"Basis of settlement under this contract was approved by the bureau July 30th, 1919."

See, also, American Bonding Co. v. United States, 233 Fed. 364, 147 C. C. A. 300; United States v. Robinson, 214 Fed. 38, 130 C. C. A. 432; Robinson v. United States, 251 Fed. 461, 163 C. C. A. 637; United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409.

[3] The defendant contends, further, that the few minor items, referred to in the various letters of the architect, which were not completed or furnished, which were trivial in their nature, and which were taken into consideration by the bureau after July 30, 1918, prevented a complete performance, and hence there could have been no "final settlement." This fact does not alter the case. In some of the authorities cited the same situation arose, and was urged upon the court; but the claims there made were rejected.

Further discussion of the authorities, which are all in general accord, is unnecessary. It is clear that July 30, 1918, was the date on which "final settlement" was fixed administratively. The suit was not, therefore, prematurely brought, and the plea to the jurisdiction is overruled.

Ordered accordingly.

PIPE & CONTRACTORS' SUPPLY CO. v. FIRST NAT. BANK OF LITCH-FIELD.

(District Court, D. Connecticut. September 1, 1920.)

No. 2156.

1. Sales 332—Seller held not warranted in reselling, reasonable time not having elapsed.

Where defendant bank sold plaintiff secondhand machinery, under an agreement providing for down payment, and for payment of the balance when the machinery was loaded on cars, the bank, under Gen. St. Conn. 1918, § 4727, providing that an unpaid seller may rescind the transfer of title and resume the property, provided the buyer has been in default for an unreasonable time, applicable because the sale occurred in Connecticut, was not warranted in rescinding the sale within a very few days after the machinery was loaded on cars furnished by plaintiff; it appearing that the bank recognized plaintiff's right to notice of loading by premature demand of payment, which showed the loading had not been completed, and that the resale was at a considerable advance.

2. Sales \$\infty\$=418(1)—Damages in action for breach.

Where a bank wrongfully rescinded the sale of secondhand material, reselling to another, held, that the buyer was entitled to recover the difference between the value of the machinery and the purchase price.

At Law. Action by the Pipe & Contractors' Supply Company against the First National Bank of Litchfield. Judgment for plaintiff.

Benjamin Slade, of New Haven, Conn., for plaintiff. Lancaster & Foord, of Torrington, Conn., for defendant.

THOMAS, District Judge. This is a suit to recover damages for an alleged breach of contract. The parties have stipulated as follows:

"The above-entitled cause shall be tried by the Judge of the United States District Court, and submitted to him for determination and decision, and the parties hereto hereby waive the right of trial by jury."

The plaintiff is a New York corporation, and deals in new and secondhand pipe and fittings, engineers' supplies, boilers, engines, pumps, mine and mill supplies, derricks, wire ropes and blocks, cars, rails, hoisting engines, etc.

The defendant is a national bank, located at Litchfield, Conn., and was on the 25th of July, 1918, the owner of—

1,600 feet of 24-inch standard gauge 12-pound track.

1,600 feet of 2-inch pipe.

500 feet of 45-pound rail.

1 Leynes drill sharpener.

- 1 75 H. P. Titusville Iron Co. boiler, good for 100 pounds of steam.
- 1 Mogul oil engine, 4 H. P.
- 1 125-light generator, General Electric Co.
- 1 75-light generator, United States Electric Co.
- 1 air compressor, Ingersoll Rand, 350 cubic feet, steam 12x10, air 10x12, shop No. 25828, 120 pounds steam.
- 2,000 feet $2\frac{1}{2}$ -inch pipe.
 - 5 24-inch V-shaped cars.

1 Universal crusher, 11x22, 35 H. P. engine, with buckets, screens, capacity 8 yards.

1 small 3-legged derrick.

300 feet %-inch Ingersoll Rand hollow drill steel.

Miscellaneous lot of valves, drill steel, Jap hammers, steam drills, etc.,

all described in Plaintiff's Exhibit B and then located on what was known as the Wigwam reservoir job. All of said property was in good secondhand condition. On July 25, 1918, the parties to this suit entered into a written contract, which was marked "Plaintiff's Exhibit A." in evidence, and is as follows:

"The First National Bank of Litchfield, Conn.

"July 25, 1918.

"We hand you herewith check for \$500, and agree to pay the further sum of \$1,475 for the material now on the Wigwam reservoir job, named on attached list, when it is loaded on cars at the Litchfield station. This \$1,975 includes the purchase price and moving same to station.

"Pipe & Contractors' Supply Co.
"M. Paltrewitz, Treas.

"Accepted: Charles H. Coit, Vice Pres. "The First National Bank of Litchfield, Conn."

On the same day the plaintiff paid to the defendant the sum of \$500, which the defendant accepted as a partial payment in accordance with said contract. On August 15, 1918, the defendant on its letter head wrote the plaintiff as follows:

"Pipe & Contractors' Supply Company, 3 Dover Street New York, N. Y .-Gentlemen: In reply to your letter, signed by Mr. D. Harris August 5th, I beg to say, in regard to the material you purchased from us on July 25th, which is at the Wigwam reservoir dam, we expect the cars to be placed here on Monday next, August 19th, and the material will be on the ground ready to load. Mr. Parker expected to be at your office Tuesday or Wednesday; but, if he called there we have heard nothing from him in reference to his visit. Kindly acknowledge receipt of this letter. I understood that you wanted to have some one here when the stuff was ready to load,

"Very truly yours, Charles H. Coit, Vice President.

"CHC/DB."

On August 22, 1918, the defendant on its letter head wrote the plaintiff as follows:

"Pipe & Contractors' Supply Company, 3 Dover Street, New York, N. Y.— Gentlemen: In reference further to our letter of August 15th, I beg to say that much of the material is already loaded and we are assured the balance will all be on cars to-morrow afternoon, except crusher and boiler, which are on the ground and we feel sure it will be loaded on Saturday. Kindly give this your prompt attention and favor us with your check for \$1,475, as agreed. "Very truly yours, Charles H. Coit, Vice President.

"CHC/DB."

From this letter it is perfectly clear that, aside from the crusher and boiler even, not all of the balance of the material was loaded, so that when this notice was sent, demanding payment of the balance, the stone crusher and boiler, both very heavy and cumbersome articles. were not loaded, and some of the other material was not loaded; vet in this same letter the bank says, among other things, "Favor us with vour check as agreed." "As agreed" refers to the contract. The contract says: "We agree to pay * * * \$1,475 when it is loaded on cars at Litchfield." The demand for payment was premature, because the contractual obligation of the bank was clear and specific, and it had not performed its part of the contract, but was demanding payment before its obligation to load was completed.

No notice of any kind was sent after August 15th, advising the plaintiff that it was all loaded on the cars at Litchfield. But upon the receipt of the letter of August 15th Mr. Paltrewitz, for the plaintiff, called up Mr. Coit on the telephone, and asked him to ship the goods when all were loaded on sight draft with bill of lading; but Mr. Coit refused to do this, and on August 31st the defendant wrote the plaintiff as follows:

"The Pipe & Contractors' Supply Co., 3 Dover Street, New York, N. Y.—Gentlemen: Not having heard from you, in order to protect ourselves, we are obliged to sell the materials from the reservoir job, which we advised you was loaded on cars here, and inclose herewith our check for \$414, being the balance of your check for \$500, after deducting charges already incurred for demurrage on cars of \$86. We regret that you were unable to avail yourself of the opportunity to handle this stuff, but we could not afford to hold it here any longer.

"Very truly yours,

Charles H. Coit, Vice President.

'CHC/DB."

On September 5th the plaintiff wrote the defendant as follows:

"First National Bank, Litchfield, Conn.—Gentlemen: We were in receipt of your letter of August 31st, 1918, accompanied by your check for \$414.00 yesterday afternoon, and herewith return same to you. We are surprised at its contents. It is very evident that you have defaulted in your contract. We have always been ready, able, and willing to carry out our end of this agreement, and are presently ready, able, and willing to carry out same. What we desire is the merchandise and nothing else. We insist upon receiving this merchandise, or otherwise we shall be compelled to adopt other measures in the protection of our interest.

"Yours truly, "BA. Encl.

Pipe & Contractors' Supply Co., Per D. Harris, B. A."

The plaintiff arranged with the Railroad Administration for the cars to be used for the shipment and for a special permit. In accordance with this arrangement the cars were sent to Litchfield, and the record of the railroad company (Defendant's Exhibit 1) shows that one car arrived and was placed on August 19th, one on August 20th, and the third car on August 23d, all at noon. It will be recalled that the bank, in its letter of August 22d, said:

"We are assured the balance will all be on cars to-morrow afternoon, except crusher and boiler, which are on the ground, and we feel sure it will be loaded on Saturday"

—and the balance payment was requested. This was not only a demand made prematurely according to the terms of the contract, but was one made upon a guess, as at the time of writing that letter there was no car in Litchfield on which to complete the loading, as the third car did not arrive until noon of the day following the writing of the letter demanding balance of payment.

So also was the letter of August 31st prematurely written, so far as the statement respecting demurrage is concerned. Exhibit 2 discloses that the bill for demurrage was not mailed by the railroad company until August 31st at 5 p. m. from the Hudson Terminal Station, New

York City, and could not possibly have reached Litchfield until the morning of September 1st, and that the bill for demurrage was not paid until September 31st—according to Exhibit 1—when it appears that \$4 was refunded, which would have made \$82 for demurrage, and not \$86, and the amount of the check due the plaintiff according to the defendant's theory of the matter was \$418, and not \$414, as was inclosed in the letter of August 31st.

Mr. Mills loaded the material. He testified that it was not all loaded until 8:30 p. m. on August 23d, and that he "staked up" the cars ready for movement on August 24th. While from the fact that the last car did not arrive until noon of the 23d I should be inclined to question the accuracy of Mills' recollection that he finished all loading at 8:30 p. m. on the same day as the car arrived, plus his financial interest in the resale of the property, yet, if we concede such to have been the fact, we find that the letter of August 22d was written two days earlier than the plaintiff was called upon to make payment to the defendant.

All the material included in the inventory, Exhibit B, was resold by the defendant to a third party for a greater amount than the price named in the contract. How much more, or for what price, the vice president and sole representative of the bank, in charge of this whole transaction, testified that he could not remember. The defendant sent no notice to the plaintiff, except that contained in its letters of August 22d and August 31st.

Upon these facts, the plaintiff alleges that the defendant failed, neglected, and refused to deliver the material inventoried to the plaintiff, and to perform its part of the contract as expressed in Exhibits A and B. The defendant alleges that it did tender delivery of the goods as called for by the contract by loading them when it did on the cars at Litchfield.

[1] Both parties admit that the contract is expressed in Exhibits A and B. Two questions are presented:

First. Did the defendant, who had the first work to do under the contract, perform its contractual obligations, and, if it did, what was its remedy or duty?

Second. Did the plaintiff violate its obligations under the contract? That the defendant recognized a duty to notify the plaintiff is apparent from the fact that it sent two notices, on August 15th and August 22d. It was the duty of the defendant, under the contract, to load all of the material contained in Exhibit B, because it is expressly provided in the contract that the price agreed upon includes "purchase price and moving same to station" and "when it is loaded on cars at Litchfield station." It is not necessary to decide, as matter of law, whether the defendant was then bound to give notice of the loading, or whether it was the duty of the plaintiff to inform itself. On this subject the contract is silent. The defendant, however, evidently recognized that it was incumbent upon it to notify the plaintiff, and so sent its notice of August 22d, and possibly was acting under the inference suggested in section 4726 and section 4727, G. S. Conn.

It is not necessary to decide the question, because the whole case

turns upon broader principles. If we assume, as contended for by defendant, that the goods were in fact all loaded on the 23d, and "staked up" ready for movement on the 24th, under the statute law of Connecticut, and all decisions thereunder, the plaintiff was entitled to a reasonable time after the delivery was completed, as alleged, on the 24th, within which to make payment of the balance of the purchase price before the defendant could reclaim title and resell the goods. The arguments of counsel with reference to the right of the defendant to resell must be predicated upon a transfer of title from the defendant to the plaintiff at some time, because, in law, a right of resale is predicated upon a rescission of the transfer of title and a resuming by the original seller of the title in himself. Had the defendant the right to rescind the transfer of title and revest it in itself for the purpose of the resale under the evidence in this case? Section 4727 G. S. Conn. (Revision of 1918), and the evidence in this case, answer that question in the negative, for it provides, inter alia:

"Sec. 4727. When and How the Seller may Rescind the Sale. An unpaid seller having a right of lien or having stopped the goods in transitu may rescind the transfer of title and resume the property in the goods, provided, he expressly reserved the right to do so in case the buyer should make default, or provided, the buyer has been in default in the payment of the price an unreasonable time."

In the case at bar there was nothing in the contract which would bring the defendant within the first clause quoted above, and the only remaining way it could rescind the sale and resume title in the goods for purposes of a resale would be in case "the buyer has been in de-

fault in the payment of the price an unreasonable time."

The time elapsing between August 22d, the date of the letter, or August 24th, the date of the loading, and the letter of August 31st, advising the plaintiff of a resale, is short—too short to be held unreasonable under all the conditions, circumstances, and the evidence in the case. It was unreasonable of the bank to act so quickly. The plaintiff was entitled to a reasonable time within which to make the balance payment, and it did not get it. The motive for the haste on the part of the bank was not the demurrage charges on the cars, for which the plaintiff was alone liable, but was due to its eagerness to avail itself of the larger price received by it from the new customer, to whom it resold the goods. Therefore the conclusion is imperative that on August 31st the bank could not rescind the sale, and revest title in itself for purposes of a resale, and thus bring itself within the second clause of the statute just quoted.

It is unnecessary to discuss and decide all the claims made, but sections 4727 and 4717 of the General Statutes and the rules therein laid down compel a decision here adverse to the defendant. This whole subject-matter is ably discussed by Professor Williston in his work on Sales, in chapter XVI, pages 923 and 966, and without quoting at length it is sufficient to say that his discussion of the rules and the cases cited are in accord with the conclusion herein expressed.

[2] The only remaining question is the amount of damages the plaintiff is entitled to recover. The defendant offered no testimony

whatever as to the value in August, 1918, of the material listed in Exhibit B. Two officers of the plaintiff company detailed the prices of each article at length, and testified to a total valuation of \$12,135, and \$11,375, respectively. A disinterested witness from Massachusetts, and an expert well qualified, fixed the value at \$9,875, while still another expert from New York fixed the value at \$9,300.

I therefore am justified in finding that the fair market value in August, 1918, of the material listed in Exhibit B was \$9,500. From this sum there should be deducted the purchase price, \$1,975, so that the difference, \$7,525, represents the actual loss sustained by the plaintiff, for which amount, together with interest at 6 per cent. from September 1, 1918, judgment may be entered for the plaintiff with costs.

The day the trial of this case began the defendant deposited with the clerk of the court \$500 in cash. The plaintiff claimed this was evidence against the defendant. Whether it was or not it is unnecessary to say. The defendant claimed its right to deposit it with the clerk, as it was money it neither wanted nor claimed the right to hold, as it was the amount paid to it by the plaintiff on July 25, 1918, at the time the contract was signed. The clerk may return this \$500 so deposited to the defendant, less any commission which a federal statute may impose, if any.

The counterclaim filed by defendant warrants no consideration. Judgment accordingly.

KINGS COUNTY LIGHTING CO. v. NIXON, Public Service Commission of New York, et al.

(District Court, S. D. New York. October 13, 1920.)

1. Evidence 383(8)—Books of gas company, kept as required, are prima

facie "evidence" of expenses.

Though "evidence" has been variously defined, and is a relative term, it always contains the element of the relation between a proposition to be established and material to establish the proposition; and books of account kept by a gas company in the manner required by the Public Service Commission, for the purpose of enabling the commission to keep watch of the public utilities of the state, would be the first source for information as to the cost of making the gas, and are prima facie evidence of such expenses on behalf of a gas company, as well as when used

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Evidence.]

2. Gas = 14(1)—Eighteen months' operation at loss sufficient to entitle company to relief.

Even if a period of 18 months, when conditions were abnormal, was insufficient experience on which to fix a reasonable rafe, it is sufficient to show that the existing rate was confiscatory, where the gas plant was operated at a loss during the entire period, since, even if the gas company should have temporarily operated at a loss during readjustment periods, the 18 months was a reasonable time for such operation.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

8. Couris C=39(1)—Question considered by three judges, granting tem-

porary injunction, not reconsidered.

While the decision of three judges in granting a temporary injunction is only a District Court decision, not binding on the judge who hears the case finally, the decision of those judges on a contention presented to them, which was not affected by the cross-examination of the witnesses, or by additional evidence at the final hearing, will not be disturbed.

4. Gas \$\infty\$-14(1)—Noncompliance with statutory requirement, because of necessity, does not diffeat right to injunction.

A manufacturer of gaz is not deprived of his right to an injunction against a statutory rate, which compelled him to operate at a loss, by his failure to comply with the statutory requirement as to the quality of the gas, which requirement might itself have been held confiscatory under the conditions.

5. Judgment \$\infty\$ 828(3)—Finding gas rate not confiscatory by state court not conclusive under changed conditions.

A judgment of a state court, finding a statutory rate for gas not confiscatory under conditions existing before that suit, is not conclusive that the same rate is not confiscatory under changed conditions existing thereafter.

6. Gas ← 14(1)—City not necessary party to suit to enjoin statutory gas rate.

A city in which a gas company is operating is not a necessary party to a suit by that company against the Public Service Commission and others to restrain the enforcement of the statutory rate for gas.

7. Stipulations \$\infty\$=18(1)\top Master's findings of value in excess of stipulation improper.

Where the parties to a suit to restrain the inforcement of a statutory rate for gas stipulated as to the value of the gas company's plant for the purposes of that suit, a finding by the master, adding to the stipulated value an additional value for necessary improvements, was improper.

8. Gas =14(1)—Where statutory rate fails to pay expenses, holding as to fair return is immaterial.

In a suit to restrain the enforcement of a statutory rate for gas, where it was shown that the cost of making the gas exceeded the rate, a holding as to the return to which the company was entitled on its capital was immaterial.

9. Gas =14(1)—Courts cannot make rates.

Courts cannot make rates for charges; their only power being to pass upon rates after they are made.

Stipulations = 18(1)—Stipulation held not to preclude evidence subsequent to decree.

Where the parties to a suit to restrain the enforcement of a statutory rate for gas stipulated that for the purpose of that litigation the gas company had an investment of a stated value, either party dissatisfied with that stipulation or the legal effect thereof after the decree may, in proper proceedings, seek and obtain opportunity to present evidence as to value.

11. Gas = 14(1)—Company held entitled to credit for 15 per cent. of unaccounted-for gas.

A gas company operating within the legal boundaries of a large city, but in fact supplying numerous small consumers through long mains in sandy soil, where the amount of metering was excessive, is in reality operating in a country town, and is entitled to 15 per cent. of unaccounted-for gas, which experience shows common in towns of that character.

(268 F.)

12. Gas €=14(1)—Evidence held to sustain item for repairs.

In a suit to restrain the enforcement of a statutory gas rate, evidence that any gas-making company is entitled to take in its meters for repair after they have been in service for five years, is sufficient to sustain the master's allowance of an item of repair which does not exceed the expenditure thereby required.

13. Gas ← 14(1)—Increased cost of gas oil does not require change to coal gas plant.

The fact that the cost of oil for the manufacture of gas has been increased by the demands for oil and gasoline, so as to make the cost of the gas exceed the statutory rate, does not require the gas company to manufacture gas from coal, for which it possessed no equipment, before seeking to enjoin the enforcement of the rate.

In Equity. Suit by the Kings County Lighting Company against Lewis Nixon, constituting the Public Service Commission of the State of New York, and others. On exceptions by plaintiff, by the Public Service Commission, and by the Attorney General of the State of New York to the report of the special master. Report modified and confirmed, and decree entered awarding injunction to plaintiff.

Samuel F. Moran, of New York City (George L. Ingraham, of New York City, on the brief), for plaintiff.

Wilbur W. Chambers, Deputy Atty. Gen., and Terence Farley and William S. Jackson, both of New York City, for defendants.

HOUGH, Circuit Judge. In view of the nature of this case, all the evidence submitted to the master has been read and considered, to the end that the exceptions filed might be disposed of after an independent review of the record, even as to matters of fact. It does not, however, appear necessary to make new findings, as the exceptions argued refer to those made by the master.

Defendants' Exceptions.

These exceptions extend substantially to every proposition found either in the master's report or opinion. Yet they may be grouped with sufficient accuracy under the following heads:

(1) Plaintiff has sought to support its case almost wholly by incom-

petent evidence, viz. its own books.

(2) The period from January 1, 1919, to June 30, 1920, is too short a time upon which to base any finding of the nature of a statutory

gas rate.

(3) Plaintiff is prevented by the accepted rules of equity from advancing the contention here made, because it has during all or most of the year and a half above referred to persistently and deliberately disregarded the statutory rule that the gas produced by it must be of "22 candle power."

(4) Plaintiff is barred from prosecuting this action by a judgment entered March 29, 1920, in the Supreme Court of New York, wherein

relief similar to that now demanded was sought.

(5) The city of New York is a necessary party defendant herein,

without which no legal determination of the matters involved can be had.

(6) The master erred, after finding that plaintiff must necessarily enlarge its capacity at an expense of not less than \$1,600,000, in assuming:

"That this amount should be added to the stipulated value of complainant's plant used in the public service, for the purposes of this case."

(7) The master erred in holding that "gas unaccounted" for should be estimated at as much as 11 per cent, of the total gas produced, and in not holding that no more than 8 per cent, should be so allowed.

(8) The master erred, in that he allowed as operating costs to the plaintiff excessive sums for coal, oil, repairs, clerical expenses (audit-

ing), and uncollectables.

(9) The master erred in holding that 8 per cent. on the investment was a fair return.

No exception not assignable to one of the foregoing heads, seems to

me worthy of mention.

I. This fundamental exception is necessarily disposed of by the ruling of Learned Hand, J., in Consolidated Gas Co. v. Newton, 267 Fed. 231, unless I should feel obliged in conscience to disagree with my colleague. Under all ordinary rules of procedure, Judge Hand's opinion is now the law of this court.

[1] But I am not in the least inclined so to disagree. The object of the statute has been well pointed out in People ex rel. New York Railways Co. v. Public Service Commission, 223 N. Y. 378, 119 N. E. 848. It is to make the method of accounting by regulated corporations uniform, "so that the accounts could be readily comprehended by those required to examine the same." The object is "not to regulate the management of their finances, but to show what the management was." While the Public Service Commissions in this state are not in any full sense ratemaking bodies, they may be described as the eyes of the commonwealth, to keep watch on the public utilities of the state. It is for this purpose that they are authorized and indeed directed to regulate account keeping, to the end that the act of seeing what has been done may be easily performed.

The system is now almost nation-wide, and the most prominent example of its application is the system of railway accounting promulgated and enforced by the Interstate Commerce Commission. Yet it is said that books so kept are not even prima facie evidence of the facts related therein. Definitions sometimes advance argument, and it is to me material to observe what evidence means. Dean Wigmore, in his well-known treatise (volume 1, p. 3), has collated the historic definitions, and in commenting upon them points out that evidence is always a relative term. Yet there is a constant contained in it, viz. the relation between the proposition to be established and the material

evidencing the proposition.

In the matter before the court the proposition to be established is what it costs to make gas, and the logical inquiry is: How would any person interested in that question and acquainted with business go about to ascertain the correct answer? If he found that all gas-

making companies were in the business for profit, and all were required by public authority to keep accounts showing their expenses and charges, would he not first investigate and prima facie accept the results shown by such books? There is but one answer to this inquiry. And when he further learned that such accounts were used by the Public Service Commission (and properly used) whenever complaint was made by the public that the consumer's price for gas was too high, I do not think he could doubt that the books were of the same evidential value as always, when the question propounded was whether the rate compelled the maker to manufacture gas—by means of im-

pairment of capital.

The use of entries kept in the regular course of business, and of abstracts of such entries, when the practical inconvenience of producing the entrants on the witness stand plainly outweighs the probable utility of so doing, has greatly increased of late years, and properly so. Otherwise modern business could not be investigated in courts. Confining reference to the appellate court of this circuit, instances may be found of using the train sheet of a train dispatcher (Chesapeake, etc., v. Stojanowski, 191 Fed. 720, 112 C. C. A. 310); books kept even by assistant weighers and in a criminal cause (Heike v. United States. 192 Fed. 83, 112 C. C. A. 615): the books of banks and abstracts from them as evidence against the bank official under indictment (Parker v. United States, 203 Fed. 950, 122 C. C. A. 252); similar books as against the surety of a dishonest employé in a civil suit (American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644, affirmed 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977); any maritime papers commonly kept under international maritime customs (Grace v. Browne, 86 Fed. 155, 29 C. C. A. 621; Bacon v. Conroy, 172 Fed. 532, 97 C. C. A. 158); and the books of controlled and controlling corporations in Barber, etc., Co. v. Forty-Second Street Co., 180 Fed. 648, 103 C. C. A. 614.

The exceptions referred to under this head are overruled.

[2] II. Relying upon the rule of Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034, it is asserted in various forms that a year and a half of such a time of trouble as has afflicted the world during and since the World War is too short a period to enable any court (and presumably any other tribunal) to measure and pass judgment upon a statutory public utility rate. This case is singular, in that the question presented is not whether 80 cents for gas affords a fair return for the making, but what shall be done when it appears that it costs more than 80 cents to make and distribute the gas, before there is or can be any question of profit or return at all.

The point is that the 80-cent rate is confiscatory, not because it does not yield a sufficient percentage on capital, but because to produce it at that price consumes capital. Neither the Willcox Case nor any other decision can be cited to show that any definite or fixed period of experimentation is a necessary prerequisite to a suit of that kind. If plaintiff were getting any return at all another question might be presented, but it is to me a matter of no doubt whatever that a year and

a half is a long enough time to experiment with proved capital losses before applying for relief.

The argument is also made (as a variant of this point) that the times are abnormal, and that corporations like plaintiff are only carrying their share of the public burden in gratuitously distributing gas for a reasonable time. Whether this court has power to consider that argument may be doubtful; but, assuming that it may be considered, I am of opinion that the eleemosynary practice has lasted a reasonable time, and the exceptions under this head are overruled.

[3] III. The contention that plaintiff comes into court with "unclean hands," because it has failed to furnish gas of the statutory candle power, cannot prevail in this district, after the action of the court which granted the temporary injunction in ruling upon this very point. It may be said that the decision of a court of three judges is after all but a District Court decision, and not binding upon the judge who hears the case at final presentation.

In a sense this is true, for the court hearing the application for injunction pendente lite necessarily acts upon affidavits, the potency of which may largely disappear after consideration of the evidence of witnesses subject to cross-examination. But in this instance no crossexamination or additional evidence has changed the situation presented

when the motion for temporary injunction was argued.

This plaintiff has (in the language of Judge Learned Hand's recent decision) persistently and deliberately disregarded the candle power requirement. I think it is proven that it has done so of necessity and has not thereby injured any one; but that is, after all, beside the point,

if there be anything in the argument.

- [4] But I think there is nothing in the argument, unless a plaintiff manufacturer, who cannot pay the bills incurred in making his regulated article (without speaking of profit or return), is obliged to cease operations rather than to give the public something, even though that something be not statutory. This manufacturer might have based its suit on the allegation that the 22 candle power requirement was in itself confiscatory, having regard to the admittedly greater expense of complying with the standard of illumination. Both upon reason and authority the exceptions based upon the foregoing argument are overruled.
- [5] IV. The judgment entered in the Supreme Court of the state on March 29, 1920, concluded nothing except matters which became history with the end of 1918. By its specific terms it left further occurrences open for future litigation, and this is the future litigation. The matter may be summed up thus:

It has been held by a final judgment, as yet unreversed, and therefore controlling, that an 80-cent rate for this plaintiff was, if not fairly compensatory, at any rate nonconfiscatory during 1916, 1917, and 1918. Non constat that the same rate is nonconfiscatory in 1919 and 1920. The Supreme Court of New York did not lay down any proposition opposed to this statement, and had no power so to do, if it had tried. The exceptions under this head are overruled.

[6] V. It having been decided by the court in which I am now sitting, and by the Circuit Court of Appeals for this Circuit, that the city of New York is not a necessary party defendant to an action of this kind, the exceptions relating to that question are overruled upon

authority.

[7] VI. The master's finding here complained of is regarded as immaterial; yet for the sake of form the exception is sustained, in so far as the master held that the sum of \$1,600,000 "should be added to the stipulated value of complainant's plant used in the public service, for the purposes of this case." The stipulation was that the existing plant was worth at least a certain amount of money, and it went no further. I do not think that it was necessary or proper for the master to add anything to or take anything from this valuation, which, however, seems to me to have no other function under the whole evidence than to put it beyond the bounds of present argument that plaintiff has an actually existing investment of at least \$3,300,000, now worth that sum, and all engaged in making gas.

VII. The matter of gas unaccounted for will be considered un-

der plaintiff's exceptions.

VIII. I agree with the master that the variation in measurements between the vendor's and vendee's quantities of coal and oil are trifling, and indeed I go further, and hold it as matter of common knowledge that variations no greater in extent than are here shown do occur, and must occur, as the result of the handling and rehandling of materials of this kind. The exceptions with respect to coal and oil are overruled.

The matter of repairs will be treated of under plaintiff's exceptions. The item of clerical expenses cannot justly be complained of. In my opinion it has increased less than might be expected by reason of the substitution of women for men in the accounting departments and the territorial expansion of plaintiff's business. The exceptions under

this heading are overruled.

The uncollectables are reasonable in amount—indeed, unusually so, having regard to the nature of plaintiff's business; i. e., it has no large customers and supplies small tenant householders. This subject was gone into at great length on the trial in the lower court in Willcox v. Consolidated Co., supra, and the result there reached is confirmatory of the master's finding on this annoying item. All defendant's exceptions under this head are overruled.

- [8] IX. I do not find it necessary to express either agreement or disagreement with the master in respect of his holding and finding that 8 per cent. on the investment is a fair return. It would be necessary to express opinion as to what was a fair return, if this case presented the inquiry whether the return actually received was compensatory or confiscatory.
- [9] There is no return at all; and, the question being whether it is confiscatory to make gas for nothing, it is not necessary to go beyond that fact in deciding this particular case. It is elementary that courts cannot make rates; they only pass upon rates after they are made. The defendant's exception to the master's holding that 8 per cent.

is a fair return is sustained without prejudice, and solely on the ground that such finding is immaterial to the present cause at the present time.

It follows that, except as above indicated under VI and IX, all defendant's exceptions will stand as overruled.

Plaintiff's Exceptions.

First. The evidence adduced does show that there is no relation between the heat unit content of gas and its candle power, and that it is true that 22 candle power gas may contain fewer (or more) than 620 B. T. U. per cubic foot. Consequently plaintiff's first exception is sustained as filed, though the materiality and importance of the finding is not perceived.

[10] Second. The substance and effect of the stipulation between the parties referred to in this exception was that for the purposes of this litigation, and not otherwise, the plaintiff had an actual investment devoted to gas making, whereof the value was at least \$3,300,000. The report is modified so as to set forth this first fact; but it is further the fact that if for any purpose after decree—e. g., on application made at the foot of the decree when drawn in usual form—either party is dissatisfied with this stipulation or the legal effect thereof or the legal inferences to be drawn therefrom, then either party may seek and obtain opportunity to adduce evidence in respect of value.

[11] Third. The question of "unaccounted-for" gas is both important and perplexing. I am convinced that plaintiff has the kind of plant operating in the kind of territory which is sure to produce a large quantity of unaccounted-for gas. I mean that large customers are conspicuously absent; the service pipes run long distances through sandy soil, and the consumers are of a class that require an excessive amount of metering.

Although legally and nominally in a great city, this particular gas maker is in reality operating in a country town. I think the testimony as to such a concern is plain that up to 12 per cent. loss by "unaccounted-for" gas is habitually taken by experienced men as matter of course. After that such men begin to look for the source of trouble, and are by no means sure of being able to find it.

This is one of those contingencies of business that courts must accept on the basis of experience, and in my opinion the most valuable evidence produced are the tabulations—Defendant's Exhibit D6 and Exhibit D1. The fair way to consider such item of expense (for that is what it really is) is to permit to this corporation (for the years 1919 and 1920) such average loss as has fallen upon suburban or small town companies during the period of observation shown by the exhibits above stated. The matter must rest largely in opinion, yet it cannot be that any percentage actually observed must be allowed because it occurred; there must be a limitation, arbitrary to be sure, but fair because based upon observed experience.

In my judgment 15 per cent, is the limit according to the evidence in this case, and to that extent the plaintiff's third exception is sustained.

[12] Fourth. This exception relates to the item of repairs: it is not large, but it does contain a principle. I agree with the plaintiff that the evidence shows that it or any other gas-making company is entitled to take in its meters for repair after they have been in service five years. Therefore, since the item of repair actually proven does not exceed the expenditure implied in the foregoing finding, the fourth exception of plaintiff is sustained.

Fifth. I do not find it necessary to pass upon this exception, which in substance is covered by the findings already made in this opinion. It follows that the master's report, with the unimportant modifications

above indicated, is satisfactory to the court.

The sum of the matter is this: It cost plaintiff, and would have cost any other well-operated maker of gas oil, at least 84 cents to furnish 1,000 cubic feet of gas in the year 1919, and at least 96 cents

to do the same thing in 1920.

[13] The fundamental reason for this is that the oil best fitted for the gas maker is also richest in gasoline; therefore plaintiff, and other similarly situated manufacturers, are and have been competing with (especially) the automobile. This difficulty is not temporary, so far as human foresight goes. It may well be that gas makers will be driven back to coking coal; but that does not affect the rights of a concern lawfully organized to make oil gas and possessing no plant for coal gas.

A final decree may be submitted, which will, after appropriate recitals respecting the exceptions to master's report, confirm the report as modified, declare the unconstitutionality of the acts of 1906 and 1916 in respect of rate, award to plaintiff injunction as prayed for, and costs against the appearing defendants. It will also contain the usual provision for applying at the foot of decree for further relief, or for modification or vacation of injunction.

One meaning or implication in this last provision is this: This court will not directly or indirectly announce, fix, or suggest a rate for gas; but, if plaintiff endeavors to charge and collect an inequitable

rate, it can vacate its own injunction.

WILLYS-OVERLAND CO. v. AKRON-OVERLAND TIRE CO., Inc.

(District Court, D. Delaware. August 2, 1920.)

No. 386.

 Trade-marks and trade-names \$\sim 59(4)\$, 78—Use of word in corporate name by tire company constituting unfair competition as against automobile company.

Where the word "Overland," which was a part of their corporate names, had been used by complainant and its predecessors for 13 years, and registered, as a trade-mark for automobiles, and had been featured in extensive advertising, so that it had become associated by the public with complainant and its products, and had also been used with complainant's consent in the names of other corporations associated with it in the automobile business as subsidiaries or sales agents, the adoption of such word

as a part of its corporate name by defendant, which was engaged in the business of rebuilding automobile tires and purposed listing its stock on exchanges, held to constitute unfair competition, which entitled complainant to an injunction, although it was not at the time engaged in making tires.

Trade-marks and trade-names 575—Actual deception not essential of unfair competition.

To warrant the granting of an injunction against unfair competition, it is not essential that the evidence should show that any particular person has actually been misled.

In Equity. Suit by the Willys-Overland Company against the Akron-Overland Tire Company, Inc. On motion for preliminary injunction. Granted.

Andrew C. Gray, of Wilmington, Del., and Robert G. Thach, of New York City, for plaintiff.

John R. Nicholson, of Wilmington, Del., and Nathan Vidaver, of New York City, for defendant.

MORRIS, District Judge. The plaintiff, the Willys-Overland Company, an Ohio corporation, by its bill of complaint charges the defendant, Akron-Overland Tire Company, Inc., a Delaware corporation, with a wrongful and unfair use of the word "Overland," and now moves for a preliminary injunction restraining and enjoining the defendant from using that word as the whole or as a part of its corporate name, from listing its capital stock upon the New York curb market, or any other association or exchange where listed stocks and securities are dealt in, under any name containing the word "Overland," and from designating its tires, or other automobile accessory made or sold by it, by the word "Overland," or by any combination of words containing that name.

The plaintiff obtained its charter in 1912. It thereupon acquired the entire business, assets, trade-mark, trade-name, and good will of Willys-Overland Company, a corporation, which in its turn had acquired the like rights and property of the Overland Automobile Company, an Indiana corporation. The last-named company manufactured and sold automobiles. It began business in 1907. During all of the intervening period of 13 years the plaintiff and its predecessors have sold their prodducts under the name "Overland" throughout the United States. This name was, in 1909, registered in the United States Patent Office as a trade-mark for automobiles by the Overland Automobile Company. The word "Overland" appears upon the products of the plaintiff. Advertisements of the plaintiff appearing in newspapers, periodicals, and upon billboards and electric signs throughout the United States have given special prominence to "Overland." Companies affiliated with the plaintiff include that word in their corporate names, as do also, with the consent of the plaintiff, many companies dealing exclusively in the products of the plaintiff. The products of the plaintiff have long been widely and favorably known to the public by the name "Overland."

[1] Consequently a corporation other than the plaintiff, engaged in the manufacture or sale of automobiles, their parts or accessories, and using the word "Overland" as a part of its name, or marking such articles "Overland," thereby suggests to the public that it is the plaintiff, or is connected therewith, and that its product is made by or for the plaintiff. Such deception would unquestionably enable the corporation engaging therein to pass off at least a portion of its product and capital stock as the product and capital stock of the plaintiff is widely bought and sold by the general public. The plaintiff and its predecessors, operating under corporate names embodying the word by which their products were and are known, have built up and established for the plaintiff a reputation for financial responsibility and fair dealing, and have led the public to expect a certain

standard of quality in its products.

The business of the defendant is that of rebuilding or retreading automobile tires and selling the same. It was organized in October, 1919, under the name of Akron Tire Company, Inc. In January, 1920, by amendment of its charter, it changed its name to Akron-Overland Tire Company, Inc. The circumstances surrounding the change of name are instructive. The Overland Tire Company, a New Jersey corporation, was engaged in the same business as the defendant. The plaintiff objected to the use of "Overland" in the corporate name of that company, and requested that that word be eliminated therefrom. After conferences and correspondence between representatives of the two corporations, counsel for the Overland Tire Company agreed to recommend that the request of the plaintiff be complied with, upon condition that the plaintiff share pro rata in the expense thereof, to which condition the plaintiff assented. But the elimination was not made. On the contrary, another course was pursued. The plaintiff soon thereafter received from the attorney representing the Overland Tire Company a letter reading in part as follows:

"With reference to the above corporation [Overland Tire Company], I am informed to-day that it has just been acquired by Akron Tire Company, a corporation of the state of Delaware. I also am informed that Akron Tire Company proposes to consolidate or merge the two corporations, and will change its name to Akron-Overland Tire Company, at least for the present. The Overland Tire Company had determined to change its name, but the present owners decided to proceed under the new name as stated above. Neither * * * nor the writer represent the Akron Company in any capacity, which it is understood is represented by * * * *."

The defendant acquired the business, property, and rights of the Overland Tire Company, and immediately changed the name of the former to Akron-Overland Tire Company, Inc., as above stated. Four of the seven directors of the defendant were directors of the Overland Tire Company; it having five directors. The president and secretary of the defendant were president and secretary, respectively, of the Overland Tire Company. The business of the defendant is not so unrelated to that of the plaintiff as to prevent injury to the latter if confusion results from the action of the former. That the name of the defendant is conducive to confusion there can be no doubt on the

evidence. The Detroit Free Press published July 28, 1919, on its financial page, an item containing these statements:

"Stock of the Overland Tire Company will shortly be sold on the New York curb. This is the company in which John N. Willys [the president of the plaintiff] is said to be the controlling factor."

A letter to John N. Willys says:

"* * * I was under the impression, when I had purchased tires from the Overland Tire Company, that that firm and yours was one."

Indeed Burrill Ruskay, the treasurer and a director of the defendant company, seems to have recognized the likelihood of confusion, for in his affidavit, filed on behalf of the defendant, he says:

"That on or about the first part of June, 1919, my attention was called to the fact that the Overland Tire Company of New Jersey was in need of additional capital in order to expand its business. That after negotiations had progressed, and when about to sign a definite agreement to undertake the sale of the stock of the Overland Tire Company, I pointed out the possibilities of an objection being raised by the Willys-Overland Company to the name Overland."

Later in his affidavit Mr. Ruskay admits by necessary implication that actual confusion has resulted. He states:

"To my personal knowledge and belief, the similarity in names harms the Overland Tire Company, in view of the stock market antics of the stock of the Willys-Overland Company, and also the criticism that have been brought to our attention of the products of that company."

If an illustration be needed that the confusion was not eliminated by the prefix "Akron," it is found in the above quotation from the affidavit of Mr. Ruskay. He there refers to the defendant as "Overland Tire Company." If an officer of the defendant so designates the defendant in an affidavit, a like designation by that part of the public purchasing tires and capital stock should not be characterized as unreasonably careless. Again, one of the corporations engaged in selling the plaintiff's products has, with the consent of the plaintiff, the corporate title "Overland-Akron Motor Mart Company." In Celluloid Manufg. Co. v. Cellonite Manufg. Co. (C. C.) 32 Fed. 94, Mr. Justice Bradley, referring to the defendant's name, said:

"It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse, when one party seeks to benefit himself by the good name of another."

Philadelphia Trust, S. D. & I. Co. v. Philadelphia Trust Co. (C. C.) 123 Fed. 534, 541, is to the same effect.

There is some prima facie conflict in the evidence upon the point whether the confusion results in injury to the plaintiff or to the defendant. Numerous affidavits filed on behalf of the plaintiff assert that the plaintiff is injured by the confusion. Some affiants for the defendant, including Mr. Ruskay, as appears from the last-quoted portion of his affidavit, say the detriment resulting from the confusion falls upon the defendant. Such deponents, when so stating, apparently overlook the force of the fact that the defendant voluntarily and deliberately adopted "Overland" as a part of its corporate name,

long after the word had acquired a secondary significance in the automobile industry, and after its potency for benefit or injury had become well known. Conflicting testimony of that character is not of the kind

required to prevent a decree for a preliminary injunction.

The defendant must have had some reason for adopting "Overland" as a part of its corporate name. What was the reason? It is not a family name, a geographical name, or a descriptive name. The cause and the only cause advanced for its use by the defendant is found in the affidavit of its president, who says:

"The use of the word 'Overland' in the corporate name was not commenced with a view to defrauding or deceiving any person, or for the purpose of hindering or embarrassing the complainant in its lawful business; but the word was deemed peculiarly adaptable to tires which are essentially the part of an automobile which goes 'over the land.'"

Such an excuse calls for no comment. Yet the defendant incongruously points out that it does not sell its tires as Overland tires, but designates them by a name having no resemblance to the word in question. Why the name that was deemed by the defendant to be "peculiarly adaptable to tires which are essentially the part of an automobile which goes over the land" was not used for its tires, but was used as a part of its corporate title, is left to surmise. It seems to me that a remark of Lord Macnaughten in Reddaway v. Banham, L. R. [1896] A. C. 199, 221, is peculiarly applicable to this situation. He said:

"But fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the court."

In my opinion it appears from the evidence that the defendant is using "Overland" in its corporate title unfairly and to the detriment of the

plaintiff.

[2] That the use by a defendant in its name of a word, of the kind in question, calculated to lead the public to believe its goods are the goods of the plaintiff, may be enjoined is well settled. Bissell Chilled Plow Works v. T. M. Bissell Plow Co. (C. C.) 121 Fed. 357, 365; Selchow v. Chaffee & Selchow Mfg. Co. (C. C.) 132 Fed. 996, 1000; Eastman Company v. Kodak Cycle Co., 15 R. P. C. 105; Premier Cycle Company v. Premier Tube Company, 12 Times Law Reports, 481. It is not essential for the evidence to show that any particular person has actually been misled. Bickmore Gall Cure Co. v. Karns, 134 Fed. 835, 67 C. C. A. 439; T. A. Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904. The fact that the plaintiff is not now engaged in the manufacture of tires is not a bar to the relief sought. Eastman Co. v. Kodak Cycle Co., supra; British-American Tobacco Co. v. British-American Cigar Stores Co., 211 Fed. 933, 128 C. C. A. 431, Ann. Cas. 1915B, 363; Dunlop Pneumatic Tyre Company v. Dunlop-Truffault Cycle & Tube Mfg. Co., 12 Times Law Reports, 434; Metropolitan Tel. & Tel. Co. v. Metropolitan Tel. & Tel. Co., 156 App. Div. 577, 141 N. Y. Supp. 598.

I am satisfied from the pleadings, affidavits, and exhibits that the motion of the plaintiff for a preliminary injunction should be granted.

A decree in conformity herewith may be submitted.

ELI LILLY & CO. v. WILLIAM R. WARNER & CO.

(District Court, E. D. Pennsylvania. September 29, 1920.)

No. 1355.

1. Property 2—Person honestly acquiring formula using common materials may reproduce it.

The first user of a formula for medicine composed of common materials and which is not patented acquires no monopoly therein; but any one acquiring knowledge of the formula without any breach of trust or good faith can reproduce it and market it, with the representation that it is the same as the original.

2. Trade-marks and trade-names \$\infty\$ 17—Right to cocoa as coloring and fla-

voring matter cannot be menopolized.

The right to use cocoa in connection with quinine and yerba santa cannot be monopolized, on the claim that the use of the cocoa is merely to give a distinctive color, since it also has a distinctive flavor, attractive to the public, which cannot be given by any other means, and the right to such flavor is not one which can be exclusively claimed.

The name "Coco-Quinine," applied to a liquid preparation of quinine, in which the bitterness of the quinine is disguised by yerba santa and cocoa added to give a distinctive color and flavor, is a mere descriptive name, which cannot be an exclusive trade-mark.

4. Trade-marks and trade-names =93(3)-Evidence held not to show un-

fair selling methods.

Evidence that dealers inferred from statements by defendant's salesmen that they were to substitute defendant's preparation for plaintiff's when it was called for, with denials by the salesmen that they made such representations, and without evidence that any officer or sales manager of defendant had authorized such representations, held insufficient to show unfair selling methods by defendant.

5. Trade-marks and trade-names \$\iiin\$ 93(3)—Testimony of unfair sales should

be direct and positive.

Testimony of unfair sales by defendant, for the purpose of substituting their product for that of plaintiff, when the latter was called for, should be established by direct, clear, and positive testimony.

In Equity. Suit by Eli Lilly & Co. against William R. Warner & Co. to restrain unfair competition. Bill dismissed.

E. W. Bradford, of Washington, D. C., for plaintiff.

Francis Rawle and Joseph Henderson, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff is a corporation engaged, at Indianapolis, Ind., in the manufacture and sale of pharmaceutical and chemical products. It employs a large staff of traveling sales agents in selling its product to druggists and physicians throughout the United States. In 1899 it commenced the manufacture and sale of a liquid preparation known as "Coco-Quinine." It contains quinine as its therapeutic agent, and is designed for the administration of quinine sulphate in cases where the liquid form is preferred to capsules or pills. Yerba santa is used in the compound to disguise

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the bitterness of the quinine, and chocolate syrup is used for a coloring and flavoring medium. The formula is not patented, and the preparation is not the subject of a registered trade-mark. It is put up in bottles with a label, with the word "Lilly" in red script on a green background. The plaintiff, through its sales agents, was successful in introducing it and establishing extensive sale for it among pharmacists and dispensing physicians; that is, those who do not prescribe for their patients, but supply medicine from their own stock. The sales by druggists were upon physicians' prescriptions and to customers who inquired for chocolate-quinine or Coco-Quinine.

The defendant is a Pennsylvania corporation, organized in 1908 to take over the long-established business of William R. Warner & Co., pharmaceutical and chemical manufacturers, and is chiefly owned and managed by Mr. Henry Pfeiffer, Mr. Gustavus A. Pfeiffer, and Mr. G. D. Merner, through holdings of its stock, and they are also the owners of the Pfeiffer Chemical Company and Searle & Hereth Company. For the purposes of this suit, the united control and the close union in business of these three companies is not disputed.

In 1906 the Pfeiffer Chemical Company put upon the market a product known as "Quin-Coco." This product is practically identical with the plaintiff's Coco-Quinine. It consists of quinine with yerba santa, vanillin, saccharin, and cocoa, with a syrup base. Since the organization of the defendant company in 1908 Quin-Coco has been manufactured by the Searle & Hereth Company and distributed solely by the

defendant, the Warner Company.

The defendant has since its organization, through its sales agents, distributed and sold Quin-Coco as a substitute for Coco-Quinine. It has not attempted to sell it as Coco-Quinine, but has offered it and solicited orders for it from druggists as a substitute for Coco-Quinine and identical to it in therapeutic value. It is not established, nor is it claimed, that it is known to consumers as a product of Eli Lilly & Co. The use of chocolate to disguise quinine in tablet and lozenge form, and the use of yerba santa in the compound to disguise the bitterness of the quinine, was not new when the plaintiff made its preparation in liquid form, nor was the plaintiff the first discoverer of the use of chocolate for disguising quinine in liquid form. First in tablets or lozenges, and later in liquid form, the combination was known long prior to the manufacture of the plaintiff's preparation.

The plaintiff's bill is based upon the ground that it originated the product, and distinguished and identified it as its product, by the color and flavor of chocolate, which is not essential to its therapeutic value; the chocolate being used for the sole purpose of making the remedy known by color and taste. It claims that chocolate is but one of many ingredients which could be used for this purpose, but by no means the sole medium. It claims that Coco-Quinine was the first successful preparation commercially known to physicians and druggists; that by legitimate business methods the plaintiff made it a distinctive and desired product throughout the United States, and won for it a high reputation with physicians, druggists, and the public in general; that into the market created by the plaintiff at great expense and effort

the defendant introduced Quin-Coco, by selling in that market a counterfeit of Coco-Quinine under a name resembling that used by the plaintiff for its genuine article; that the defendant's product was sold as a substitute for plaintiff's by unfair and dishonest means, supplying the counterfeit where the genuine was desired and called for, with the result that in numerous instances druggists filled prescriptions calling for Coco-Quinine with Quin-Coco, and sold Quin-Coco when they knew Coco-Quinine was desired. It is claimed that by these alleged deceptive and dishonest means the defendant acquired trade which had been built up by the efforts and at the expense of the plaintiff.

The plaintiff seeks an injunction restraining the defendant from the further manufacture and sale of a liquid preparation in the administration of quinine, or quinine in liquid form, colored or flavored with cocoa. It further seeks an injunction restraining the defendant from the use of the name "Quin-Coco" as a name designating such product, on the ground that it is a mere reversal of the words comprising the name long used by the plaintiff for designating its product "Coco-

Quinine."

The effect of issuing an injunction would be to grant the plaintiff a monopoly, perpetual in effect, of the right to manufacture and sell a liquid preparation containing quinine, with its bitterness disguised by the use of yerba santa, or some similar agent, if any exist, in combination with cocoa, which is chocolate less its fatty components, and which gives the preparation a distinctive color and flavor. The defendant contends that it can lawfully make and sell a substitute for any medicinal preparation, provided it does not do anything which would constitute "passing off" its product for that of another. The plaintiff, while conceding that it has no exclusive right to the formula unless patented, and conceding further that it has no trade-mark, and that the defendant has not attempted to simulate the label upon its package, contends that because of the circumstance that, after its formula for a liquid preparation of quinine and yerba santa was satisfactorily worked out, it adopted the use of chocolate, so as to give the preparation a distinctive color and flavor, which would identify it as the plaintiff's product, the public was, through unfair means, deceived through the defendant's imitation containing the same color and flavor.

The plaintiff cites the case of Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164, and the authorities on which that decision is based, to sustain its position that the defendant may not use chocolate or cocoa for coloring the product because the plaintiff has used it to give its product a distinctive color and flavor. This contention, if the facts were such as to show acts on the part of the defendant to induce dealers to deceive the consumer into believing that it was getting the plaintiff's product, would have support in the Gay-Ola Case, if the function of the chocolate were merely to give a distinctive color. The Gay-Ola product was colored by the use of caramel, and as stated by the court:

"There is here no claim that caramel serves any other purpose in either compound, except merely to give color, and saying that it is one of the 'component elements,' as one of the witnesses does, is saying nothing more. It follows that the adoption, not only of caramel, but of the selected amount of caramel, was for the main and primary purpose of making the two articles look just alike. In this connection it appears that there is a great variety of coloring materials open to the use of any manufacturer, and selections from which are used by other manufacturers."

The plaintiff, however, must go further than debarring the defendant from the use of chocolate as coloring matter. It is alleged in the bill, and proved in the case, and is a matter of common knowledge, which perhaps requires no proof, that the flavor of chocolate is obtainable from no other substance. The plaintiff must therefore debar the defendant, not only from the use of the color, but from the use of the flavor of chocolate. In support of this proposition, the plaintiff has not cited any authorities, and I think the obvious reason is that there are none; to the effect that flavors, and particularly such a distinctive flavor as chocolate, may, because adopted by the plaintiff, be monopolized. While the plaintiff has shown that other liquid preparations of quinine, with the bitterness disguised and flavor added, may be made, it has not shown that the chocolate flavor may be obtained by any other means than by the use of chocolate, or that chocolate flavor may be used without producing the chocolate color in the liquid. While the distinctive flavor of chocolate is a matter of common knowledge, it is equally a matter of common knowledge that it is a flavor which appeals to the palate and taste of people almost universallv.

[1] The plaintiff is confronted at first with this proposition: That it has no exclusive right to the use of its formula. Its only right is to prevent any one from obtaining or using it through a breach of trust or contract, and any one that came honestly to the knowledge of it could use it without the plaintiff's permission and against its will. Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442. The ingredients of which its product was composed are of such common everyday use that the plaintiff cannot be held to have the right to prevent others from using the same combination as used by it, and the preparation may be used and manufactured by any one who in good faith acquires knowledge of its composition, and such person may publish the fact that he has made it in accordance with the original formula. Hostetter v. Fries (C. C.) 17

Fed. 620.

[2] Upon the right of the plaintiff to appropriate, through its appropriation of the color, the flavor of chocolate, the case of Wrigley & Co. v. Grove Co., 183 Fed. 99, 105 C. C. A. 391, is in point. The court said in that case:

"The right to make and sell chewing gum out of ingredients not deleterious to health, and to flavor it with wintergreen, vanilla, strawberry, pineapple, spearmint, or any other flavoring material, is inherent in every citizen, whether a corporation or an individual. Having a right to make and sell gum, it follows, as a necessary corollary, that he has the right to describe it. The flavor is a very important factor, regarding which the public desires to be informed, and which the seller has a clear right to communicate, if, indeed,

he is not under obligation to do so. If his gum be flavored with spearmint, for instance, he cannot inform the public of this without using the word 'Spearmint,' and to deprive him of that privilege is to interfere with his rights. 'Spearmint' is a descriptive term as applied to chewing gum, and no one can deprive a manufacturer of its use or appropriate it as a trademark."

While that case was upon the question of the right to appropriate the word "Spearmint" as a trade-mark, it being the name of a well-known flavor, the denial of the right is based upon the right of any manufacturer to flavor his product with whatever flavoring material he desires. To the same effect is Larson, Jr., Co. v. Lamont, Corliss & Co., 257 Fed. 270, 168 C. C. A. 354, where the question was the right to the exclusive use of the word "Pep-O-Mint," which was denied upon the ground that it was the mere indication of a flavor, the use of which was open to the public generally. It follows, therefore, that the right of the defendant to use chocolate flavor carries with it a right to use that color, unless it should appear, which it does not, that the flavor could be used without the color.

The effect of the plaintiff's contention would be that the consumer who asks for chocolate quinine, cocoa and quinine, or quinine flavored with cocoa or chocolate, cannot have his remedy with the desired flavor, unless he purchases the plaintiff's Coco-Quinine, because one of the incidents of the flavor is that it carries with it a color in which the plaintiff has monopoly to indicate the derivation of its product. If, conceding that the chocolate has no therapeutic value, although it is contended by the defendant that it has a peculiar value as a physical mixer for the quinine, there can be no exclusive use of the flavor, it follows that the plaintiff cannot acquire an exclusive use of it because of the incident of color under the claim that that marks the

derivation of its product.

"Quin-Coco," as affected by its similarity to that of the plaintiff's product "Coco-Quinine." It is too well settled to require citation of authorities that a mere descriptive name cannot be monopolized. What the plaintiff has for sale is a mixture of quinine and chocolate or cocoa, and the name discloses that fact. It does nothing more. It is not an arbitrary i. .ne, disclosing the derivation of the product from the plaintiff, and the defendant, therefore, has the right to use a combination indicating the same facts in relation to its product by use of the name "Quin-Coco." The combination of quinine and chocolate was known in the books and catalogues under various names containing the same significance for years before the plaintiff adopted its name, and there is proof in the case of a number of products bearing names indicating the use of the same materials in pharmaceutical preparations for the past 10 years.

[4] The plaintiff does not contend, and there is no evidence to show, any direct "passing off" of the defendant's product for that of the plaintiff. The plaintiff contends that the evidence shows that the defendant's agents, in selling Quin-Coco as a substitute for Coco-Quinine, used unfair selling methods, in suggesting to druggists that, because of the similarity of the products in therapeutic value and appearance, it could be passed off by the druggist to the consumer who

asked for Coco-Quinine, and could also be substituted by the druggists in prescriptions which called for Coco-Quinine, thus by suggestion inducing the druggist to pass off Quin-Coco for Coco-Quinine; and it is contended that there is sufficient evidence to establish the fact that druggists have, through these suggestions of defendant's salesmen, actually passed it off upon the public and physicians. The evi-

dence upon this point has been carefully examined.

[5] In a charge of this nature, the testimony should be direct, clear and positive. But the testimony in most of instances consists rather of impressions of the witnesses as to what the defendant's salesmen meant than of statements of what they said. The answers of the witnesses upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to the defendant's salesmen, the salesmen, upon being called, denied having made any

such suggestions.

The plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged, or suggested the alleged unfair selling methods on the part of its That Coco-Quinine and Quin-Coco were substantially salesmen. identical products; that Quin-Coco could be purchased at a saving upon the price of Coco-Quinine; that it could be placed upon the market as a substitute for Coco-Quinine-were all matters which under the law the defendant had a right to represent to its customers. In view of the fact, which I find established under the evidence, that no officer or sales manager of the defendant authorized or instructed the salesmen in unfair selling methods, in view of the unsatisfactory testimony upon which unfair selling methods of the salesmen is charged, and in view of the positive denials of any such acts on the part of the salesmen, it is concluded that the plaintiff has failed to establish its right to a decree based upon unfair selling methods.

It is held that the defendant had a lawful right to reproduce the plaintiff's preparation to tell the plaintiff's customers that it was essentially the same as the plaintiff's product in composition and therapeutic effects, and to sell it as a substitute for the plaintiff's product. Saxlehner v. Wagner, 216 U. S. 375, 30 Sup. Ct. 298, 54 L. Ed. 525; De Long Hook & Eye Co. v. Amercian Pin Co. (D. C.) 200 Fed. 66; Viavi Co. v. Vimedia Co., 245 Fed. 289, 157 C. C. A. 481; Singer Mfg. Co. v. Loog, L. R. S. Appeal Cases, 15; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. The plaintiff has no exclusive right in the color and flavor inevitably following the use of cocoa or chocolate, which the defendant had a right to combine with quinine in a pharmaceutical preparation. The defendant had a lawful right to call its preparation "Quin-Coco," which is a descriptive name of the same effect as "Coco-Quinine." The plaintiff has not established unfair selling methods on the part of the defendant.

It follows that the bill should be dismissed, with costs to the defendant; and it is so ordered.

In re IRWIN.

(District Court, W. D. Pennsylvania. October 7, 1920.)

No. 9477.

Bankruptcy 5-184(1)—Sale of property by bankrupt, without change of possession, invalid.

Under the law of Pennsylvania, the sale by a dealer in automobiles in that state of an automobile then in his showroom to a purchaser in New York, to whom he gave a bill of sale and storage receipt, where the car remained in his possession, without anything indicating change of ownership, until his bankruptcy, held invalid as against his trustee.

In Bankruptcy. In the matter of Perry Anderson Irwin, bankrupt. On review of order of referee. Affirmed.

Gunnison, Fish, Gifford & Chapin, of Erie, Pa., for petitioner.

ORR, District Judge. The certified question in this case is raised

upon the following facts:

Perry Anderson Irwin, the bankrupt, was a dealer in automobiles in the city of Erie at the beginning of the year 1920. In January or February he purchased from the manufacturers one Columbia Sedan, model C 5, No. 1,321,551. On March 4, 1920, being in need of money, he went to Rochester, N. Y., with the invoice he had received for the car, and entered into an arrangement with the Transportation Finance Company, a corporation of the state of New York, having its principal office in that city. He then and there executed and delivered to said corporation a bill of sale for said car, and entered into a certain lease agreement, wherein he was named as the lessee and said corporation was named as the dealer or lessor, by the terms of which it appears that said corporation leased said car to him for a rental of \$2,137, of which \$427 was paid on the execution of the lease, and the balance, \$1,710, became due and payable by the bankrupt June 4, 1920. At the same time and place said bankrupt gave a storage receipt to said corporation, acknowledging the payment of \$1 for the storage of said car for three months, with the agreement that the same should be kept within the showroom of the building at No. 1915 State street, Erie, Pa. At the same time and place the said bankrupt gave his judgment note to the order of said corporation for the payment of said \$1,710 in three months from said date; that being the deferred payment expressed in the contract of lease. In the lease, as in the storage receipt, the bankrupt's place of business is stated to be at No. 1915 State street, Erie, Pa.

At the time of the execution of these papers in the city of Rochester, the said car was in said place of business of the bankrupt, where it remained until after the trustee in bankruptcy had duly qualified. From the time of the receipt of the automobile from the factory until the appointment of the receiver, the said automobile remained in the custody of the bankrupt. It was included among his assets in the schedules filed. Relying upon the transactions which took place in

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the city of Rochester, the said corporation presented its petition to the referee, claiming title to the car, and seeking an order for its delivery to the petitioner. The referee held that the claim should not be allowed, and, upon exception to his ruling, certified a question to this court.

Once more we have in this court for consideration the law of Pennsylvania relating to a sale of personal property, where there has been no actual or symbolical delivery of possession. Notwithstanding repeated decisions that, in Pennsylvania, delivery of possession of personal property is indispensable to transfer a title by the act of the owner which shall be valid against creditors, claim after claim is presented in bankruptcy proceedings for the recovery of personal property, in which the claimant claims title to the personal property of which the bankrupt had a sole, continuous possession from the time he had purchased the property from a manufacturer or jobber.

We are not now dealing with a contract of bailment, where possession has taken place in pursuance of the contract, nor are we dealing with a contract of conditional sale entered into in compliance with the provisions of the Conditional Sales Act of Pennsylvania. We are dealing with what has ever been condemned in Pennsylvania, to wit, the retention of possession of personal property by the seller and the rights of creditors of the seller with respect to such property. The reason, perhaps, why the question is so often pressed in the court, is because many of the claimants are from other states, where a doctrine prevails different from that in Pennsylvania.

The curious may find in the fifth English edition of Benjamin on Sales, at the bottom of page 498, the statement:

"The English doctrine is now also established in Virginia, West Virginia, Massachusetts, New Jersey, North and South Carolina, Rhode Island, and several other states, while in Pennsylvania, Maine, Connecticut, New Hampshire, Vermont, Illinois, and others, the retention of possession is treated as per se fraudulent. In New York and in many of the other states, the matter is regulated by statute," etc.

By the English doctrine, of course, is meant that the question of whether there is fraud in the retention of possession is one of fact for a jury. It is probable that many of the states have had occasion to change the law since that edition was printed in 1906, but the law in Pennsylvania has never been changed.

The referee has well stated the law, as determined by the courts of Pennsylvania, in the following language:

"The necessity of delivery of possession to give good title to personal property was fully set forth in Clow v. Woods, 5 S. & R. 275, 9 Am. Dec. 346, which was cited by Justice Sharswood in McKibbin v. Martin, 64 Pa. 352, 3 Am. Dec. 588, to be 'the Magna Charfa of our law on the subject,' and in Jenkins v. Eichelberger, 4 Watts, 121, 28 Am. Dec. 691, Chief Justice Gibson said: "To tolerate a lien severed from the possession by any device whatever would be pregnant with all the mischiefs of colorable ownership, and to sanction it at the expense of the community would be justified but by the accomplishment of more important objects than individual accommodations."

"While the rigor of the rule has been somewhat abated under certain circumstances, yet the rule still obtains, and when property which can be easily delivered has never been in the custody or even in the state with the one claim-

ing ownership, the courts will not recognize his right as against creditors of the alleged vendor, when they have absolutely no notice, or anything to put

them upon inquiry, as to any other party claiming the property."

"While this transaction would be deemed valid between the parties, yet it is not good between the creditors of the bankrupt, and especially since he was heavily in debt when the alleged transfer was made. It has been repeatedly held by the courts that 'a sale of personal property, leaving the vendor in possession and without doing anything to indicate a change of ownership, is fraudulent as against creditors."

"As before said, while the rigor of the rule has been somewhat relaxed, yet the rule is still the law of the state. It is true now, as it was when the rule was announced in Clow v. Woods nearly a century ago, that if a purchaser pays the price for goods purchased by him, without taking possession of them, he takes the risk of the integrity and solvency of his vendor, when the rights of a subsequent bona fide purchaser or an execution creditor arise. Stevens v. Gifford, 137 Pa. 219, 20 Atl. 542, 21 Am. St. Rep. 868; White v. Gunn, 205 Pa. 229, 54 Atl. 901."

The federal courts necessarily adopt the views of the state court with respect to title to personal property. In Re Arcade Drug Co., 263 Fed. 681, the Court of Appeals for the Third Circuit considers the question and adopts the rule with respect to the required delivery of possession in sales of personalty in Pennsylvania. The syllabus to that case is applicable to the facts in the case at bar:

"Where the real purpose of a transaction, in form an absolute transfer by a drug company of a soda fountain with a lease back, was to give the lessor security for her alleged loan, on property which the debtor drug company still held in possession and never delivered, the lessor had no rights in the property as against the drug company's trustee in bankruptcy."

The learned counsel for the claimant admits the general rule to be as declared by the referee in his opinion, but insists that it is not inflexible, and cites a line of cases which, it is contended, show that the rule has been relaxed. An examination of those cases shows that they do not change the requirement that the vendee must take possession, but rather that they show that there is no "unbending test of the sufficiency of delivery and the retention of possession to be applied to all cases." This distinction and the last quotation is found in the opinion of the court in the case of White v. Gunn, 205 Pa. 229, 54 Atl. 901. No case has been pointed out to us where there has been a valid sale of personal property in Pennsylvania without a delivery, either actual or symbolic. Often it has been necessary to submit the question to a jury as to whether there was a delivery or not. Often it is difficult to determine whether the visible relation between an owner and his goods has been broken.

The case of Evans v. Scott, 89 Pa. 136, may be referred to as an interesting case, because it illustrates a difficulty which often arises by reason of the relation of the parties, as well as their relation to the property and its location, in determining whether or not there has been a sufficient taking of possession to protect the purchaser. It appears in that case that two brothers lived together in the same house. One owned all the furniture; the other bought a carpet on credit, which was laid in the house. When the credit expired, he did not pay for it. The other then went to the seller, paid the price, and had a bill of sale made to himself. The transaction was held to be valid, and the taking

of possession by the brother, who paid for the carpet, was sufficient. Clearly he should not have been deprived of the carpet by the creditors of his brother, just because his brother occupied the same house with him.

Renninger v. Spatz, 128 Pa. 524, 18 Atl. 405, 15 Am. St. Rep. 692, is another case upon which counsel for exceptant relies. In that case, the property of a husband was purchased at a sale of a farm and the personal property located thereon. The vendee leased the property to the wife of the vendor, and sold to her the furniture which he had bought. The wife could not be deprived of the furniture at the suit of the husband's creditors, just because the property remained in the same place, and because the relationship between her and her husband continued to exist. There was such delivery, and she had taken such possession as, under all the circumstances, could be reasonably expected, in view of the relationship to the property and to each other.

A vendee of the entire stock of goods in a store is not required to remove the goods in order to take possession of them. His taking possession of the store with the goods therein is its equivalent. Symbolic delivery, by the transfer of a bill of lading or warehouse receipt, or by tagging ponderous machinery with the name of the vendee, is a sufficient taking of possession. In all the Pennsylvania cases there must be such a delivery to the purchaser, and such a taking of possession by him, as the circumstances of the case may require, in lieu of manual delivery and receipt. There is no reason why a different rule should be applied to an automobile than may be applied to any other movable chattel. Nothing is much more capable of being moved for delivery and receipt than an automobile.

We are satisfied that the decision of the referee should be sustained, the exceptions to his findings overruled, and the petition of the claimant dismissed.

In re ROBINSON MACH. CO.

Petition of C. E. FALES MACHINERY CO.

(District Court, E. D. Michigan, S. D. August 27, 1920.)

No. 4256.

Bankruptey = 140(1) - "Conditional sale" distinguished from "absolute sale with retention of title as security"

With retention of title as security."

A contract of sale of machinery to bankrupt for use, providing that deferred payments should be evidenced by notes and that the machinery should remain the property of seller until fully paid for, with the right to retake possession on any default, where the notes were retained by seller, held, under the law of Michigan, a contract of conditional sale, and not one of absolute sale with retention of title as security, and on bankruptcy of purchaser before payment seller held entitled to reclaim the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Absolute Sale; Conditional Sale.]

In Bankruptcy. In the matter of the Robinson Machine Company, bankrupt. On review of order of referee denying petition of the C. E. Fales Machinery Company for reclamation of property. Reversed and remanded.

R. E. Hofelich, of Detroit, Mich., for petitioner.

Clark, Emmons, Bryant, Klein & Brown, of Detroit, Mich., for trustee.

TUTTLE, District Judge. This is a petition to review an order of the referee denying the petition of the C. E. Fales Machinery Company for reclamation of certain machinery furnished by it to the bankrupt under a contract, the proper construction and effect of which are the subjects of the present controversy. The contract was as follows:

"Detroit, Michigan, April 12, 1918.

"Subject to strikes, accidents, or other delays beyond our control, please furnish the following machinery, delivered f. o. b. our factory about April 12, 1918.

"One 20" improved Steptoe back-geared crank shaper, with regular equipment.

"For which we agree to pay nine hundred and twenty-five and no/100 dollars.

"In case payment is divided, to be made as follows, the deferred payments to be evidenced by notes bearing date of shipment and interest:

"\$200.00 cash payment. "\$300.00 two months note.

"\$425.00 three months note.

"The above-described property shall be kept and used at Ecorse, in Wayne county, state of Michigan, and it is agreed that title to said property shall remain in C. E. Fales Machinery Company until fully paid for in cash, and that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after 30 days from its arrival at destination shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and a fulfillment of all its contracts of warranty express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of the C. E. Fales Machinery Company, that said machinery shall not become a fixture to any realty on account of being annexed thereto, and that the rental value thereof is one hundred and fifty dollars per month, and which said sum the undersigned hereby agrees to pay to said C. E. Fales Machinery Company, and in case default is made in the payment of one or more of the aforesaid notes or sums of money this contract shall, at the option of C. E. Fales Machinery Company, be forfeited and determined, and C. E. Fales Machinery Company shall have the right to take away said ma-[Signed] Robinson Machine Co., chinery.

"Accepted by

"By A. Robinson, Pres. C. E. Fales Machinery Co., "By R. E. Merriam."

The property referred to in said contract was delivered to, and has remained in the possession of, the bankrupt and of its trustee in bankruptcy. It was not furnished for resale. The notes mentioned in the contract, and executed and delivered by the bankrupt to the petitioner, were promissory notes in the usual form, dated with the date of said contract. The amount due and unpaid at the time of filing the reclamation petition was \$244,88. The notes were not transferred and the

rights of no third persons have intervened. The instrument was not filed as chattel mortgages are by law required to be filed.

Upon the hearing on said petition the referee was of the opinion that the transaction consisted of an absolute sale with reservation of title as security only, and that the contract was, in its real nature and effect, a chattel mortgage, and, because not filed as required by law, void as to certain creditors of the bankrupt. He therefore denied the petition for reclamation.

If it was the understanding and the intention of the parties to this contract in making it that the vendor should have the right to sue for the purchase price of property the title to which had passed, and should have the right, at the same time, to retain title to such property, then this instrument evidences, in legal effect, an absolute sale, with retention of title only as security for the payment of the purchase price that is, an absolute sale with a chattel mortgage back from the purchaser; and in that event, as such instrument was not filed as required by the Michigan statute applicable to chattel mortgages and instruments intended to operate as such (section 11939, Michigan Compiled Laws of 1915), the referee was correct in holding it void as to creditors, and in denying reclamation thereunder. If, on the other hand, the real intent of the parties, as expressed in this contract, was that the title to this property should actually and absolutely remain in the vendor until the payment of the purchase price agreed on, the contract represented a pure conditional sale; the condition precedent to the passing of title being the payment of such price, and, in the meantime, the vendor holding the legal title and being entitled to reclaim possession in accordance with the terms of the contract. Atkinson v. Japink, 186 Mich. 335, 152 N. W. 1079; Young v. Phillips, 202 Mich. 480, 168 N. W. 549; Id., 203 Mich. 566, 169 N. W. 822; Owen & Co. v. Keller, 206 Mich. 555, 173 N. W. 343; In re American Steel Supply Syndicate, Inc. (D. C.) 256 Fed. 876, and cases there cited.

The referee apparently based his decision on the conclusion that the provision in the contract, to the effect that the deferred payments were to be evidenced by interest-bearing notes, itself indicated such an intent and agreement as created an absolute sale with retention of title merely as security. I am unable to agree with this conclusion. In the absence of any negotiation of the note, and with no resulting prejudice to the rights of innocent third persons, I find no inconsistency between the provisions that "in case payment is divided, to be made as follows, the deferred payments to be evidenced by notes," and the condition, following the provision just quoted, that "the above-described property shall be kept and used at Ecorse, in Wayne county, state of Michigan, and it is agreed that title to said property shall remain in C. E. Fales Machinery Company until fully paid for in cash."

The mere receipt of a promissory note by the vendor under a contract of sale does not amount to the payment or extinguishment of the debt for the purchase price, unless it is shown that such note was, by agreement between the parties, to operate as such payment or extinguishment. A. Leschen & Sons Rope Co. v. Mayflower Gold Mining & Reduction Co., 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) 1.

No evidence to that effect is disclosed by the record in the present case, and I am of the opinion that the clear provision that the "deferred payments" under the contract were "to be evidenced by notes" does not indicate an intention that the vendor shall have the right to sue for the purchase price as such (necessarily on the theory that the title had passed), while at the same time assuming to reserve such title, and therefore it seems clear that such provision does not render the contract one of absolute sale with retention of title only as security for payment of the purchase price. Thirlby v. Rainbow, 93 Mich. 164, 53 N. W. 159; Pettyplace v. Groton Bridge & Mfg. Co., 103 Mich. 155, 61 N. W. 266; Atkinson v. Japink, supra; Monitor Drill Co. v. Mercer, 163 Fed. 943, 90 C. C. A. 303, 20 L. R. A. (N. S.) 1065, 16 Ann. Cas. 214.

Considering all of the language in this contract, including the clause already considered, and the recitals that "title to said property shall remain in C. E. Fales Machinery Company until fully paid for in cash," that "said machinery shall not become a fixture to any realty on account of being annexed thereto," and that "the rental value thereof is one hundred and fifty dollars per month, which said sum the [vendee] hereby agrees to pay to said [vendor]," and bearing in mind the absence of language authorizing the vendor to retain the title until payment of any judgment for the purchase price, I reach the conclusion that this transaction constituted a purely conditional sale, with complete reservation of title in the vendor until performance of the condition precedent attached to such sale, namely, payment of the purchase price in full in cash, and not an absolute sale, with a so-called retention of title in the seller as security for the payment of the purchase price of property, the title to which had passed by such sale to the vendee.

It follows that the petitioner is entitled to the reclamation sought, and the order of the referee denying such reclamation must be, and is, reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

P. PASTENE & CO., Inc., v. GRECO CANNING CO.

(District Court, N. D. California, Second Division. August 30, 1920.) No. 16076.

1. Sales = 172—Must be reasonable effort to obtain product to exempt from liability for nondelivery under "short pack" provision of contract.

In an action for short delivery under a contract by a canning company for sale of a stated number of cases of a tomato product from the season's pack, to constitute a defense under a provision of the contract that "in case of short pack seller agrees to make pro rata delivery," it is not sufficient to show a shortage of the tomato crop in the immediate vicinity of defendant's plant, but it must be further shown that it could not have obtained them within a reasonable distance.

2. Sales \$\iiint 172\top Trouble with machinery is not a "circumstance beyond control," so as to excuse for nonfulfillment of contract for product.

Trouble with machinery in the plant of a canning company held not to exempt it from liability for short delivery under a contract for sale

and delivery of a stated quantity of its product, as a "circumstance beyond its control."

3. Contracts \$\infty\$=170(1)—Acts constituting construction by parties must be done with full knowledge of facts.

To constitute a binding construction by the parties of a written contract, it ought to appear with reasonable certainty that the acts of both parties were done with knowledge, and in view of a purpose at least consistent with that to which they are sought to be applied.

At Law. Action by P. Pastene & Co., Incorporated, against the Greco Canning Company. Judgment for plaintiff.

Thomas, Beedy & Lanagan, of San Francisco, Cal., for plaintiff. John L. McNab, of San Francisco, Cal., for defendant.

VAN FLEET, District Judge. Action to recover for breach of contract to manufacture and deliver 3,000 cases of Salsa De Pomidoro, or Italian tomato paste, in the crop season of 1916. There was delivery under the contract of but 665 cases, or about 22 per cent. of the quantity contracted for, and the action proceeds upon the theory that the plaintiff is entitled to recover upon the basis of a full and complete delivery of the quantity contracted for.

The defense is based on this provision of the contract:

"In case of short pack, seller agrees to make pro rata delivery. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances beyond its control, such obligations shall at once terminate and cease."

The defendant's claim is, in substance, that there was a "short pack," within the meaning of the contract, resulting partly from a very considerable failure in the tomato crop by reason of weather conditions, and partly from trouble with defendant's processing appliances, which caused great delay and difficulty; that by reason of these conditions defendant was compelled to make a pro rata delivery; that plaintiff received its full pro rata of the pack actually made, which was all it was entitled to. The different elements of this defense will be considered.

[1] 1. As to a failure of the crop, it is sufficient to say that the evidence, which is more or less conflicting, is not sufficient to sustain that feature of the defense—at least to any such extent as that claimed. There was evidence tending to show that early rains and frosts damaged the crop to some extent, and thus decreased production, particularly in the Santa Clara valley, the territory more immediately surrounding defendant's plant; but it was not only very indefinite as to the real extent of the injury in that valley, but wholly so as to the effect in other fields of production in adjacent counties, where it appeared the tomato is largely grown, and, there being nothing in the terms of the contract requiring that the goods contracted for be produced from tomatoes grown in any particular section, it was essential to sustain this defense, even had there been a more complete failure in the immediate field, to show that the fruit could not have been secured in

other parts of the state in quantity to fulfill the contract. Newall et al. v. New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487. The evidence discloses no such effort in this respect as would establish inability to get the fruit elsewhere, or to excuse the failure to perform the contract to the great extent shown. To the contrary, I am satisfied that, taking all the evidence into consideration and giving the defendant the benefit of every intendment and deduction making in its tavor as to failure or damage to the crop, the court would be wholly unwarranted in finding the defendant justified in abating more than 20 per cent.

from a full delivery under its contract.

[2] 2. As to the delay and difficulty encountered by defendant from trouble with its paste-making machinery, it is not, and indeed could not well be, seriously claimed that such a cause would ordinarily come within the definition of a "circumstance beyond its control," which would excuse performance by defendant within the terms of the contract. Carnegie Steel Co. v. United States, 240 U. S. 156, 36 Sup. Ct. 342, 60 L. Ed. 576; Morgan v. Lyall, 16 Quebec K. B. 562; Connorsville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 76 N. E. 294, 3 L. R. A. (N. S.) 709; American Bridge Co. v. Glenmore Distilleries Co. (Ky.) 107 S. W. 279; Vredenburgh v. Baton Rouge Sugar Co., 52 La. Ann. 1666, 28 South. 122. But the claim under this head is, first, that the custom in the packing business is to recognize such causes of delay as justifying a "short pack"; and, second, that independently of this custom the parties themselves put that construction upon the contract, and that the court is bound thereby. But the evidence on the subject is too vague, unsatisfactory, and conflicting to enable the court to find the existence of any such custom. It tends strongly, to the contrary, to indicate that nothing is ordinarily regarded by the trade as justifying a "short pack," other than causes beyond the control of the packer, such as those stipulated in the contract or of a kindred character.

Nor do I think the evidence sustains the contention that the parties in their dealings have given the contract any such construction as that contended for. This claim is based solely upon certain passages occurring in the correspondence carried on during the time the goods were being processed. Quite early in the packing season the defendant wrote plaintiff of difficulties being encountered with the processing machinery, which were causing delay, and that by reason of that, and because "the crop this year is very short, as we have had considerable rain, which has caused much damage," it was predicted that the pack would be as low as 25 per cent. In answer the plaintiff wrote, expressing regret over the difficulties being encountered and disappointment at the prospect of a "short pack," and, expressing the hope that defendant would find conditions improving, said:

"At this time we will only state that, if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course, that in any case we shall expect a full pro rata delivery of all such goods as you are successful in producing."

There were later references in the correspondence to the same subject, but none bearing more definitely on the question of a practical construction of the contract than those given. It is quite obvious that there was nothing in the suggestions made by plaintiff, in reply to a recital by defendant of the difficulties encountered, which could be seized upon as tending to show that plaintiff was giving the contract a construction in any respect differing from that its language would import. The defendant had mentioned to plaintiff, as one of the difficulties presenting itself, a short crop resulting from weather conditions, a thing which plaintiff would at once recognize as justifying or excusing a "short pack" under the very terms of the contract. The answer must be read, as does his next letter, in which he makes reference to hearing that weather conditions had improved, as indicating that damage to the crop was what he had in mind in his suggestion about meeting defendant's situation "in reasonable fashion." Very clearly it cannot be construed as an acquiescence in any suggestion which may be gathered from defendant's letters that the latter was relying on the trouble with its machinery as justifying a "short pack."

[3] In construing acts or expressions of the kind relied on as constituting a construction by the parties of a written contract at variance with the ordinary import of its terms, it is a cardinal rule that—

"It ought to appear with reasonable certainty that they were acts of both parties, done with knowledge, and in view of a purpose at least consistent with that to which they are now sought to be applied." Sternbergh v. Brock, 225 Fa. 279, 287, 74 Atl. 166, 169 (24 L. R. A. [N. S.] 1078, 133 Am. St. Rep. 877).

Here the only information plaintiff had as to conditions confronting the defendant was what those conditions were represented to be by the latter, and as to which, as we have seen, the failure of the crop was at least exaggerated. In this respect, therefore, the plaintiff is entitled to rely on the terms of the contract as written.

The further considerations urged by counsel as to the construction to be put upon the contract have not been overlooked, but are regarded as inapplicable to its express terms. The contract price, delivered by defendant f. o. b. cars San Francisco, was \$7 per case, and it is stipulated that the market price at the time and place of delivery was \$10 a case. In view of the foregoing considerations, plaintiff should have judgment in accord with those figures, based upon a delivery of 80 per cent. of the quantity contracted for, less the quantity already delivered, and for its costs.

Judgment may be entered accordingly.

In re KORNSTEIN.

(District Court, E. D. Missouri, E. D. November 11, 1920.)

1. Aliens \$\infty\$=68\to Naturalization denial bars further application for five years.

Denial of naturalization petition on the ground applicant was not a man of good moral character debarred his again seeking citizenship for at least five years thereafter.

- 2. Aliens 68—Government may cross-examine naturalization candidate.

 The government may inquire into the entire life history of the candidate for naturalization, in determining his right to naturalization, through the cross-examination prescribed by Naturalization Act June 29, 1906, § 11 (Comp. St. § 4370).
- 3. Aliens \$\iiint_71\frac{1}{2}\$, New, vol. 7 Key-No. Series—Naturalization revocable.

 Where an alien engaged in an immoral and illegal business procures naturalization, he will on proper proceedings be stripped of his citizenship on the ground that he fraudulently and illegally procured it.
- 4. Aliens \$\iiin\$ 62—Running disorderly hotel held to permanently bar naturalization.

Where petitioner for naturalization had for years conducted a disorderly hotel, he would be permanently barred from citizenship by denying his naturalization application with prejudice.

 Aliens \$\ifficcite{2}\$=68—Verifying witnesses of false naturalization application are permanently disqualified.

Where affidavits of witnesses to naturalization application specifically recited that they possessed personal knowledge of the fact that the candidate was a man of good moral character, whereas in fact he ran an assignation house, such witnesses would be debarred from further appearance as naturalization witnesses in the court.

- Aliens 68—Incompetent witness vitiates naturalization application.
 A witness who is incompetent renders a naturalization application void.
- 7. Aliens \$\iiint_68\$—Naturalization witnesses cannot be substituted.

 A competent naturalization witness cannot be substituted for an incompetent one.

In the matter of the petition of Boruch Kornstein for naturalization, wherein the government prayed that the petition be denied with prejudice, and that the verifying witnesses thereon be disqualified from further appearance in naturalization causes in the District Court. Prayer of the government granted.

M. R. Bevington, Chief Naturalization Examiner, of St. Louis, Mo., for the United States.

DYER, District Judge. On June 23, 1920, the applicant, Boruch Kornstein, an alien and native of Russia, giving his occupation as that of a hotel keeper, filed petition for naturalization No. 8904 in this court. As a part of his application, Kornstein identified himself as the identical person whose petition for naturalization No. 3368 was on September 11, 1914, denied on a finding that he was not a man of good moral character.

The government opposes the naturalization of this candidate, and prays that his petition be denied with prejudice, and that the verifying witnesses thereon be disqualified from further appearance in naturaliza-

tion causes in this court. In support of its motion, the United States establishes that the adjudication of September 11, 1914, was based on testimony that the petitioner conducted a hotel, the principal patronage of which consisted of women of the underworld and their paramours. Testimony adduced on behalf of the government in connection with the present petition for naturalization of this candidate is to the effect that the character of the hotel he still conducts has not materially changed, and that the same is an assignation house with an established reputation

of years' standing as such.

The first question presented is whether the proprietor or keeper of a hotel or lodging house, of the character the evidence shows the petitioner conducted, can be said to be a person of good moral character, attached to the principles of the Constitution, within the meaning of the naturalization act. From a review of the authorities, it appears that naturalization has been refused on the following grounds: Where the candidate has been guilty of perjury, In re Spenser, 5 Saw. 195, Fed. Cas. No. 13,234; where the liquor laws of a state are flouted, United States v. Hrasky, 240 Ill. 560, 88 N. E. 1031, 130 Am. St. Rep. 288, 16 Ann. Cas. 279, United States v. Gerstein, 284 Ill. 174, 119 N. E. 922, 1 A. L. R. 318, and In re Trum (D. C.) 199 Fed. 361; where false answers are given to a naturalization examiner during the preliminary examination of the candidate, In re Talarico, 197 Fed. 1019; and where the candidate habitually violated the election laws by voting, In re Centi (D. C.) 211 Fed. 559.

[1-4] It is quite clear the denial by this court of the candidate's petition for naturalization of September 11, 1914, on the ground that he was not a man of good moral character, debarred his again seeking citizenship for at least five years thereafter. In re Hartman (D. C.) 232 Fed. 798, and cases there cited. It is equally clear that the government may inquire into the entire life history of the candidate, in determining his right to naturalization through the cross-examination prescribed by section 11 of the Naturalization Act of June 29, 1906, 34 Stat. pt. 1, p. 596 (Comp. St. § 4370). United States v. Bressi (D. C.) 208 Fed. 372; In re Spenser, supra. It is therefore immaterial that more than five years have elapsed, following the adjudication of said September 11, 1914, before the candidate resubmitted his present case on petition No. 8904, which bears date of June 23, 1920. The test in any given naturalization case is whether the candidate is in law and in fact actually entitled to citizenship. Schurmann v. United States (C. C. A.) 264 Fed. 920, 921, and cases there cited. Where an alien engaged in an immoral and illegal business procures naturalization, he will on proper proceedings be stripped of his citizenship on the ground that he fraudulently and illegally procured the same. United States v. Raverat (D. C.) 222 Fed. 1018. The evidence in this case is to the effect that the petitioner has for years conducted a disorderly hotel. Can one who conducts such a place for business be considered a man of good moral character for naturalization purposes? The question must be answered in the negative. There are some offenses against morals that must be held to permanently bar an alien from citizenship. In reRoss (C. C.) 188 Fed. 685; In re Spenser, supra. The maintenance of an assignation house must be held to fall within this rule. The government's prayer that the application of this candidate be denied with prejudice to his right to renew the same will therefore be granted.

[5-7] This leaves but one further matter for decision, that of the objection lodged against the verifying witnesses. The affidavits of said witnesses, which constitute a part of the petition for naturalization in this cause, specifically recite that they, the witnesses in question, possess personal knowledge of the fact the candidate is a man of good moral character. If they actually knew the true character of the candidate for whom they youched, then their testimony could only have deceived the court, and as a result of this have brought about the naturalization of an unworthy candidate. On the other hand, if they did not know his true character, and despite this fact they declared on their oath that they possessed such knowledge, then their testimony was more than worthless, being contrary to the facts and such as to work an imposition on the court. In naturalization petitions, the courts are peculiarly at the mercy of the witnesses offered by the candidate. Such candidate takes care to see that only those who are friendly to him, and who he is satisfied will give testimony in his favor, are offered as witnesses. The courts cannot be expected to possess acquaintance with the candidates presenting themselves for naturalization—in fact, no duty rests upon them in this particular; so that witnesses appearing before them are in a way insurers of the character of the candidate concerned, and on their testimony the courts are of necessity compelled to rely. A witness who is incompetent renders an application void. United States v. Martorana, 171 Fed. 397, 96 C. C. A. 353. A competent witness cannot be substituted for an incompetent one. United States v. Gulliksen, 244 Fed. 727, 157 C. C. A. 175. The question of a witness' qualifications in naturalization proceedings is therefore a matter of more than usual importance. A witness who testifies to the good character of a candidate, in a case where such candidate is not in truth and in fact a man of good character, is not a credible witness, such as the law calls for. A petition verified by such an incredible witness will be denied.

The danger of permitting such witness to continue to act in naturalization causes is such that, at least until such time as opportunity presents for the appellate court for this circuit, or the Supreme Court of the United States, to declare the law on the subject, the witnesses in this case will be debarred from further appearance as naturalization witnesses in this court.

POLK v. MILES, Collector of Internal Revenue.

(District Court, D. Maryland. May 10, 1920.)

No. 816.

1. Internal revenue &= 8-Transfer of corporate stock held not made in "con-

templation of death."

A transfer of corporate stock by a father to his son, made to settle family quarrels and to assure the father an income after the death of his wife, who had been furnishing him money, is not made in "contemplation of death," within the statute imposing the inheritance tax, where the father, though advanced in years, was in vigorous health, but died unexpectedly shortly after the transfer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.1

2. Internal revenue ==8-Transfer of corporate stock for interest thereon

during transferor's life takes effect immediately.

A transfer of corporate stock by a father to his son, in consideration of the son's promise to pay the father during his life a stated interest on the par value of the stock, takes effect immediately, and is not postponed till the death of the father, and is therefore not subject to the inheritance

At Law. Action by Gabriel Clark Polk, individually and as executor of the estate of Lucius C. Polk, against Joshua W. Miles, Collector of Internal Revenue for the District of Maryland and Delaware. Judgment directed for plaintiff.

Fisher & Fisher, of Baltimore, Md., for plaintiff. Samuel K. Dennis, of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff seeks to recover an inheritance tax paid under protest. To understand the issues involved, it is necessary to go back to the conditions under which there was living, in the spring of 1915, a family consisting of Lucius C. Polk, upon whose estate the tax has since been levied, his wife, Mary E. Polk, and their son, Gabriel C. Polk. They will be referred to as the "husband."

"wife," and "son," respectively.

For many years, the husband had held all the stock of the Chesapeake Brewing Company. It had been a losing venture, kept affoat by advances nominally made by the husband, but for the most part apparently out of funds given to him from time to time by his wife, who was in receipt of a large income, to which she was entitled for life, with remainder to the son. The husband had scant resources of his own. The sands of the wife's life were, to the knowledge of all of them, rapidly running out. The husband and son were on anything but goods terms. The wife and son believed that the husband would not wait long after her death before contracting a new alliance, with a person of whom they strongly disapproved. The husband also had his apprehensions that the decease of his wife would cut off his source of supply, as it was highly probable that the son would be far less liberal with him. He could not get anything from the brewery, for

it was steadily running behind. Indeed, without new money to put into it, it would speedily go into liquidation.

A new quarrel between husband and son led all of them to seek the mediation of a close relative, a distinguished Baltimore judge. As the result of his interposition, on the 11th of May, 1915, some 17 months before Congress imposed any tax on inheritances, the husband and son entered into a written agreement, the purpose and effect of which is now in controversy. By it the husband made over to the son all his stock in the brewery, and all that it owed him, amounting to a trifle less than \$105,000. The son promised that during the lifetime of the wife the brewery should pay the husband monthly interest at the rate of 4 per cent. per annum on this sum, and after the death of the wife the son would, so long as the husband lived, guarantee that such payments would be made.

The government claims that the \$105,000 was taxable, as transferred by the husband (1) in contemplation of, or (2) intended to take effect

in possession or enjoyment at or after his death.

[1] What constitutes contemplation of death within the meaning of like statutes has been many times decided, and the facts of this case do not bring it within any well-considered definition ever given to the phrase. It is true that the husband was well advanced in years, but he was still vigorous, and was supposed to be looking forward to matrimony rather than to death. The latter overtook him rather sudden-

ly, not long after the statute became a law.

[2] May the collector of internal revenue sustain his action, on the ground that the transfer made was not intended to take effect in possession or enjoyment until after the husband's death? There is no question that the son at once entered into possession of the brewery's stock, with whatever enjoyment it was possible to get out of it. The agreement reserved to the husband no rights in it, and the government has not sought to tax the stock, which was worthless, or nearly so. The indebtedness had value, provided the business was promptly wound up. What, if anything, it would be worth, if its collection was postponed until after the death of the husband, no one could then say. What did the transaction amount to? Was it anything other than the purchase by the husband from the son of an annuity of nearly \$4,-200 a year, payable in monthly installments; the buyer paying for it by assigning to the seller his claim against the brewery? It has been many times held that the vendor of an annuity enters at once into the possession and enjoyment of the price paid for it, which does not, upon the death of the annuitant, figure as part of his estate for taxation purpose. Matter of Edgerton, 35 App. Div. 125, 54 N. Y. Supp. 700, affirmed 158 N. Y. 671, 52 N. E. 1124; Matter of Thorne, 44 App. Div. 8, 60 N. Y. Supp. 419, affirmed in 162 N. Y. 238, 56 N. E. 625.

It follows that the tax was improperly collected, and the plaintiff

is entitled to recover it.

BARNETT v. CONKLIN.

(Circuit Court of Appeals, Eighth Circuit. July 15, 1920. Rehearing Denied October 25, 1920.)

No. 5509.

1. Appeal and error \$\infty 71(3)\$—Denial of injunction against judgment claimed

to have been satisfied is appealable.

An order denying an injunction to restrain plaintiff from taking any proceedings to enforce a judgment, for the reason that it had been satisfied by another defendant, is a final appealable order, though an order refusing to quash an execution for irregularities is one within the discretion of the court, and not appealable,

2. Judgment \$\iins\$88-Satisfaction by release of joint judgment debtor the same in contract and tort actions.

The rules governing the satisfaction of a joint judgment by settlement and release of one of the joint judgment debtors is the same, whether the action in which the judgment was rendered was one in tort or on contract.

3. Judgment \$\infty 888_Satisfaction of one joint judgment debtor does not re-

lease others, contrary to stipulation.

The acceptance by a judgment creditor from one judgment debtor of payment of part of the amount of the judgment, and release of that debtor from further liability on the judgment, with stipulation that such release should not affect the liability of the other judgment debtors, does not release the other debtors.

4. Judgment \$\infty 888\$—State statute held not applicable to release of joint judgment.

Rev. St. Mo. 1909, § 5431, as amended by Laws 1915, p. 268, relating to contribution between defendants in judgment for tort and settlement with joint debtors or joint tort-feasors, does not apply to a settlement with one judgment debtor after the judgment has been rendered, with stipulation that it shall not release the other debtors.

On Petition for Rehearing.

5. Judgment 526—Character of judgment determined by character of cause

The character of a judgment as one on contract or for tort may be ascertained by going back of the judgment and examining the character of the cause of action.

6. Judgment \$\isplies 888—Does not cut off statutory right to compromise with one tort-feasor.

The right under the Missouri statute to compromise with one or more wrongdoers, and to release them from further liability without impairing the right to collect the balance of the claim or cause of action from the other wrongdoers, is not cut off by the recovery of a judgment, but such compromise may be made after judgment as well as before.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by Roland R. Conklin against G. A. Barnett and others. From an order denying defendant Barnett's petition to enjoin plaintiff from taking proceedings to satisfy the judgment rendered therein, defendant Barnett appeals. Affirmed.

J. G. L. Harvey, of Kansas City, Mo. (James A. Reed, of Kansas City, Mo., on the brief), for appellant.

Leslie J. Lyons, of Kansas City, Mo. (Hiram W. Currey, of Joplin,

Mo., on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. This is an appeal from an order made by the court below March 22, 1919, denying the petition of appellant, filed January 9, 1919, which prayed that appellee be enjoined from taking any proceedings to satisfy a judgment rendered by said court on October 3, 1918, for the sum of \$167,225.88, in an action wherein appellee was plaintiff and Porto Rico Mining Company, Barnett Mining Company, J. W. Ground, and appellant were defendants. A motion is made to dismiss the appeal, for the reason that the order denying the petition of plaintiff was not a final order and involved the exercise of discretion.

A word in regard to prior proceedings. An appeal was taken to this court from the judgment rendered October 3, 1918, on March 22, 1919. On the argument of said appeal at the September, 1919, term of this court, it was sought by counsel for appellants, against the objection of counsel for appellee, to have the court review the action of the trial court in making the order now sought to be reviewed on this appeal. After the appeal from the judgment had been argued and the case submitted, the present appeal was taken, and a stipulation by counsel was filed in this court, wherein counsel agreed that the court might consider the present appeal in connection with the appeal from the judgment. This court being of the opinion that the order of March 22, 1919, could not be reviewed on the appeal from the judgment alone, and not wishing to take jurisdiction of a case argued before it was ap-

pealed, let the present appeal follow the usual course.

[1] The proceeding which resulted in the order appealed from was in no true sense simply a motion to quash an execution involving the exercise of discretion. The proceeding was equivalent and took the place of a proceeding in equity to enjoin the enforcement of the judgment for the reason that it had been satisfied. The prayer of the petition did ask that the execution then outstanding be quashed; but that was merely incidental to the general relief, which was that the enforcement of the judgment should be enjoined. It was not a matter involving the discretion of the trial court, but a matter in regard to which appellant was entitled to the judgment of the court upon the facts pleaded. The denial of the petition by the trial court finally determined, so far as that court was concerned, the rights of appellant, which were substantial rights, not involving the mere regularity of the execution. In so deciding we have no intention to avoid the force and effect of Boyle v. Zacharie, 6 Pet. 648, 8 L. Ed. 532, Evans v. Gee, 14 Pet. 1, 10 L. Ed. 327, Loeber v. Schroeder, 149 U. S. 580, 13 Sup. Ct. 934, 37 L. Ed. 856, and McCargo v. Chapman, 20 How. 555, 15 L. Ed. 1021; or the cases of Nooiin v. U. S., 164 Fed. 692, 90

C. C. A. 513, and Carroll et al. v. Davidson, 152 Fed. 424, 81 C. C. A. 566.

Boyle v. Zacharie was a writ of error to revise the decision of the Circuit Court in refusing to quash a writ of venditioni exponas issued for the sale of the ship, General Smith, which was seized upon a fieri facias issued on a judgment against Boyle. Counsel for Boyle made a motion to quash the venditioni exponas, upon the ground, among others, that an appeal had been taken from the judgment, and an injunction and bond given in pursuance thereof, which it was claimed acted as a supersedeas. The provisions of Acts Md. 1799, c. 79, and Acts Md. 1723, c. 8, were also relied upon. It thus appears that the motion to quash merely attacked the regularity of the issuance of the execution and did not attack the integrity in any way of the judgment. It was decided that the denial of the motion to quash was not a final judgment; one of the reasons given being that the same court that issued the injunction, issued the execution, and therefore had control of both writs, and in its discretion could determine which should stand.

In Evans v. Gee a judgment had been rendered against Evans by the Circuit Court at the May term, 1836. No execution, so far as the record showed, had been issued until March 16, 1838, when one was taken out, bearing teste the second Monday of October, 1837, returnable the second Monday of April, 1838. The execution was levied on sundry slaves, and a bond given for their delivery. The bond recited that the execution in virtue of which the levy was made bore teste of the May term, 1836. One of the sons of Thomas Evans made an affidavit stating that his father died on September 12, 1837, and on this affidavit a motion to quash the execution and delivery bond was founded. The motion was refused, but the reason therefor does not appear. The Supreme Court decided that the reason was immaterial, as the refusal to quash the execution was not a final judgment. It therefore appears from the report of this case that the motion to quash was founded upon an irregularity in the issuance of the execu-The point made against the execution was that it was issued against a dead man.

In Loeber v. Schroeder, supra, the Supreme Court said:

"The motion to quash the fi. fa. in this case on the grounds that the order of the Court of Appeals, which directed it to be issued, was void for the reasons assigned, stood upon no better footing than a petition for rehearing would have done, and suggested federal questions for the first time, which, if they existed at all, should have been set up and interposed when the decree of the Court of Appeals was rendered on January 28, 1892."

Of course the ruling on a motion for rehearing or new trial is addressed to the discretion of the court, and not reviewable at all in the federal courts.

In McCargo v. Chapman, supra, a motion to quash an execution issued therein was made upon two grounds:

"(1) Because the same issued more than seven years after a prior execution. (2) Because the same issued more than seven years after the return of the last preceding execution."

It was decided by the Supreme Court in this case that the order quashing the execution was not such a judgment as could be reviewed by writ of error.

Carroll et al. v. Davidson, 152 Fed. 424, 81 C. C. A. 566, was a case in admiralty, where the court denied a motion to set aside a decree previously entered. This, of course, was not a final decision. Noojin v. U. S., supra, simply followed the general rule that a mere motion

to quash an execution is not a final judgment.

We have no doubt but that the order in this case was final as to the matters alleged in the petition, and was appealable. The action in which the judgment in favor of appellee was rendered was an action brought by him against appellant and the other defendants for fraud and deceit in the sale of certain mining property situated in Jasper county, Mo. The court, after a trial of the cause, adjudged that the contract of sale should be rescinded, canceled, and set aside. It also adjudged the title of the property to be in the defendants, and rendered a money judgment against them for the amount of money paid for the property in the sum above stated as damages. On the 11th day of March, 1919, the following compromise agreement between J. W. Ground, one of the defendants in the original action, and appellee, was filed in the court below. This agreement, in words and figures following, was the basis upon which appellant rested his prayer for relief in the present proceeding:

"Whereas, Roland R. Conklin, the above-named plaintiff, did on or about October 3, 1918, recover a judgment in the above-entitled cause for \$167,225.88, and costs of suit, against the above-named defendants, and each of them; and

"Whereas, J. W. Ground, one of the above-named defendants, desires to settle, compromise, and adjust the above-mentioned judgment, in so far as same affects him, by the payment of a portion thereof; and

"Whereas, Roland R. Conklin, the above-named plaintiff, is willing and has agreed to accept the amount hereinafter mentioned as a partial payment on

said judgment:

"Now, therefore, in consideration of the payment by J. W. Ground to Roland R. Conklin of the sum of \$25,000 cash in hand, the receipt of which is hereby acknowledged, and the execution and delivery by said J. W. Ground of his promissory note, payable to the order of Roland R. Conklin on or before thirty (30) days after date, with interest at six per cent. (6%) per annum from date, and his two other like promissory notes, for \$25,000 each, due and payable on or before six and twelve months, respectively, after date, and each bearing interest at the rate of six per cent. (6%) per annum from date, the payment of the last two mentioned notes to be secured by the assignment and delivery to Roland R. Conklin, as collateral to said notes, of \$200,000 par value of the stock of the Joplin-Pittsburg Railway Company, it is agreed as follows:

"First. That said Roland R. Conklin does hereby acknowledge payment by said J. W. Ground of the sum of \$100,000 on said judgment, and discharges and releases all lands, tenements, chattels, goods, wares, merchandise, and property of every kind and description now owned by said J. W. Ground, or which may be hereafter acquired by him, from any and all liens and effects of said judgment, and shall not pursue the said J. W. Ground individually or as a stockholder in the Barnett Mining Company or Porto Rico Mining Company further as to the collection of the balance of said judgment, or enforce the payment of said balance out of any property of said J. W. Ground by any

process whatsoever in said cause, or by any supplementary or independent

action or proceeding.

"Second. That the said Roland R. Conklin hereby specifically retains and reserves unto himself, his heirs, administrators, executors, or assigns, each, all, and every right, privilege, or remedy given him by law or equity to pursue, enforce, and collect the balance of said judgment against and from the other defendants in said cause, and this compromise, settlement, and agreement shall not be taken, held, or construed in any manner whatsoever as a release or discharge of said other defendants from the force, effect, and lien of said judgment.

"Third. That it is the intention of the parties hereto that said payment of \$100,000 made by said J. W. Ground shall constitute a partial payment only on said judgment, and be held, construed, and taken as a mere credit thereon for that amount, and not as a release, discharge, or satisfaction thereof, or of the cause of action upon which said judgment is based, as to said other de-

fendants.

"Fourth. This agreement shall become effective and binding upon the par-

ties hereto on and from the date of the notes above mentioned.

"In witness whereof, the parties have hereunto set their hands, at Joplin, Jasper county, Mo., on the day and date above mentioned."

Upon the facts stated in the agreement and other facts appearing in the record, counsel for appellant contends: (1) That the judgment in favor of appellee in the original action was rendered in an action sounding in tort. (2) That the stipulation above set forth constituted a satisfaction of the judgment as to J. W. Ground. (3) This being so,

the judgment was also satisfied as to all of the defendants.

[2] That the judgment was rendered in an action sounding in tort may be conceded, but we are of the opinion that it makes no difference whether it was or not as to the question now under consideration. It also may be conceded that the stipulation constituted a satisfaction of the judgment as to J. W. Ground. At this point we cannot follow counsel for appellant in his contention that the satisfaction of the judgment as to J. W. Ground, in view of the language of the stipulation, constituted a satisfaction of the judgment as to the other defendants. We have stated that in our opinion it is immaterial whether the judgment was rendered in an action sounding in tort or not. Our reasons for so thinking are as follows. We understand the rule at common law as to joint debtors, or joint and several debtors, to be as follows:

"At common law a release of one or two or more joint debtors, or joint and several debtors, releases all, because the debt is entire, and, when once released, can no longer be enforced against any party to it." 34 Cyc. p. 1081, and cases cited.

Again at common law:

"A release given to one of several joint judgment debtors on his paying his proportionate share of the judgment or on other consideration releases the judgment as to all, unless the creditor expressly reserves the right to enforce the judgment as to the others." 23 Cyc. p. 1477.

The judgment rendered in favor of appellee in the original action was joint and several, or at least joint. So far as the common law is concerned, the release of J. W. Ground, without more, would release

the other defendants, regardless of whether it was a judgment rendered in an action sounding in tort or not. After the rendition of the judgment, appellee had no other cause of action than that which might arise upon the judgment. In other words, the cause of action

existing before judgment was merged in the judgment.

[3] It remains, therefore, to consider whether the reservations made in the stipulation as to releasing the defendants other than Ground have the effect of holding the balance of the judgment against the other defendants. We have no doubt they do. We are of the opinion that Tillitt v. Mann, 104 Fed. 421, 43 C. C. A. 617, and Carey v. Bilby, 129 Fed. 203, 63 C. C. A. 361, decided by this court, compel us to so hold, even if we had any different opinion than that announced in those cases, which we have not, so far as the point in controversy is concerned. The stipulation, like all other contracts, should be construed according to the intention of the parties to the same. Concerning this intent there can be no doubt, as it is plainly expressed in the stipulation itself. In Berry v. Pullman Co., 249 Fed. 816, 162 C. C. A. 50, L. R. A. 1918F, 358, the Circuit Court of Appeals for the Fifth Circuit followed Carey v. Bilby, supra, giving the same its full approval. See, also, Leschen Co. v. Mayflower Co., 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) 1, and cases cited; Am. Bonding Co. v. Pueblo Inv. Co., 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357, and cases cited: U. S. Fidelity & Guarantee Co. v. Board of Comr's, 145 Fed. 144, 76 C. C. A. 114.

Counsel for appellant cites Dulaney v. Buffum, 173 Mo. 1, 73 S. W. 125, in support of the proposition that the reservation in the stipulation of the right of appellant to pursue the other defendants is void because repugnant to the release given to J. W. Ground. In the case cited the release was given in an action sounding in tort before judgment, and was given so far as two of the defendants in the action were concerned. The court followed the case of Ruble v. Turner, 2 Hen. & M. (Va.) 38. Other cases are cited to the same effect. We are of the opinion, however, that the true rule is stated by this court in Carey v. Bilby, supra, as follows:

"The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which they had sustained, that it was not in fact full compensation for the injury, and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey."

We are of the opinion that it is not permissible at this date in the progress of the law to construe the stipulation between appellee and J. W. Ground by striking out of it the stipulation that appellee did not intend to release the other defendants, and then, when so emasculated, to decide that it was a release of the other defendants, but that

the whole stipulation must be construed together, and the intent of the parties thus ascertained. In this case the satisfaction that the appellee was entitled to had been definitely ascertained, and beyond question he has not received that satisfaction, and this fact is considered by the courts very important in construing a release, for the purpose of determining whether it was a partial or a complete release of the debt. In cases where a settlement has been had with one tort-feasor before judgment, it is very difficult at times to ascertain what satisfaction the injured party is entitled to, and therefore difficult to ascertain whether he has received that satisfaction or not. It plainly appears in this case, however, that appellee has not received that satisfaction which the law awarded him. We should hesitate to deprive him of the balance of the satisfaction by adding to a harsh rule of the common law a harsh construction of the stipulation.

[4] Certain legislation of the state of Missouri is referred to by counsel for both parties, and a different construction placed upon the

same by each. The legislation referred to is as follows:

In 1855 (Rev. St. 1855, c. 51, § 8) the following statute was passed:

"Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract."

This statute simply related to the right of contribution. In 1915 (Laws 1915, p. 268) the statute was amended to read as follows:

"Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. It shall be lawful for all persons having a claim or cause of action against two or more joint tort-feasors or wrongdoers to compound, settle with, and discharge any and every one or more of said joint tort-feasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tort-feasors or wrongdoers against whom such person or persons has such claim or cause of action, and not so released." Section 5431, R. S. 1909.

We are of the opinion the statute is not relevant to the question involved in the present case, except that it shows the intent of the Legislature of Missouri to give persons, having a claim or cause of action against two or more joint tort-feasors or wrongdoers, the right to compound, settle with, and discharge any and every one or more of said joint tort-feasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons from such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tort-feasors or wrongdoers. This statute, so far as we know, has not been construed by the Supreme Court of Missouri; but we are

of the opinion that it clearly covers two situations: (1) Where the claim or cause of action has been reduced to judgment, in which event there is created the right of contribution which did not exist at common law. (2) Where the claim or cause of action has not been reduced to judgment the statute gives the right above stated. But the present case does not involve either one of these situations. The views herein expressed compel an affirmance of the order appealed from.

Affirmed.

On Petition for Rehearing.

PER CURIAM. [5] In view of the fact that counsel for petitioner seem to have misunderstood the opinion of the court in this case, we

deem it proper, in denying the petition for a rehearing, to say:

First, that we do not hold, as seems to be inferred, that the character of a judgment is not determined by the character of the cause of action. We recognize as well established the rule that, wherever it is necessary to ascertain whether the judgment is for tort or is on contract a court may go back of the judgment itself and examine into the character of the cause of action.

Second, the judgment obtained by Conklin against Barnett and Ground for \$167,225.88 was for tort. The written instrument pursuant to which Ground paid or agreed to pay \$100,000 for his release from the judgment was not a satisfaction of it. The character of the transaction and the intention of the parties is definitely stated in the third paragraph of the instrument, wherein it is said that the intention is that the payment of \$100,000 by Ground "shall constitute a partial payment only on said judgment, and be held, construed, and taken as a mere credit thereon for that amount, and not as a release, discharge, or satisfaction thereof, or of the cause of action upon which said judgment is based, as to said other defendants." What we hold is that the payment by Ground under such circumstances did not release Barnett from his liability for the balance of the judgment for the tort.

[6] Third, that under the statute of Missouri 1915 the same conclusion would necessarily follow. That statute authorizes persons having causes of action against two or more wrongdoers to compromise with one or more, and to release him and them from further liability, without impairing his right to demand and collect the balance of his claim or cause of action from the others. No reason is perceived why that right is cut off by the recovery of a judgment which, as to the amount of the claim, merely makes certain that which was uncertain before. The rule that the character of a judgment is affected by the character of the cause of action is applicable in such a case. Other provisions of the Missouri statute indicate that it was the intention to put judgments as well as causes of action for torts upon the same plane as those on contract.

Petition denied.

NATIONAL SURETY CO. v. McCORMICK.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)

No. 2751.

 Principal and surety 59—Compensated suretyship treated like other insurance.

The obligation of a contract of insurance, in the form of a bond entered into by the surety for the revenue which it derives from the business of suretyship, should be treated as other insurance contracts, which are usually construed most strongly against the insurer.

2. Depositaries 14—Treasurer of Chicago Sanitary District could sue on depositary's bond in own name.

Where a bank, with which the treasurer of the Chicago Sanitary District had deposited funds of the district, failed, the treasurer could properly sue in his own name the surety on the depositary's bond; for his obligation to the district, under Hurd's Rev. St. Ill. 1917, c. 24, § 346, and rule 15 of the district's board of trustees, adopted thereunder, was absolute, so that any security which he might take for repayment to him of deposited funds would be wholly for his own protection, and the employment in the bond of the term "treasurer," following the name of the obligee, was descriptive only, not only of the person, but also of the funds for which the surety was liable, if deposited.

 Depositaries = 13—Drains = 17—Chicago Sanitary District treasurer could deposit district funds on time deposit; bond covered time deposits.

The treasurer of the Chicago Sanitary District did not transgress the law by making deposits of district funds on time deposits, so that a depositary's bond could not be said not to cover such deposits, nor was it void as part of an illegal transaction.

It is common knowledge that the highest interest rate on bank deposits is carried by deposits on time certificates.

5. Depositaries =13—Depositary's bond, indemnifying treasurer of Chicago Sanitary District, held to cover time "deposits."

A bank depositary's bond, indemnifying the treasurer of the Chicago Drainage District, conditioned to "pay out the funds * * * so deposited with it * * in accordance with the warrant, check, or direction" of the treasurer, did not exclude time deposits by indicating, by the use of the words "warrant" and "check," that the deposits contemplated were such only as were subject to immediate withdrawal by check or otherwise, for the word "deposits" was in no manner limited, and commercially it includes deposits of all kinds, such as are customarily made with banks, and of which the most examples are checking and time deposits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deposit.]

6. Interest \$\infty\$=47(1)—Due on bond from time of suit.

Under Hurd's Rev. St. III. 1917, c. 74, § 2, providing that interest shall be payable on moneys after they become due "on any bond, bill, promissory note, or other instrument of writing," etc., where the action is on a bond, it does not have to appear that there was a liquidation or a settlement, or that the delay of payment is vexatious, in order that interest

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may be allowed; but it is sufficient that it is a bond which was sued upon, and that the money was due, in which event interest is properly allowed from the date of commencement of suit.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by J. A. McCormick, individually and as assignee, against the National Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff in error is a corporate surety company, and as such, under date of June 2, 1914, it executed as surety, with the La Salle Street Trust & Savings Bank as principal, a surety bond to defendant in error as obligee, in penal sum of \$25,000, conditioned as follows:

"The condition of the foregoing obligation is such that whereas, the La Salle Street Trust & Savings Bank has been designated by said obligee as depository of funds and moneys coming into his hands as such treasurer of said Sanitary District of Chicago; and whereas, said obligee may from time to time deposit said funds and moneys with said the La Salle Street Trust & Savings Bank:

"Now, therefore, the condition of the foregoing obligation is such that if the said the La Salle Street Trust & Savings Bank shall well and faithfully perform and discharge its duties as such depository, and pay out the funds and moneys so deposited with it, and each and every part thereof, in accordance with the warrant, check, or direction of the said J. A. McCormick, as such treasurer, and shall account for and pay over all moneys received by it as such depository, then this obligation shall be null and void; otherwise, to remain in full force and effect."

June 12, 1914, the bank failed; defendant in error holding its two obligations as follows:

"The La Salle Street Trust & Savings Bank of Chicago. No. 247. Chicago, Ill., May 1st, 1914. \$25,000.00. John A. McCormick, Treas., has deposited with us twenty-five thousand dollars, payable to the order of himself in current funds on the 1st day of August, 1914, without grace, on the return of this certificate properly indorsed, with interest at 3%."

"The La Salle Street Trust & Savings Bank of Chicago. No. 265. Chicago, Ill., June 11th, 1914. \$50,000.00. John A. McCormick, Treas., has deposited with us fifty thousand dollars, payable to the order of himself in current funds on the 3d day of September, 1914, without grace, on return of this certificate properly indorsed. Interest from June 3, 1914."

Both represent funds of the Sanitary District which defendant in error as such treasurer deposited in the bank. The first, as appears from its date, was deposited before the bond was given, and the last was issued to defendant in error upon his surrender of a similar obligation for like amount given March 3, 1914, and due June 3, 1914, not paid at its maturity, but surrendered and canceled upon the delivery of the new certificate the day preceding the failure of the bank.

Suit upon the bond was brought by McCormick, "Treasurer of the Sanitary District of Chicago," and the breaches alleged were the failure of the bank to pay the said two obligations then held by him. While the suit was pending, McCormick ceased to be treasurer of the Sanitary District, and thereupon an amended declaration was filed by him in his own name as plaintiff setting forth that he had resigned as such treasurer, and had fully accounted for and paid over to the said Sanitary District all moneys and funds which had come into his hands as such treasurer, and that said Sanitary District had executed to him an assignment of all rights, if any, which it had in and to the obligation sued upon.

By agreement in open court jury was waived and the cause submitted to the court, which found the debt at \$25,000 and the damages \$47,750—the last being the amount of the two obligations, less certain dividends paid thereon by the receiver of the defunct bank—and it was adjudged that the debt be discharged upon the payment of \$25,000, with interest at 5 per cent., per annum from February 27, 1915. All these allegations of fact are undisputed, and are fully supported by the evidence.

Fletcher Dobyns, of Chicago, Ill., for plaintiff in error. George Buckingham, of Chicago, Ill., for defendant in error.

Before BAKER and ALSCHULER, Circuit Judges, and FITZ-HENRY, District Judge.

ALSCHULER, Circuit Judge (after stating the facts as above). Plaintiff in error contends that in any event McCormick has no right of recovery; that the bond describes him as "treasurer," and that as treasurer only can he recover, but not in his individual capacity; that the Sanitary District itself had no interest in the bond, and was not protected by it; and that its assignment to McCormick conveys him nothing.

The Sanitary District is a public corporation, and the statute of Illinois which is its source of existence and power provides that its board of trustees shall elect a treasurer, who shall hold office during the pleasure of the board, which shall prescribe his duties and fix the amount of his bond to be given to the board. Chapter 24, § 346, Hurd's

Rev. Stat. Ill. (1917 Ed.).

Rule 15 of the board, enacted pursuant to the statute and in force during all of these transactions, provides that the treasurer shall receive all moneys of the district, sign its checks, negotiate all its bonds, and make payments of interest on same, and pay bonds and interest at maturity, "and he shall convert into the treasury all sums received as interest on any deposit of the funds of the Sanitary District," fixes his salary at \$2,500 per annum, and his official bond to the district at \$3,000,000, and provides that—

"The selection of depositories of the funds of the Sanitary District of Chicago in the hands of the treasurer shall be entirely in the control of the treasurer, and no action of the board shall be considered as ratifying the selection of any depository by said treasurer, or in any way waiving the strict liability of said treasurer, for the custody of, and accountability to the board, for said funds."

This would indicate that the contention is quite sound that the Sanitary District had no interest in this bond, but looked wholly to its treasurer and his official bond for its security. Who, then, but Mc-Cormick himself, had any interest in the bond, or could have been contemplated by the parties as being protected by it? It is suggested that when he ceased to be treasurer the action might be brought or maintained by his successor in office. If the district itself has no interest in it, what possible interest in it can his successor have; and when McCormick has made good his unqualified obligation to pay over to the district, what concern is it of either the district or the successor whether or not anything is realized on this private unofficial contract of indemnity?

[1] It is urged that the rule of strict construction generally applicable to the obligation of sureties should be here applied. But this is not that ordinary contract of voluntary suretyship, as to which there has arisen a sort of tenderness toward sureties. This is a contract of insurance, entered into by the surety for the revenue which it derives from the business of suretyship, and in this relation the obligation should be treated as other insurance contracts, which are usually construed most strongly against the insurer. Liverpool, etc., Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; Commercial, etc., Ass'n v. Fulton, 79 Fed. 423 (2 C. C. A.) 24 C. C. A. 654.

[2] The obligation of the treasurer to his district being absolute, any security which he might take for repayment to him of deposited funds would be wholly for his own protection, and the employment in the bond of the term "treasurer," following the name of the obligee, is descriptive only, not alone here of the person, but tending also to describe the funds for which the surety contracted liability if deposited with the bank; i. e., funds only which came into McCormick's hands as treasurer of the Sanitary District, and none others. We conclude on this point that defendant in error in his own name could properly maintain suit on the bond.

[3, 4] Next it is urged that McCormick had no lawful right to put out the funds of the district on time deposits, or in any way to place them beyond his power of immediate withdrawal, and that in consequence either the bond did not cover time certificates, or, if it did cover time certificates, that the bond is void, and no recovery can be had

upon it.

The income of the district is largely from taxes annually assessed and collected, and may not be required to be paid out for many months after their receipt by the treasurer. The same rule 15 makes the treasurer the financial adviser of the board, and he of all persons should know at what times the available funds of the district are required to meet maturing obligations. There is no statutory inhibition upon the treasurer's deposit of funds with banks; indeed, in this day it would be ridiculous to assume that he must keep the same in his physical possession, at the risk of being deemed a violator of the law if he deposits them in banks. From the statute and rule above referred to it is evident, not only that it was not to be deemed unlawful and improper for him to deposit the funds, but that the receipt of interest on deposits was contemplated and permitted, provided only that the district was to have the benefit of it. It is not unreasonable to assume that he would be expected, though not required, to obtain the highest rate of interest consistent with safety and commercial practice. and it is common knowledge that the highest interest rate on bank deposits is carried by deposits on time certificates. Knowing, as the treasurer must be presumed to know, the financial needs of the district, he could with safety make deposits to mature at times when the funds are needed by the district, and thus secure for the district the largest

interest return thereon. If he miscalculates, and places funds beyond the reach of the district when they are required, he and his official bond would be liable to make prompt restoration, wholly regardless of whether the funds were deposited upon time or call. We are of opinion that in making deposits on time certificates the treasurer did not transgress the law. This view makes it unnecessary to consider further the proposition that the bond is void and unenforceable if it contemplated indemnity against time deposits.

[5] But plaintiff in error insists that the wording of the bond itself excludes time deposits as a subject of the indemnity. The con-

tention is grounded on the condition of the bond that the-

"bank shall well and faithfully perform and discharge its duties as such depository, and pay out the funds and moneys so deposited with it, and each and every part thereof, in accordance with the warrant, check, or direction of the said J. A. McCormick as such treasurer, and shall account for and pay over all the moneys received by it as such depository, then this obligation," etc.

Counsel stress the words "warrant" and "check" as conclusively indicating that the deposits contemplated by the obligation were such only as were subject to immediate withdrawal by check or otherwise, thus excluding time deposits. But the terms and manifest intent of the bond are too broad and inclusive to warrant such limitation. The word "deposits" is in no manner limited, and commercially it includes deposits of all kinds such as are customarily made with banks, and of which the most usual examples are checking and time deposits. We find no merit in this contention.

The case of McCormick v. Hopkins, Receiver, 287 III. 66, 122 N. E. 151, involved practically the same situation above considered. Another surety company had given McCormick its bond of indemnity against loss which might accrue to him through deposits of the same sort of funds in this same bank, and the action was against that surety company, predicated on this same \$50,000 time certificate of deposit. A reading of the opinion in that case makes it evident that the court, in substance, at least, if not in precise form, considered the propositions above discussed, and resolved them all against the contentions of the receiver of that surety company.

Two questions are here raised with which that opinion does not deal, viz.: As to liability upon the \$25,000 time certificate of May

1, 1914; and as to recovery of interest.

Respecting the first of these, the claim is that, as the certificate antedates the bond, it does not fall within its indemnity, and that the court therefore erred in the inclusion of that certificate in the damages found. Finding, as we do, that the \$50,000 certificate, which postdates the bond, is clearly within the indemnity of the bond, and the amount of that obligation, less dividends paid thereon by the bank's receiver, largely in excess of the full penalty of the bond, it is needless for the purposes of this proceeding to determine whether the \$25,000 certificate would sustain action on the bond. It was suggested on argument that, if the question of contribution between surety companies

should arise, the proposition of liability upon the smaller certificate might be important. We do not see how anything that may be done in this proceeding would bind or affect those who are not parties to it. Such questions must be determined if and as they arise, upon issues made between the then parties, wholly independent of what is here determined. As to plaintiff in error in this action, if there was error in including the smaller certificate in the damages as found, the error was harmless.

[6] As to the proposition of interest, it is claimed that the damages were not liquidated, and that delay in payment was not shown to be vexatious, and that therefore interest is not chargeable under the statutes of Illinois. Chapter 74, § 2, Rev. Stat. Ill., provides that interest shall be payable on moneys after they become due—

"on any bond, bill, or promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received for the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment."

Where the action is on a bond, it does not have to appear that there has been a liquidation or a settlement, or that the delay of payment is vexatious, in order that interest may be allowed. It is sufficient that it is a bond which was sued upon, and that the money was due. The court allowed interest at the statutory rate from date of commencement of suit, and in this there was no error. Illinois Surety Co. v. Davis, 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206; In re Morrison (C. C. A.) 261 Fed. 355; Holmes v. Standard Oil Co., 183 Ill. 70, 55 N. E. 647.

The judgment of the District Court is affirmed, with interest and costs, together with 2 per cent. damages to defendant in error, under section 2 of rule 28 of this court (235 Fed. xii, 148 C. C. A. xii).

MICHIGAN CENT. R. CO. v. VASTAG.

(Circuit Court of Appeals, Seventh Circuit. June 28, 1920. Rehearing Denied October 22, 1920.)

No. 2747.

Railroads \$\infty\$ 350 (1) — Evidence held to raise jury question as to whether
accident occurred as claimed.

Testimony by plaintiff that he was struck by a west-bound train when his foot got caught in the flangeway along the south rail is not physically impossible, so as to be insufficient to go to the jury, though plaintiff was found unconscious after the accident 35 feet east of the crossing and north of the track, and there was no blood near the crossing, and plaintiff told the claim agent, shortly after the accident, that he was struck at another crossing.

Railroads 330(3)—Neglect to look and listen not excused by want
of signals.

The failure of railroad employés to sound the bell or blow the whistle on approaching a crossing cannot excuse a pedestrian for failing to look or listen for an approaching train.

3. Railroads €=327(2)—Pedestrian held contributorily negligent in failing to look.

A pedestrian, who stepped on the tracks at a street crossing when a train, which could have been seen for a distance of 2 miles, could not have been more than 200 feet away, was guilty of contributory negligence, which relieves the company of any liability for its failure to ring the bell or blow the whistle.

 Railroads ←303(3)—Street crossing sidewalk with flangeway held not defective.

The fact that a sidewalk crossing was constructed with the necessary flangeway slightly wider than the flanges does not, in the absence of evidence of negligent construction, show a violation of the statutory or common-law duty to construct safely the crossing, though the flangeway was approximately the width of some shoe heels, since it would be impossible to construct a flangeway which would be safe for all sizes and shapes of heels.

Railroads \$\iftharpoonup 346(3)\$—Res ipsa loquitur rule inapplicable to sidewalk crossing.

The rule of res ipsa loquitur does not apply to the construction of the flangeway at a sidewalk crossing, so as to show negligent construction, on proof that a pedestrian caught his heel in the flangeway.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by Steve Vastag against the Michigan Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Action to recover damages for injury to person. Verdict and judgment for plaintiff. Defendant in error, herein called plaintiff, while crossing the tracks of defendant in error, herein called defendant, caught his foot between the rail and the sidewalk, and was run over by a passenger train, losing a leg thereby.

On the evening in question, at about 7 o'clock, plaintiff was about to leave Hammond for his home in Gary. Missing a street car, he walked along a street parallel to and immediately south of some railroad tracks, seven in number, two of which belonged to defendant. He reached Howard street (running north and south), and went north on the east sidewalk, crossing five of the tracks, before his progress was interrupted by a long freight moving eastward. Here he waited until the train had cleared the crossing some 40 or 50 feet, and then resumed his journey northward. As he stepped on the last track, the so-called west-bound Michigan Central main track, the heel of his foot caught between the north edge of the south rail and the south edge of the adjacent sidewalk. This space was approximately 2¾ inches wide, a trifle over 2 inches deep, the width of the bottom being 2¾ inches. This flangeway, found in all crossing structures, is left for the engine and car wheels to pass along, and in the instant case was made of two car rails. One old rail was laid on its side, so that its ball fitted along the ball of the rail over which the car wheels passed. The bottom of the old rail, therefore, was flush with and formed the edge of the sidewalk.

The train that struck plaintiff was coming from the west, was in plain sight, and could be seen from the Howard street crossing a distance of 2 miles. It was moving rapidly, and the engineer neither rang the bell nor blew the whistle. Upon being struck, plaintiff was rendered unconscious, and remained so for some time after he reached the hospital. He was discovered by passers-by about 15 minutes after the accident, being found some 15 to 35 feet east of the sidewalk, and "a foot or so" north of the north rail. No blood was found on the south rail, where plaintiff claimed to have caught his foot, or elsewhere, except on the north rail, near where he lay. One witness testified that when he saw plaintiff his shoe was on his foot and the heel on the shoe intact. Another witness stated he found "a heel" on the east sidewalk the following morning. Neither the heel nor the shoe was offered in evidence.

Plaintiff's declaration consisted of four common-law counts. The first charged a failure to "use due care in managing, controlling, and operating its railroad and its train and said crossing, so that plaintiff might not be injured." The second charged defendant with having failed "to properly grade and gravel its road and tracks." The third charged defendant with having "carelessly and negligently constructed and maintained said crossing, * * * so that a certain opening next to and adjoining the south rail of said west-bound track was arranged and allowed to be and remain so that pedestrians were liable to catch their feet in said place and be held and fastened there." The fourth count charged defendant with having failed "to use due care to sound the bell and whistle as required by the statute," etc.

Defendant assigns error: (a) In refusing to direct a verdict in its favor. (b) In refusing to admit evidence offered by it. (c) In refusing its requested instructions.

Edward W. Everett, of Chicago, Ill., for plaintiff in error. Charles P. Molthrop, of Chicago, Ill., for defendant in error. Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). Defendant urges that a careful examination of the evidence will convince us that the accident never occurred at the Howard street crossing, and that it was a physical impossibility for it to have occurred in the manner described by plaintiff. In support of this position, it is urged that, if plaintiff was caught in the flangeway adjacent the south rail, then he could not have been thrown to the north side of the north rail, and, if he was struck by a rapidly moving west-bound passenger train while thus caught, he would have been carried to the west, whereas he was found at least 15 feet and possibly 35 feet east of the sidewalk. Defendant further insists that in any case there would have been blood

marks where he was run over and at the point where he was left unconscious. This theory, it is claimed, is corroborated by a statement given by plaintiff to a claim agent shortly after the accident, wherein plaintiff stated he was run over at Columbia avenue, a street immediately east of Howard street, but at which crossing there was no sidewalk.

[1] After a full and careful examination of all the evidence, we conclude a jury question on this phase of the case was presented. The plaintiff may have rolled or thrown himself violently about, and thus account for his position north of the track and east of the sidewalk. As to the absence of blood marks, it appears that several hours elapsed before witnesses examined the premises carefully the following morning, and it does not conclusively appear that the premises remained untouched overnight. Moreover, the amount of blood lost may, under the circumstances, have been small, and wholly absorbed by the clothing. Likewise any statement made by plaintiff shortly after the accident at most only impeaches his sworn testimony. From the entire story we think it was for the jury to draw the proper conclusion.

[2, 3] While plaintiff, in view of the passing freight train, was not in the best position to hear the bell or the whistle, we accept his statement that they were not sounded. Defendant insists, however, that liability, if any, arising out of its breach of duty in this respect, is defeated by plaintiff's contributory negligence. Certainly defendant's failure to sound the bell and blow the whistle cannot excuse plaintiff for failing to look or listen for an approaching train. This passenger train was in plain sight. It could have been clearly seen, had plaintiff looked, for a distance of 2 miles. As he stepped on the tracks it could not have been more than 200 feet away. Distressing as the consequences are, plaintiff's contributory negligence relieves defendant of any liability due to its failure to ring the bell or blow the whistle. Northern Pacific Ry. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542.

[4] As to the alleged defect in the street crossing, the Indiana statute reads:

"That it be the duty of each railroad company whose road or tracks cross, or shall hereafter cross, any street, avenue or alley in any incorporated town or city in the state of Indiana * * * to properly grade and plank or gravel its said road and tracks at its intersection with and crossing of said street, avenue or alley in accordance with the grade of said street or avenue, in such manner as to afford security for life and property at such intersection and crossing."

Defendant concedes a common-law duty equal to that imposed by the statute, but denies dereliction in any respect. Aside from the happening of the accident, we fail to find any evidence pointing to negligence, or deficiency. None has been suggested. The planks were in good repair and in proper position. No complaint is made concerning them. There had been no widening or deepening of the flangeway. There was no evidence that this structure was not properly or well constructed. In fact, certain offered expert proof that flangeways were usually constructed in this manner was rejected upon plaintiff's objection.

It is necessary to provide a flangeway, if car and engine wheels are to be provided with flanges and remain on the track. The flanges on these wheels are about 2 inches wide and vary but slightly. A space somewhat wider than the width of the flange is necessary. But a space much wider than $2\frac{3}{4}$ inches would not necessarily lessen the danger to the pedestrian. With feet and heels varying in size and shape, no single width could satisfactorily accommodate all. Had the width been greater, it might have been more dangerous, for plaintiff's heel was $2\frac{1}{2}$ inches wide and 3 inches from the back to the front.

[5] Nor can the rule res ipsa loquitur here apply. It is not a case where the flangeway can be entirely eliminated, nor can all possibility of danger be avoided. In fact, the operation of a railroad over a street crossing must necessarily be attended with some danger. This being the case, there is always a possibility of some foot or heel being caught. It is not a case where a foot thus caught necessarily implies a defect

in the crossing.

We recognize that in many cases of crossing accidents situations are presented requiring the court to submit the question of negligence to the jury. But in all of them there is some defect in original construction, or some "wearing away," either in the rail, or the planks, or in the hole, evidencing some want of repair or neglect in maintenance, some clumsy workmanship or careless inspection, that raises the jury question. In the present case, our attention has not been called to a single suggested change in the structure; and in open court, counsel admitted this was not a case for the application of the rule res ipsaloquitur.

Concluding, as we do, that the evidence fails to support any of the counts, it is unnecessary for us to consider any other defense or as-

signment of error.

The judgment is reversed, and the cause remanded.

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BECKER v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)

No. 2711.

War

4—Evidence not sustaining conviction under Espionage Act.

Evidence *held* insufficient to support conviction, under Espionage Act June 15, 1917, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), for seditious utterances.

In Error to the District Court of the United States for the Western District of Wisconsin.

John M. Becker was convicted of violation of the Espionage Act, and brings error. Reversed.

Ralph W. Jackman, of Madison, Wis., for plaintiff in error. B. R. Goggins, of Grand Rapids, Mich., for the United States. Seymour Stedman, amicus curiæ.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

PAGE, Circuit Judge. Defendant Becker was, on August 7, 1918, found guilty in the United States District Court for the Western District of Wisconsin on the first, third, and fifth counts of an indictment returned May 27, 1918, under section 3 of the Espionage Act of June 15, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), for the use in his speech in a public meeting at Monroe, Green county, Wis., on February 5, 1918, of the following language, set out and identical in each count of the indictment, viz.:

"The idea of having an administrator of fuel and food is ridiculous."

"There is no shortage of food. The idea of a shortage of food is being preached by agents employed by corporations for their own gain, and going about the country on high-paid salaries."

"This is a rich man's war. We won't have peace as long as these high-salaried fellows have jobs to protect."

"There is no labor shortage."

"There is no seed shortage."

There is also added and set out in the third and fifth counts the following:

"Farmers, beware of taxes, war taxes, which must be paid in July."

The charges are that the defendant:

First count: "Did willfully and feloniously make and convey certain false reports and false statements, with intent to interfere with the operation and success of the military and naval forces of the United States, and promote the success of its enemies."

Third count: "Did willfully and feloniously cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and

naval forces of the United States."

Fifth count: "Did willfully and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of the service and of the United States."

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This writ was prosecuted to reverse the judgment entered on the verdict, and as set out in the journal entries in the record reads as follows:

"That the defendant be sentenced to one year on each count, or three years in all."

But the bill of exceptions is as follows:

"The court sentenced the defendant to be imprisoned * * * for a period of three years, said sentences of imprisonment to run concurrently on each of the counts upon which conviction was had."

The circumstances surrounding the calling of the meeting at which the speech was made are important because they show conditions in Monroe. Green county had failed to "go over the top" on either of the Liberty Loans. Witness Lucksinger and others not named, who constituted the Green county council of defense, had so failed in their duties that Swenson, federal food administrator for Wisconsin, had made repeated complaints, and insisted that the council of defense should be reorganized, and in June, 1917, eight months before the meeting in question, had notified them to have the county chairman call a mass meeting and send in recommendations for a new council of defense, to be appointed by the state council. Nothing having been done, Swenson later summoned witnesses Ludlow and Lucksinger, and possibly others, to Madison, and told them that they must be reorganized. The witness Truckenbrod says that the meeting of February 5th was called pursuant to a meeting between the witnesses Lucksinger, Ludlow, Bolander, Neverman, and himself, where it was said:

"Here we are finding out that this council of defense expense is going to be more than any one has figured on, and we feel that the county board ought to know what is before them, how much it is going to cost. As long as we have to reorganize, we think it would be a good idea to call a session of the county board, and have them here when the organization is started, so they will all understand it, * * * so each one can go home and tell his people just what is expected of them in regard to the council of defense."

Because of a storm, only 6 of the 27 members of the county board were present; but there were others present, and the 50 or 60 people present proceeded as a kind of mass meeting. Many speeches were made, and, in a controversy over the statement that Dane, an adjoining county, had done better than Green county, defendant insisted that Green had been more liberal than Dane and that her people were loyal and patriotic. There is no evidence whatever that anything said or done by the defendant obstructed the recruiting or enlistment service of the United States, so that the fifth count is wholly unsupported.

There is substantial evidence in the record that the words set out in the indictment were used by the defendant in the course of and as a part of his speech. An examination of the record will show that all of the things which the witnesses remembered of what Becker said would probably require less than one minute to relate. Yet the record

also shows that he spoke in all from 15 to 20 minutes. No witness attempted to reconstruct or reproduce his speech. Two witnesses did, however, make statements that more clearly show what the speech was, and was intended to be as a whole, than it is possible to gain from any of the testimony bearing upon the isolated words of the indictment. The witness Dodge, who had the basis of an unfriendly feeling for the defendant, rather than a friendly one, came in after the defendant had made a part of his speech, but heard much of it, says:

"I think when I came in he [Becker] was trying to deliver a patriotic speech, but switched off onto the food and fuel situation."

The witness Saucerman, who had no occasion to feel friendly towards the defendant, says:

"After further discussing, in his opinion, the inadvisability of having called the county board together, the major portion of his talk was delivered to the assemblage as a group of farmers: 'You farmers, I want you farmers to remember' thus and so, his general idea of an economic address that he was delivering: 'You farmers must save your money; there will be taxes to pay in July, there will be war taxes.'"

It was clearly the impression of one of these men that the defendant was delivering a patriotic address, and of the other that he was delivering an economic address. And again, the witness Young undertakes to state the connection in which defendant used the language in the indictment, "Farmers, beware of taxes, etc.":

"Toward the close of the speech, after he had criticized the fact of calling the supervisors together and calling attention to the circumstances of this meeting—he told us to remember that they would have to pay for this, and they would have to pay for other things, and 'you have war taxes, you have to pay war taxes, and they will come in,' either June or July, I don't remember which he said."

Used in this connection, any construction must be very tortuous that will bring this part of the language of the indictment within any definition of a seditious utterance. Young, who was a traveling salesman for a wholesale grocery house, when he heard the statement about the preaching by high-salaried men, did not seem to think that the defendant was doing anything more than making a drive at him. Young remarked at the time: "He must mean me."

Another matter, indicating that many of the witnesses were not in a position to directly and accurately testify to or correctly interpret what Becker said, is the fact that their attention was being given to other matters. Kohli, when Becker said somebody was sneering at him, saw Neverman whispering to Young. He could not remember what words preceded, or what was said in the full discussion as to the food and fuel administration. Neverman said:

"During the time defendant was talking, Young and myself were talking on two occasions, one when I asked who the gentleman was who was coming to the railing, referring to Becker, and the other when Young leaned to me and said, "That is for me," when he made the reference about agents going about the country, on high salaries. That was all there was to it."

Johonott says:

"Neverman, Young, and myself were talking, and Young and Neverman were smiling. I heard him say some one was sneering at him. This happened about four or five minutes after he started to talk."

Before one can be convicted for the use of words or phrases which are a part of a speech, the evidence should be so clear and convincing as to show that the language complained of is, in the connection in which it is used, subject to the interpretation sought to be placed upon it in the indictment. Becker was a native-born American citizen, and seems to have had the approval of the community in which he lived, because for 21 years he had been elected and re-elected to the important and responsible office of county judge.

One witness, in order to qualify himself to testify, made inquiries of the banks about the purchase of Liberty bonds by the defendant. He also gave a Sunday dinner to the other witnesses, Lucksinger, Neverman, Durst, Weirich, Young, the two Knoble girls, and others, among whom was the witness Karlen. We cannot conceive that the demands of justice require such a line of conduct on the part of witnesses, and where indulged in it warrants very close scrutiny of the testimony and the purposes of those who engaged in such activities.

In Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, the court said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

We must hold, as a matter of law, that the record does not show that the words used by the defendant meet the test laid down in the Schenck Case, so as to justify a conviction.

The judgment is reversed.

In re CONSUMERS' PACKING CO.

ADER v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)

No. 2792.

1. Bankruptcy 212, 455—Order held not final; individual, surrendering money, entitled to intervene to have rights determined.

Where an unconditional order that an individual turn over certain moneys was followed by an order reciting that the individual turned over to the clerk of the court in open court said sum, "with reservation as to the ownership of said fund," both orders being entered before the adjudication in bankruptcy, the first one was not a final and reviewable order, on failure to ask review of which the individual lost his rights, but was not modified by the second, so that he was entitled to file an

intervening petition against the bankruptcy trustee, to have his rights determined on a proper issue made up, and to have such determination preserved in a reviewable order.

Denial of petition of claimant of moneys turned over to the court to intervene by petition against the bankruptcy trustee was reviewable only by petition for review, not by appeal.

Appeal from the District Court of the United States for the Eastern

Division of the Northern District of Illinois.

Petition to Review and Revise an Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the bankruptcy of the Consumers' Packing Company. Application by Edward J. Ader to file an intervening petition against the Central Trust Company of Illinois, trustee in bankruptcy, was denied, and petitioner appeals and petitions to review and revise. Appeal dismissed, and, on petition to revise, reversed and remanded.

Edward Maher, of Chicago, Ill. (Bernhardt Frank, of Chicago, Ill., of counsel), for appellant and petitioner.

Jerome J. Cermak, of Chicago, Ill., for appellee and respondent.

Before BAKER and PAGE, Circuit Judges, and FITZHENRY, District Judge.

PAGE, Circuit Judge. This is a consolidated submission of an appeal and a petition to review and revise an order of the District Court of the United States for the Eastern Division of the Northern District of Illinois, refusing permission to Edward J. Ader, appellant petitioner, to file an intervening petition in Consumers' Packing Company bankruptcy proceedings to determine the ownership of certain moneys turned over to the court by Ader under orders hereinafter set out.

On an amended involuntary petition filed February 21, 1919, the Consumers' Packing Company was adjudged a bankrupt on March 15, 1919. Upon the filing of the petition, a very vigorous inquiry into the affairs of the company was at once begun, and continued for a considerable space of time. On March 12, 1919, the court entered the following order:

"On motion and upon reading and considering the verified petition of James Shumacher this day filed herein, come the parties by their solicitors, and, after hearing the statements and arguments of counsel, the court being fully advised in the premises, it is ordered that E. J. Ader forthwith turn over to the receiver herein \$21,000 withdrawn by him from the Greenbaum Sons Bank & Trust Company."

On March 14th the court entered an order, in part as follows:

"This cause coming on again to be heard upon the examination of witnesses relative to the nature, location, and extent of the assets and liabilities of said bankrupt, come the parties by their solicitors, and the examination of witnesses proceeds, and during the course of said examination Bernard

Brown turn over to the receiver herein the sum of \$500 received from said bankrupt as attorney's fees; Erbstein, Heyman & Sellect turn over to the clerk of this court the sum of \$500 received by them from said bankrupt company as attorney's fees; and Chas. Erbstein, as solicitor for E. J. Ader, turns over to the clerk of this court in open court the sum of \$21,000 in accordance with the terms of the order entered on March 12, 1919, with reservation as to the ownership of said fund. * * * It is further ordered by the court that the further examination of witnesses be and hereby is continued until March 15, 1919."

On the 17th of March the following order was entered:

"This cause coming on to be heard upon the examination of witnesses for the discovery of assets, come the parties by their solicitors, and the examination of witnesses proceeds, and during the course of said examination E. J. Ader in open court tenders the sum of \$30,164, with reservation as to the ownership of said fund. It is thereupon ordered by the court that the Central Trust Company of Illinois, receiver herein, redeposit said sum with the Northern Trust Company of Illinois, in the name of the receiver of the Consumers' Packing Company. It is further ordered by the court that the further examination of witnesses be and hereby is continued to March 24, 1919."

When the orders of March 12th and 14th were entered, there had been no adjudication in bankruptcy. The adjudication order was entered March 15th. There are no other orders in the record affecting this matter, except the order complained of, entered November 18, 1919.

[1] It is urged that the order of March 12th was a final and reviewable order, and that petitioner lost his rights because he did not ask to have that order reviewed. The order of March 14th shows that it is a modification of the order of the 12th, and that the money in question was not turned over unconditionally. As the record stands, it shows that those moneys were taken by the court subject to Ader's rights, whatever they were. It follows, as a matter of course, that he was entitled to have those rights determined on a proper issue made up, and such determination preserved in a reviewable order.

[2] The proper practice was to file a petition for review, and the

appeal is dismissed. In re Petronio (C. C. A.) 220 Fed. 269.

The case is reversed and remanded, with directions.

TOLEDO REX SPRAY CO. v. CALIFORNIA SPRAY CHEMICAL CO.

(Circuit Court of Appeals, Sixth Circuit. October 14, 1920.)

No. 3408.

 Patents ←328—892,603, for process for making arsenate of lead, not void for lack of invention.

Luther & Volck patent, No. 892,603, for a process for making arsenate

of lead, held not void for lack of invention.

2. Patents ←328—892,603, for method of preparing arsenate of lead, sufficiently disclosed process.

Luther & Volck patent, No. 892,603, for a process for making arsenate of lead, *held* to sufficiently disclose the process involved, although the patent does not state at what stage the catalyzer is added.

3. Patents \$\insigma 328-892,603\$, for process for making arsenate of lead, infringed.

Luther & Volck patent, No. 892,603, for a process for making arsenate of lead, held infringed by process using the same formula although defendant made only pyro-arsenate, while plaintiff made its ortho-arsenate product more prominent than its pyro-arsenate.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Suit by the California Spray Chemical Company against the Toledo Rex Spray Company. Decree for plaintiff, and defendant appeals. Affirmed.

W. H. Swenarton, of New York City, and Russell Wiles, of Chicago, Ill. (W. H. Swenarton, of New York City, and Russell Wiles, of Chicago, Ill., on the briefs), for appellant.

Livingston Gifford, of New York City (Livingston Gifford and C. G. Heylmun, both of New York City, and Wilber Owen, of Toledo,

Ohio, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. This suit is upon patent No. 892,603, July 7, 1908, to Luther & Volck upon a process of making arsenate of lead, which is carried out, according to the specification, by combining lead oxide (litharge) suspended in water and arsenic acid in solution; the reaction being assisted by the cyclic action of the catalyzing agent—either acetic acid or nitric acid. The specification gives the formula of combining weights of lead oxide and arsenic acid, respectively, as varying from 1.938 to 2.9 parts of the lead oxide to one part of arsenic acid, according as ortho-arsenate or pyro-arsenate is desired. As shown by the specification, the weaker acid solution—practically three parts of lead oxide and one part of arsenic acid—produces the ortho-arsenate "with traces of pyro-arsenate of lead, lead salts of the catalyzer, and the catalyzer." The stronger acid solution (practically two parts of lead oxide and one part of arsenic acid) produces pyro-arsenate, "with traces of ortho-arsenate of lead, lead salts of the catalyzer, and the

catalyzer." A varying of these proportions produces a corresponding variation in the acidity of the product. The preferable proportion of the catalyzing agent is given as "one to three pounds of the catalyzer to one hundred pounds of the lead oxide." The only claim is as follows:

"The process of making arsenate of lead, which consists in reacting upon lead oxide held in suspension in water with arsenic acid in the presence of a catalytic agent; the lead oxide and arsenic acid being used in the proportion of their combining weights."

The defenses are invalidity and noninfringement. This appeal is from an interlocutory decree finding the patent valid and infringed. The grounds of asserted invalidity are (1) lack of invention in view of the prior art, especially if the patent is construed broadly enough to

cover defendant's process; (2) lack of sufficient disclosure.

[1] 1. Invention.—Many years previous to Luther & Volck's patent application (July 10, 1907) standard chemical authorities had taught that arsenate of lead could be obtained by the action of arsenic acid on nitrate of lead, by direct precipitation. Previous to the application for the patent in suit, the usual, if not the only, commercial method of making arsenate of lead was by combining either acetate of lead or nitrate of lead with arsenate of soda; the products of the respective reactions consisting of arsenate of lead, together with acetate or nitrate of soda, according as acetate or nitrate of lead was used. In neither the general teaching of the chemical authorities referred to nor in the double decomposition process was there any catalytic or cyclic action involved. Bell & Fell, however, had, in 1866, been granted a patent (No. 59,901) for an improvement in the manufacture of white lead, by which sulphate of lead was produced by the direct action of nitric acid upon lead oxide (thus forming nitrate of lead), to which product was added sulphuric acid and water, resulting in a lead sulphate. process (designed for use in the paint art) the nitric acid acted as a catalyst; that is to say, as an agent or auxiliary in liberating, from time to time, portions of the oxide of lead and converting the same into lead nitrate, which, by the action of the sulphuric acid, are immediately converted into lead sulphate—the constant repetition of this process until the whole mass of lead oxide is converted into lead sulphate, constituting the so-called cyclic action. The Bell & Fell specification also states that acetic acid may be used in place of nitric acid. The patent contains a formula fully as specific and definite as that of the patent in suit, if not more so.

The presence or absence of invention in the patent in suit thus depends upon whether, at the time of Luther & Volck's application, it was within the expected skill of the chemist, knowing, first, that lead nitrate would react with arsenic acid to produce lead arsenate, and, second, that the Bell & Fell process converted lead oxide into sulphate of lead by the use of nitric acid as a catalyzer—to further know that arsenate of lead could be produced instead of sulphate by substituting arsenic acid for Bell & Fell's sulphuric acid. At first blush, and without further statement of facts, the presence of invention in the Luther

& Volck patent would seem doubtful. But further facts must be taken into account.

While arsenate of lead has long been used in the paint and dye arts, in combination with other substances, its sole use, uncombined, seems to be and to have been as an insecticide. In 1890, it had been used with good results in combating the gypsy moth. The insecticide art, however, involves not only chemistry, but entomology; the live problem being to obtain a product such as will cover the foliage and fruit, and so result in killing the insect, without killing or injuring either fruit or foliage. Climatic conditions and the degree of sensitiveness of both fruit and foliage are necessarily involved. The invention of the patent in suit owes its birth to a campaign for the extermination of the cod dling moth in the Watsonville district of California, beginning in the year 1903, and carried on by the patentees, the one as a laboratory assistant in the Department of Entomology in the University of California, the other as a student in agricultural chemistry in the same institution, and under the supervision of the professor of entomology therein, under conditions of such obstinacy as to convince that department that the reputation of the university was directly at stake.

In the district in question, which was foggy, not only had orchards previously been injured by the use of paris green (arsenite of copper), as well as by arsenate of lime, which had killed the fruit, but it was found, during the campaign in question, that while certain commercial samples of arsenate of lead at first seemed effective, others caused serious burnings, due to the variability and unreliability of the double decomposition products of the lead arsenate, resulting from inability to control the degree of acidity in the product or satisfactorily to eliminate impurities and by-products, as well as the presence of mediums, such as large quantities of soda, interfering with complete reaction. The direct combination of arsenic acid and lead oxide was found slow and impracticable. Exhaustive experiments were accordingly made by the inventors in the actual manufacture of lead arsenate, with the aid of formulas given in bulletins of the universities and other available sources, and with the design of overcoming the obstacles presented. The adoption of nitric acid and acetic acid as catalyzers to control the proportion of acid content resulted and solved the problem; the coddling moth being within a few years thereafter completely controlled.

The invention was followed by the inauguration in 1907 of a factory at Watsonville for the manufacture upon a large scale of arsenate of lead in accordance with the formula of the patent. The process of the patent is shown to have substantial advantages over the process of the prior art; its new and specially distinguishing feature being the ability to control more positively and more readily the character of the arsenate (whether ortho or pyro), including the percentage of acidity. We are also convinced by the testimony that the process of the patent more readily and effectively produces superiority of product as respects smoothness, distribution, and adhesiveness. The double decomposition process has been very largely superseded by the process of the

patent in suit, although as late as 1913 one of the prominent paint manufacturers of the country still made some arsenate of lead by the double decomposition process. The manufacture of lead arsenate at the Watsonville factory has increased from about 20,000 pounds in 1907 to about 400,000 pounds in 1918. Beginning with March, 1916, licenses under the patent were issued to the two largest chemical corporations, a large drug manufacturer (perhaps the largest), the largest dry color manufacturer, one of the largest paint manufacturers, and one of the largest insecticide manufacturers in the United States—all, except one company, operating upon substantial royalties, the remaining company paying an outright consideration of \$30,000, with royalties besides, in case of successful adjudication of the patent. The manufacture by these licensees under the patent aggregated in 1918 more (apparently considerably more) than 5,000,000 pounds.

While in the light of the invention of the patent it may seem that it would naturally have occurred to one acquainted with the Bell & Fell disclosure to have tried the substitution of arsenic acid for sulphuric acid in making arsenate of lead, the fact remains that in the 40 years which elapsed since Bell & Fell it seems to have occurred to no one to try that experiment. In the light of this fact, and the further fact that mere analogy is not, in chemistry, usually so certain an index as in mechanics (Naylor v. Alsop Process Co. [C. C. A. 8] 168 Fed. 911, 919, 94 C. C. A. 315; General Electric Co. v. Laco-Philips Co. [C. C. A. 2] 233 Fed. 96, 103, 147 C. C. A. 166), we are not satisfied to say that it was within the expected skill of the chemist to know that Bell & Fell's process of making sulphate of lead (which may or may not have been employed commercially) was equally available for producing arsenate of lead by the mere substitution of arsenic acid for sulphuric acid. agree, also, with Judge Killits that in this case the evidence of favorable public reception and commercial success, in connection with the history of the working out of the invention, removed whatever doubt might otherwise exist as to invention. We think the case clearly within the doctrine applied in Minerals Separation, Ltd., v. Hyde, 242 U. S. 261, 270 (37 Sup. Ct. 82, 61 L. Ed. 286), and the authorities cited on the latter page.

2. The Disclosure.—The objections on this score are: (a) Failure to disclose by the patent that the product of the invention was intended as an insecticide, and that the fine, fluffy product, such as the process of the patent is shown to produce, is desired or even producible by the process of the patent; and (b) lack of sufficient information to enable one skilled in the art to practice it. The first objection impresses us

as so plainly without merit as to require no discussion.

[2] As to the Second Objection: We are convinced from the testimony that the disclosure is sufficient to enable one skilled in the art to practice the invention. It is true that conditions of temperature, quality of the ingredients used, and perhaps other elements, require care and to some extent experimentation to produce the best results. But the disclosure is addressed to those skilled in chemistry (Minerals Separation, Ltd., v. Hyde, supra, 242 U. S. at pages 270, 271, 37 Sup. Ct. 82,

61 L. Ed. 286), and we are impressed by what seems to us the greater weight of the evidence that the disclosure is ample for those so skilled.

In this connection it is urged that it does not appear from the patent at what stage the catalyzer is to be added, and it is contended that if it be added last—that is, after the arsenic acid—the process of the patent cannot be effectively carried out. In our judgment, this objection is not sound. It is true that the claim does not state the order in which the catalyzer is to be added, and that the first part of the specification does not in so many words say that it is added after the introduction of the arsenic acid, although that seems the more reasonable construction. But the more natural deduction from the formula later given is that the catalyzer is to be introduced before the arsenic acid is added. This being so, it would not seem highly important whether or not the process of the patent could be effectively carried out by adding the catalyzer as the last element. But notwithstanding defendant's evidence, and the experiment designed to support it, that the catalyzer must be added before the arsenic acid in order to success, the testimony of plaintiff's expert, in connection with his experiments, shows satisfactorily to our minds that successful working out of the process can be had, even by adding the catalyzer last, although that is not the preferable or desirable method.

[3] 3. Infringement.—We think the testimony clearly shows that the defendant's process infringes the patent as we have construed it. It employs 2.2 parts of lead oxide to one part of arsenic acid, being thus between the minimum and maximum of the patent, and it employs 2.81 per cent. of nitric acid as a catalyzer, which is between the minimum of 1 and the maximum of 3 per cent. specified in the patent. It is not, to our minds, important that defendant makes only a pyro-arsenate, or that plaintiff uses the word "ortho" as a trade-mark, making its ortho-arsenate product more prominent than its pyro-arsenate. It is enough that defendant uses the precise formula of the patent,

The decree of the District Court should be affirmed.

McLEOD TIRE CORPORATION v. B. F. GOODRICH CO.

(District Court, S. D. New York. February 28, 1920.)

No. 554.

1. Patents \$\infty\$292\to\$Inspection liberally allowed.

The court will allow inspection and compel answer to interrogatories in patent cases very liberally, stopping little short of requiring everything but the names of witnesses and such information as would enable the interrogator to bring forward untruthful testimony to meet the evidence of his adversary.

2. Patents 292—Inspection not denied because disclosing trade secrets.

In a tire patent case, inspection of working drawings or blueprints from the records of defendant, showing molds, cores, and other working parts used in the commercial production of defendant's tires, would not be

denied because of defendant's objection that these represented the details of a secret process of manufacture employed by defendant, although the secrecy of the process would be safeguarded by the order so far as possible.

In Equity. Suit by the McLeod Tire Corporation against the B. F. Goodrich Company. On plaintiff's motion to be allowed inspection of drawings, etc. Motion granted in part.

Bouvier & Beale, of New York City (Clair W. Fairbank and Irving M. O'Brieght, both of New York City, of counsel), for complainant.

Charles Neave, of Boston, Mass. (Merrell E. Clark, of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. [1] It has been the practice in this district to attempt to simplify the issues and limit the testimony necessary at the trial by allowing inspection and compelling answer to interrogatories in patent cases very liberally. We have stopped little short of requiring almost everything except the names of witnesses and such information as would enable the interrogator to bring forward untruthful testimony to meet the evidence of his adversary. Dick v. Underwood (D. C.) 235 Fed. 300.

[2] The only objection to requiring inspection of working drawings or blueprints from the records of the defendant showing molds, cores, and other working parts which have been used in the commercial production of defendant's tires between October 7, 1916, and the date of filing the bill of complaint is because of the contention that these represent the details of a secret process of manufacture employed by the defendant. Even if these things are secret, they could be produced at the trial, so that I do not see how the privilege can be preserved absolutely. I therefore grant the inspection called for by (1). If the defendant desires any safeguards to preserve the secrecy of the process so far as possible, that matter can be taken up upon the settlement of the order.

The inspection demanded by 3 and 4 should also be granted. Defendant relies on its own prior use. It has stated, in answer to question 2 (c), that copies of certain construction sheets can be seen by complainant. These copies have been seen. I can under these circumstances discover no reason for refusing to allow inspection of blue-prints of mold No. 1, core No. 1, and water bag No. 1, referred to in these construction sheets, or of the original construction sheets.

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Motion granted, except as to item 2.

BREWSTER v. WALSH, Internal Revenue Collector.

(District Court, D. Connecticut. December 16, 1920.)

No. 2133.

1. Internal revenue \$\infty\$7—Interest on purchase price of bonds not included in cost in computing profit.

In computing plaintiff's profit on a sale of bonds claimed to be taxable as income, where plaintiff paid for the bonds when they were allotted to him as member of an underwriting syndicate, but did not receive them for three years, interest on the price to the date of receipt of the bonds cannot be included as a part of the cost.

2. Internal revenue 57-Stock dividend not taxable as "income."

A stock dividend declared by a corporation is not taxable as "income" under the Sixteenth Amendment to the Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

3. Internal revenue 5-7-Sixteenth Amendment does not extend subjects of

taxation, but merely dispenses with apportionment.

The Sixteenth Amendment does not extend the taxing power to new subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, from whatever source derived.

4. Constitutional law @16—Congress and state Legislatures presumed to have knowledge of construction of language used in amendment.

Congress and the several state Legislatures, in adopting the Sixteenth Amendment, are presumed to have had knowledge of the meaning attributed by decisions of the state and federal courts to the words "incomes from whatever source derived."

5. Internal revenue 5-7—Increase in capital investment not income.

Enrichment through increase in the value of capital investment is not income, within the Sixteenth Amendment.

6. Internal revenue 5-7-Tax is on capital, and not on income, when payment requires conversion of capital.

If it requires conversion of capital in order to pay a tax, the tax is on capital increase, and not on income, within the meaning of the Sixteenth Amendment.

7. Internal revenue 2, 7—Increase in value of bonds sold at profit not taxable as income, and statute attempting to tax it is unconstitutional.

The appreciation in the value of corporate bonds owned by a person not engaged in trading in such securities, though realized by a sale of the bonds at a profit, is not income, within Amendment 16, but merely a capital increase, and so much of Income Tax Law 1916, § 2, subds. (a) and (c), as attempts to tax the profit from such a transaction, violates Const. art. 1, § 9, cl. 4, prohibiting direct taxes, unless in proportion to population.

8. Internal revenue 57-Sixteenth Amendment cannot be extended to property not income, though described as such by Congress.

The word "incomes," as used in the Sixteenth Amendment, cannot be construed to include property other than income, even if such property is described as income by an act of Congress.

At Law. Action by Frederick F. Brewster against James J. Walsh, as Collector of Internal Revenue. Judgment for plaintiff.

Henry F. Parmelee and George D. Watrous, both of New Haven, Conn., for plaintiff.

Edward L. Smith, U. S. Atty., and Allan K. Smith, Asst. U. S.

Atty., both of Hartford, Conn., for defendant.

THOMAS, District Judge. This action arises under the Income Tax Law of 1916 (39 Stat. 756). The plaintiff seeks to recover of the defendant, who is collector of internal revenue for the district of Connecticut, \$17,689.13, which amount the plaintiff paid to the government under protest, as an additional income tax assessed against him for the year ending December 31, 1916. The plaintiff further claims that there is also due him the additional sum of \$67.66, which the government concedes was an overpayment of normal tax and is rightly due the plaintiff, so that the total amount claimed by the plaintiff is \$17,756.79. Trial by jury was waived, and the case was tried to the court.

The facts are stipulated. It appears that the plaintiff is not now, nor was he during the times mentioned herein, a member of any Stock Exchange, or of any similar organization or association engaged in the business of trading in, buying, or selling securities. Neither was he in any way engaged in the business of buying or selling stocks and bonds, otherwise than occasionally making purchases of stocks and bonds for investment purposes, and occasionally making sales of such stocks and bonds for the purpose of changing the character of his investments. It further appears that there are three transactions involved in the main points raised in this suit.

The first transaction concerns the bonds of the International Navigation Company. In 1899 the plaintiff acquired certain interest-bearing bonds of that company, of the face value of \$191,000, in exchange for other securities of the same corporation, and during the year 1916 he sold the same bonds for \$191,000. On March 1, 1913, these bonds were quoted in the market at 79½ per cent. of their face value, so that on that day the market value of the bonds was \$151,845. The tax sought to be collected by the government on this transaction is based upon the difference between the sale price and the market value of the bonds on March 1, 1913, to wit, \$39,155, which amount the Commissioner taxed as income for the year 1916, and is part of the tax paid under protest, which plaintiff seeks to recover in this suit.

The second transaction concerns certain bonds of the International Mercantile Marine Company. In 1903 plaintiff, as a member of an underwriting syndicate, was granted an allotment of mortgage bonds of the face value of \$257,000, in return for which he paid the company at that time \$231,300 in cash; but the bonds thus allotted were not delivered to the plaintiff until April, 1906, when he received them, with nothing by way of interest on the amount of cash he had turned over to the company in 1903. The plaintiff claims that interest at 6 per cent, for three years on \$231,300 is properly an element of cost and attributable

thereto.

[1] It becomes necessary at this point to digress from a statement of the facts and first dispose of plaintiff's claim for interest on this transaction, in order to determine what the bonds actually cost the plaintiff, as the actual cost must be determined before consideration can be given to the plaintiff's claims respecting the tax the Commissioner assessed, and which plaintiff paid under protest, pursuant to such assessment. Plaintiff's claim that interest computed from date of payment in 1903 to date of receipt of bonds in 1906, and added to the cash paid for the bonds, represents the real cost of the bonds to the plaintiff, is untenable.

In Hays v. Gauley Mountain Coal Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. 1061, one of the questions there presented was whether the respondent should be allowed to add interest to the amount of cash it had paid in 1902 for certain shares of the capital stock of another mining company, which shares it sold in 1911, but the Supreme Court held that there was "no merit in the contention that interest should be added to the purchase price in order to ascertain its cost"; so that I find that the actual cost of these bonds to the plaintiff was

\$231,300.

From the stipulation it further appears that the plaintiff sold the bonds in 1916 for \$276,150, part of them having been sold at 107% and part at 107½. But on March 1, 1913, the market quotation and market value of these bonds was 64 bid and 641/2 asked, and at such quotation had an actual market value of \$164,480. On this transaction the plaintiff failed to make an income tax return as to any profit or gain by him obtained on the sale of these bonds, and was later assessed an additional tax on \$111,670, on the ground that this was the representative gain shown by the difference between \$164,480, the value of said bonds as indicated by the market quotation of March 1, 1913, and \$276,150, the price which plaintiff received from the sale of the bonds in 1916. The tax which was assessed on this transaction by the Commissioner, and paid under protest, and which is part of the tax here sought to be recovered, was levied upon the sum of \$111,670, which amount the government claims represents the income received from the sale of these bonds, and which amount, as stated above, was the difference between the market value of the bonds on March 1. 1913, and the sum received for them when sold in 1916.

[2] The third transaction relates to a stock dividend declared by the Standard Oil Company of California, in which company the plaintiff owned 1,330 shares of its capital stock. In 1916 the plaintiff received 665 shares of stock of said company as a stock dividend declared against a surplus, 18.0754 per cent. of which had been earned after March 1, 1913. The government claims that the plaintiff derived \$12,-019.41 taxable income therefrom; but this claim has been decided adversely to the government in Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, where the identical stock dividend was under consideration, so that the plaintiff, upon that authority, is entitled to recover for the tax assessed and collected in connection with

this transaction.

The discussion is therefore narrowed to two transactions—those pertaining to (a) the International Navigation Company bonds; (b) the International Mercantile Marine Company bonds, both of which the plaintiff owned on and before March 1, 1913, and which he sold in 1916, in accordance with the conditions above set forth. So that the sole inquiry here is whether the difference in the amounts between the value of investment securities on March 1, 1913, and the amounts received for such securities when sold in 1916 is taxable income, within the Income Tax Law of 1916 (39 Stat. c. 463, pp. 756, 757).

The discussion of this proposition revolves around the Sixteenth Amendment of the Constitution and the legislation passed by the Congress after the ratification of the amendment. The Sixteenth

Amendment to the Constitution provides:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

The pertinent sections of the statute passed by the Congress to carry the amendment into effect provide:

"Sec. 1. (a) That there shall be levied, assessed, collected, and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax

of two per centum upon such income."

"Sec. 2. (a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever: Provided, that the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint-stock company, association, or insurance company, out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of its cash value."

It is thus apparent that the statute specifically imposes a tax upon net income which "shall include gains, profits, and income derived from * * * sales or dealings in property," and then provides:

"(c) For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived."

It is the contention of the plaintiff that the statute is unconstitutional, in so far as it taxes as income the increased value of investments when realized by sale, and that such a tax is a direct tax upon capital or property, not authorized by the Sixteenth Amendment, and not a tax upon income; in other words, that such gains do not come within the definition of income, as the word is used in the Sixteenth Amendment.

On the other hand, it is the contention of the government that such gains do constitute income properly taxable under the Income Tax Law of 1916.

We are therefore brought to a consideration of the scope of the Sixteenth Amendment, because there is no question but that prior to the adoption of this amendment the Congress had no power whatever to tax as income gains arising from the sale of property, where the owner thereof was not a dealer or trader in such property, so as to justify an excise tax upon his business. In support of this, reference is made to the decision of the Supreme Court in Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108. The conclusion stated by Chief Justice Fuller (158 U. S. on page 637, 15 Sup. Ct. 920, 39 L. Ed. 1108) is as follows:

"Taxes on personal property, or on the income of personal property, are likewise direct taxes," and that "the tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections * * are necessarily invalid."

In Eisner v. Macomber, supra, Mr. Justice Pitney, speaking of the Pollock Case, said (252 U. S. on page 205, 40 Sup. Ct. 192, 64 L. Ed. 521):

"It was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership, and that Congress could not impose such taxes without apportioning them among the states according to population, as required by article 1, \\$ 2, cl. 3, and section 9, cl. 4, of the original Constitution."

[3] The Sixteenth Amendment does not extend the taxing power to new subjects. In Evans v. Gore, 253 U. S. 245, at page 261, 40 Sup. Ct. 550, at page 556 (64 L. Ed. 887), Mr. Justice Van Devanter, in delivering the opinion of the Supreme Court, said:

"Thus the genesis and words of the amendment unite in showing that it does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, whether derived from one source or another."

And again in Eisner v. Macomber, supra, 252 U. S. 206, 40 Sup. Ct. 193, 64 L. Ed. 521, Mr. Justice Pitney, in discussing the scope of the amendment, said:

"As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income. Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 17-19, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D. 414; Stanton v. Baltic Mining Co., 240 U. S. 103, 112, et seq., 36 Sup. Ct. 278, 60 L. Ed. 546; Peck & Co. v. Lowe, 247 U. S. 165, 172, 173, 38 Sup. Ct. 432, 62 L. Ed. 1049. A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon prop-

erty, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts. In order, therefore, that the clauses cited from article 1 of the Constitution may have proper force and effect, save only as modified by the amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not 'income,' as the term is there used, and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised."

In the case at bar it therefore "becomes essential to distinguish between what is and what is not 'income' as the term is used in the Sixteenth Amendment, * * * and to apply the distinction according to truth and substance without regard to form," in order that article 1 of the original Constitution, section 2, clause 3, and section 9, clause 4, may have proper force and effect, save only as modified by the Sixteenth Amendment.

The question, therefore, is simply this: Is a gain in value realized from the sale of property income? Insisting with great earnestness, with persuasive argument, and the citation of cases alleged to be in support of its argument, the government contends that the answer is: "Yes." The plaintiff, with equal forcefulness, contends that the answer is: "No."

But the cases relied upon by the government arose under the Corporation Tax Act of 1909 (36 Stat. 112), and not under an income tax law. The Corporation Tax Act of 1909, as held by the Supreme Court in Stratton's Independence v. Howbert, 231 U. S. 399, 414, 416, 34 Sup. Ct. 136, 58 L. Ed. 285, was not an income tax law, and since gains by sales were specifically included as taxable, the cases decided under that act do not determine the definition of the word "income," within the Sixteenth Amendment, and so are not apposite to the instant case.

Mr. Justice Pitney, in the Stratton's Independence Case, supra, 231 U. S. on page 414, 34 Sup. Ct. on page 139 (58 L. Ed. 285), said:

"As has been repeatedly remarked, the Corporation Tax Act of 1909 was not intended to be and is not in any proper sense an income tax law. This court had decided in the Pollock Case that the Income Tax Law of 1894 amounted in effect to a direct tax upon property, and was invalid because not apportioned according to population as prescribed by the Constitution. The act of 1909 avoided this difficulty by imposing, not an income tax, but an excise tax upon the conduct of business in a corporate capacity, measuring, however, the amount of tax by the income of the corporation, with certain qualifications prescribed by the act itsef. Flint v. Stone-Tracy Co., 220 U. S. 107; McCoach v. Minchill Co., 228 U. S. 295; United States v. Whitridge (decided at this term) ante, p. 144."

And again on page 416 of 231 U. S., on page 142 of 34 Sup. Ct. (58 L. Ed. 285), he said:

"As to what should be deemed 'income' within the meaning of section 38, it of course need not be such an income as would have been taxable as such, for at that time (the Sixteenth Amendment not having been as yet ratified), income was not taxable as such by Congress without apportionment accord-

ing to population, and this tax was not so apportioned. Evidently Congress adopted the income as the measure of the tax to be imposed with respect to the doing of business in corporate form because it desired that the excise should be imposed, approximately at least, with regard to the amount of benefit presumably derived by such corporations from the current operations of the government. In Flint v. Stone-Tracy Co., 220 U. S. 107, 165, it was held that Congress, in exercising the right to tax a legitimate subject of taxation, as a franchise or privilege, was not debarred by the Constitution from measuring the taxation by the total income, although derived in part from property which, considered by itself, was not taxable. It was reasonable that Congress should fix upon gross income, without distinction as to source, as a convenient and sufficiently accurate index of the importance of the business transacted."

See, also, Anderson v. Forty-Two Broadway, 239 U. S. 69, 72, 36 Sup. Ct. 17, 60 L. Ed. 152; Stanton v. Baltic Mining Co., 240 U. S. 103, 114, 36 Sup. Ct. 278, 60 L. Ed. 546; Von Baumbach v. Sargent Land Co., 242 U. S. 503, 522, 37 Sup. Ct. 201, 61 L. Ed. 460; Doyle v. Mitchell Bros. Co., 247 U. S. 179, 183, 38 Sup. Ct. 467, 62 L. Ed. 1054.

The question before us was passed upon by the Supreme Court under the Income Tax Law of 1867 in Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, and this precise question has not been before the Supreme Court since that decision. There it was decided that under the law of 1867 a gradual increase in value extending over a period of years could not be taxed as income for the vear in which it was realized by sale. Speaking for the court, Mr. Justice Field on page 65 of 15 Wall. (21 L. Ed. 45) said:

"The question presented is whether the advance in the value of the bonds, during this period of four years, over their cost, realized by their sale, was subject to taxation as gains, profits, or income of the plaintiff for the year in which the bonds were sold. The answer which should be given to this question does not, in our judgment, admit of any doubt. The advance in the value of property during a series of years can in no just sense, be considered the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. The statute looks, with some exceptions, for subjects of taxation only to annual gains, profits, and income."

And further on page 66 of 15 Wall. (21 L. Ed. 45):

"The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital."

Respecting this decision, the Supreme Court in Lynch v. Turrish, 247 U. S. 221, speaking by Mr. Justice McKenna, said on page 230, 38 Sup. Ct. 537, on page 539 (62 L. Ed. 1087), after discussing Gray v. Darlington: "This case has not been since questioned or modified"—and meets the government's attempt to distinguish Gray v. Darlington, on page 230 of 247 U. S., on page 539 of 38 Sup. Ct. (62 L. Ed 1087), in the following manner:

"The government, however, makes its view depend upon disputable differences between certain words of the two acts. It urges that the act of 1913

makes the income taxed one 'arising or accruing' in the preceding calendar year, while the act of 1867 makes the income one 'derived.' Granting that there is a shade of difference between the words, it cannot be granted that Congress made that shade a criterion of intention and committed the construction of its legislation to the disputes of purists. Besides, the contention of the government does not reach the principle of Gray v. Darlington, which is that the gradual advance in the value of property during a series of years in no just sense can be ascribed to a particular year, not therefore as 'arising or accruing,' to meet the challenge of the words, in the last one of the years, as the government contends, and taxable as income for that year or when turned into cash. Indeed, the case decides that such advance in value is not income at all, but merely increase of capital and not subject to a tax as income."

[4] The meaning of the word "incomes" in the Sixteenth Amendment is no broader than its meaning in the act of 1867. It was adopted in its present form, using only the words "incomes from whatever source derived," with the presumptive knowledge on the part of Congress and the several state Legislatures, of the meaning attributed thereto by the decisions of the various courts, both state and federal.

It has been held repeatedly that gains realized from the sale of capital assets held in trust are not income, but are principal—exactly as the securities were before they were sold, and that where a tenant for life is entitled to the entire net income of a fund, and the trustee realizes an advance in value by the sale of an investment, the life tenant is not entitled to the gain which is uniformly treated by the courts as an increment to principal and a part of the corpus of the trust.

The following are a few of the leading cases sustaining the doctrine that the growth or increase of value, when realized on the sale of an investment, is accretion to capital and not income, as between life tenant and remainderman: Boardman v. Mansfield, 79 Conn. 634, 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178; Carpenter v. Perkins, 83 Conn. 11, 20, 74 Atl. 1062; Parker v. Johnson, 37 N. J. Eq. 366, 368; Outcalt v. Appleby, 36 N. J. Eq. 74, 78; Matter of Gerry, 103 N. Y. 445, 9 N. E. 235; Thayer v. Burr, 201 N. Y. 155, 157, 158, 94 N. E. 604; Graham's Estate, 198 Pa. 216, 47 Atl. 1108; Neel's Estate (No. 2) 207 Pa. 446, 56 Atl. 950; Lauman v. Foster, 157 Iowa, 275, 135 N. W. 14, 50 L. R. A. (N. S.) 531; Slocum v. Ames, 19 R. I. 401, 36 Atl. 1127; Jordan v. Jordan, 192 Mass. 337, 78 N. E. 459; Mercer v. Buchanan (C. C.) 132 Fed. 501, 508.

These decisions had at the time of the adoption of the Sixteenth Amendment established a definite meaning of the word "income" for the purpose of statutory and constitutional construction. It is difficult to see how the word "income" can have any different meaning when applied to the proceeds of an investment, when held by a trustee, than when held by an individual, as the Income Tax Law specifically refers to funds held in trust. Section 2 (b).

In order to show the conclusions reached by the courts, it will suffice to quote from only one of the cases to which reference is made supra. In Parker v. Johnson, 37 N. J. Eq. 366, the court said:

"The profit is not income. It was made by the trustee in the process of converting the investment, and, like a premium realized on the sale of gov-

ernment bonds in which the funds might be invested, it belongs to the fund. The trustee in this case is to keep the fund invested, and the tenant for life is entitled to the interest. It is clearly the duty of the trustee to apply the profits on one investment to making up the losses on others."

So it seems that income from investments consists, in the case of bonds, of interest; in the case of stocks, of dividends. There is no income from the sale of investments. The conclusion seems imperative that the word "income" has a well-defined meaning, not only in common speech, but also under judicial construction, and this meaning does not include the increase in value of capital assets when realized upon a sale. The following extract from the opinion of Mr. Justice Pitney in the Macomber Case, supra, 252 U. S. at page 206, 40 Sup. Ct. 193, 64 L. Ed. 521, is instructive:

"For the present purpose we require only a clear definition of the term income,' as used in common speech, in order to determine its meaning in the amendment."

It seems to me apparent that the Supreme Court, in Towne v. Eisner, 245 U. S. 418, 426, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254, and in Eisner v. Macomber, supra, followed the doctrine enunciated in Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, where it was held that a stock dividend is an accretion to capital, and not income, as between a life tenant and the remainderman, and therefore held in the Towne Case that a stock dividend was not income, within the meaning of the Income Tax Law of 1913, and in the Macomber Case that such a stock dividend was not income, within the meaning of the Sixteenth Amendment. As already stated, it is difficult to see why any different rule should be applied to the proceeds of an investment—purely a capital investment—when held by a trustee than when held by an individual.

[5, 6] Two pertinent points have been definitely established by the Supreme Court in Eisner v. Macomber, supra, 252 U. S. at page 214, 40 Sup. Ct. 196, 64 L. Ed. 521:

First. "Enrichment through increase in value of capital investment is

not income in any proper meaning of the term."

And, second. If it requires conversion of capital in order to pay the tax, it must follow that the tax is on capital increase, and not on income, for on page 213 of 252 U. S., on page 195 of 40 Sup. Ct. (64 L. Ed. 521), the court said: "Yet, without selling, the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock. Nothing could more clearly show that to tax a stock dividend is to tax a capital increase, and not income, than this demonstration that in the nature of things it requires conversion of capital in order to pay the tax."

[7] Had the plaintiff possessed no resources other than the bonds which he sold, prior to the sale his capital would have been their then entire value. The increase since March 1, 1913, was capital increase. To collect the tax on this increase in value, because the capital was converted into cash, must of necessity diminish his capital to that extent. Before the sale all the plaintiff possessed was capital, without any part of it constituting income. The sale of capital results only in changing

its form, and, like the mere issue of a stock dividend, makes the recipient no richer than before. Gibbons v. Mahon, supra; Towne v.

Eisner, supra; Eisner v. Macomber, supra.

The exact question presented in this case has not been before the Supreme Court since its decision in Gray v. Darlington, supra, nor did it arise in Eisner v. Macomber, supra. Notwithstanding certain passages in the opinion of the court in the Macomber Case, stating that, when dividend stock is sold at a profit, the profit is taxable like other income, which I consider, in view of all that has been written by the Supreme Court in a long line of income tax decisions, must mean that the profit derived from such transactions, if it is income, applies in the case of a trader, and not in the case of an individual, who merely changes his investments.

Therefore, under the authority of Gray v. Darlington, which is approved in Lynch v. Turrish, supra, I feel constrained to hold that the appreciation in value of the plaintiff's bonds, even though realized by sale, is not income taxable as such, and in reaching this conclusion I find support for it in the Macomber Case, where Mr. Justice Pitney says:

"Enrichment through increase in value of capital investment is not income in any proper meaning of the term."

It follows that the Income Tax Law of 1916, in so far as it attempts to tax such increase, is in conflict with the apportionment requirements of the first article of the Constitution, being a direct tax, and not apportioned among the several states according to population.

Counsel for plaintiff contended that the act should be so construed as to limit the tax to the actual increase from the dates of acquisition, although the value of such bonds was less on March 1, 1913, than when acquired prior thereto, in the event that the gain in value of the bonds when sold was taxable at all. In view of the decision that such increases are not income, it becomes unnecessary to discuss the point.

The conclusion herein expressed has been reached only after a very careful consideration of all the respective claims presented by able counsel in exhaustive and persuasive briefs, and with full appreciation of the admonition given by the Supreme Court in Nicol v. Ames, 173 U. S. 509, at page 514, 19 Sup. Ct. 522, 525 (43 L. Ed. 786). This court fully appreciates that "it is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States," and that "the duty imposed demands in its discharge the utmost deliberation and care, and invokes the deepest sense of responsibility," as was said by Chief Justice Fuller in the opening paragraph of the opinion in Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, at page 617, 15 Sup. Ct. 912, 39 L. Ed. 1108.

[8] In the discharge of that duty as I see it, it follows that the word "incomes" in the Sixteenth Amendment should not and cannot be so construed as to include property other than income, even if such property is described as income by an act of Congress, as such a con-

struction permits the Congress to nullify the provisions of the second section of article I of the Constitution, that direct taxes shall be apportioned.

Let judgment be entered for the plaintiff to recover of the defendant \$17,756.79, with interest on the same from July 19, 1918, together with costs of suit.

Ordered accordingly.

In re SIGELMAN.

(District Court, E. D. Missouri, E. D. November 10, 1920.) No. 8876.

1. Aliens \$\infty 60-Naturalization is matter of grace.

Foreigners are not granted citizenship as a privilege which they may demand, but as an act of grace by the government, which may fix such conditions as it sees fit.

2. Aliens © 62—Character of applicant for naturalization considered, to determine benefit to state.

The character of the applicant for citizenship is considered, with reference to the probability of his citizenship resulting beneficially to the government.

8. Aliens \$\infty\$=62—Naturalization denied to applicant desiring citizenship to return to native country, for abandoned family.

Where the purpose of an applicant for naturalization was to secure the protection of the government and obtain a passport for his return to his native country for his wife and children, whom he had left there seven years before, and with whom he had not communicated since, his abandonment of his family and the possible obligations to protect him which would be imposed upon the United States are sufficient to warrant denial of naturalization, especially where he had sought deferred classification under the draft laws because of the dependency of his family, to whom he was making no contribution, thereby evidencing an intent to evade the duties of citizenship.

Application by Abraham Sigelman for naturalization. Application denied.

M. R. Bevington, Chief Naturalization Examiner, of St. Louis, Mo., and E. W. Tobin, Asst. Naturalization Examiner.

FARIS, District Judge. [1] After due consideration of the facts in the case of Sigelman, I am of opinion that this applicant ought not to be admitted to citizenship. Foreigners who come to the United States are not granted citizenship as a privilege which they may demand, but as an act of grace for which they should humbly sue. In the exercise of this grace the government of the United States may fix such conditions as it sees fit. Among the conditions now fixed by law are the requirements that the applicant must be law-abiding and a person of good moral character.

[2] Since the status of citizenship involves reciprocal obligations as between state and citizen, it ought in fairness and in compensation for

such obligations to be beneficial as well to the state as to the person who by naturalization seeks citizenship. To this end, the proofs exacted from the applicant, and the status and condition of the applicant, which these proofs disclose, ought to be considered in the light of what such status and conditions promise to the government for the future, and with only negligible regard for the past. Luria v. United States, 231 U. S. 23, 34 Sup. Ct. 10, 58 L. Ed. 101. While the antecedent character of the applicant and his reputation and acts in the past are persuasive, as aiding the assumption of continuance upon a good course, yet the government is entitled, before it receives him, and before it assumes the obligation to protect him as a citizen, to consider whether the burdens entailed will not be so far greater than the benefits accruing to it as to make the naturalization of the applicant a bad or dangerous bargain, and a bargain utterly unfair to its other millions of citizens.

[3] Sigelman, the applicant herein, left his wife and family in the province of Minsk in Russia in the year 1913, wherein, for aught that appears to the contrary, they now are. He desires citizenship now mainly for the purpose, as the case discloses, of procuring a passport and returning to Russia under the protection of the flag of the United States, which would follow his citizenship, in order that he may get his family and bring them to this country. Such a situation possesses appealing phases from a sentimental viewpoint. But the wise general rule ought to be that no man who leaves his wife or infant children, or a wife and infant children, in the country from which he comes, and to which he owes allegiance, should be naturalized until he has brought his family to the United States, as, among other considerations, an earnest of his good faith that his purpose is to remain in the United States as a citizen. Moreover, the opportunity for fraud, and for the violation of the several state statutes, which denounce the abandonment of wife and infant children of tender age, is so great that any other rule would afford too wide an opportunity for a violation of these abandonment statutes by those whom the implied contract of their admission to citizenship has obligated to continue to be moral and law-abiding men.

Turning for a moment to the other phase of the case, which is that which has reference to the obligation of the United States to protect its naturalized citizens wherever they may be found, it is obviously unfair to the other hundred millions of citizens of this country that the obligation of protection should be assumed by the United States as to the applicant, when such protection might well result in serious difficulties between Russia and the United States; for he does not say that he desires to become a citizen of this country solely because he is attached to its principles, to its institutions, and to its form of government, and because he selects it as the best country and government on earth, but in effect he says that he wants citizenship to subserve a purpose of his own, without considering, it follows, whether such purpose may work good or ill to the country to which he offers himself. Thus the appealing sentimental side of the case becomes in my

view an insuperable barrier to the granting of citizenship to this applicant, in order that he may go in quest of his family; for, if clothed with such citizenship and given a passport, such a protection to him at this time, in the unhappy country of his birth, might well result in complications to this country utterly incommensurate with whatever benefit might accrue to the United States from his admission as a citizen.

This is a cold-blooded view, at variance, perhaps, with the much-vaunted land of liberty and home of the oppressed view of our obligations to all humanity. But in the light of the shortcomings, not to say failure, of the "melting pot," in recent times of stress and danger, and of the necessity of deporting divers immigrants, hastily and improvidently admitted to this country, the trend ought to be toward greater care in selecting proffered citizens, rather than toward a blind grabbing of all offerings. The situation imperatively demands this greater selective care. For these reasons among others held in mind, I am convinced that the application of the petitioner ought to be denied.

I reach this conclusion without particularly stressing the fact that this applicant secured deferred classification in the draft for army service, upon his representation that his wife and children, who have never been in the United States, were "mainly dependent on his labor for support." He made that representation in order to evade induction into the military service of the United States, notwithstanding the fact that he has been, as he now most insistently urges, unable to communicate with his family in any manner whatsoever since the year 1913, and therefore obviously unable to supply any support whatever to them since that date. The obvious inference, his asseverations notwithstanding, is that he is not sufficiently attached to the institutions and government of the United States to make him willing to fight in their defense.

Let the application of petitioner for citizenship be denied.

ALLEN v. SEWANEE FUEL & IRON CO.

(District Court, E. D. Tennessee, S. D. September 13, 1917.)

No. 1331.

- 1. Constitutional law 556, 106—Legislature may provide for terms of court.

 Acts Tenn. 1915, c. 18, § 2, as amended by acts 1915, c. 140, § 1, providing that in the Sixth judicial circuit, composed of Hamilton county, there should be opened and held 12 appearance terms and 3 trial terms, is not unconstitutional, as the Legislature is empowered to provide such terms as it deems requisite; future litigants having no vested rights as to procedural matters.
- 2. Removal of causes \$\iff 79(2)\$—Petition must be filed within two days, though declaration filed out of time.

 Under Shannon's Code Tenn. §§ 6076, 6077, requiring a plaintiff to file

his declaration within the first three days of the term to which process

is returnable, and defendant to answer within two days thereafter, and the established state practice by which plaintiff may file his declaration later as of right unless a motion to dismiss has been interposed, where a plaintiff so filed his declaration later in the term, defendant held required to file a petition for removal within two days thereafter.

At Law. Action by W. H. Allen against the Sewanee Fuel & Iron

Company. On motion to remand to state court. Granted.

Action at law brought by plaintiff, a citizen of Tennessee, in the Circuit Court of Hamilton County, Tennessee, May 23, 1917, against the defendant corporation, a citizen of Alabama. Declaration filed June 14, 1917. Petition for removal on ground of diversity of citizenship filed by defendant June 25, 1917. Removal denied by the Circuit Judge, July 16, 1917, on the ground that the petition was filed too late. A transcript of the proceedings in the State court having been subsequently filed by the defendant in the Federal Court, the plaintiff moved to remand the cause to the State court. Motion granted.

Tatum, Thatch & Lynch, of Chattanooga, Tenn., for plaintiff. Moore & Darwin, of Chattanooga, Tenn., for defendant.

SANFORD, District Judge (after stating the facts as above). [1] 1. By sec. 2 of the Tenn. Acts of 1915, ch. 18, p. 40, as amended by sec. 1 of ch. 140 of said Acts, p. 398, it was provided that in the 6th Judicial Circuit, composed of Hamilton County, there should be opened and held twelve appearance terms, beginning on the first Monday in each month, to which all process, except final, should be returnable, and at which issues should be made up under the rules of practice then provided by law; and three trial terms, on the first Monday in January, May and September. I see no reason to doubt the constitutionality of this statute: the Legislature being authorized, as I view it, to provide for such terms of court and practice in the courts of the several counties, as it may deem requisite to meet local needs, and future litigants having no vested rights in reference to such procedural matters which were thereby impaired.

[2] 2. The process in this suit was issued in the State court on May 23, 1917, returnable to the first Monday in June, the first day of the next appearance term. Having been served on May 25th, more than five days before the return day, the plaintiff was required, under sec. 4238 of the Tennessee Code (Shan. 6076), to file his declaration within the first three days of the appearance term, that is, by June 6th. Had this been done, the defendant would have been required, under sec. 4239 of the Code (Shan, 6077), to plead within the next two days, and hence, under sec. 29 of the Judicial Code (U. S. Comp. St. § 1011), to file a petition for removal within such time. The declaration was not, however, filed until June 14th. No motion to dismiss was made in the meantime by the defendant; although it was so entitled under sec. 4238 of the Code, supra. Under the established practice in Tennessee until the suit had been dismissed for failure to file the declaration, or at least until a motion to that effect had been made, the plaintiff was entitled

to file his declaration at any time, as of right. Caruth. Hist. Lawsuit (3d Ed.) sec. 79, p. 162; Lockhart v. Memphis Railroad (C. C.) 38 Fed. 274, 277. The defendant's right to move to dismiss is cut off by such filing of the declaration. Morison's Tenn. Plead. & Pract. 13. This rule of practice is not in conflict with Morrow v. Malone, 5 Sneed (Tenn.) 642, in which the plaintiff's application for leave to file the declaration was not made until after the defendant's motion to dismiss had been made. The plaintiff's declaration having thus been filed as of right on June 14th, in default of a previous motion to dismiss. I am of opinion that under the spirit, if not the letter, of sec. 4239 of the Code, and in accordance with the well established practice prevailing in the courts of Tennessee, the defendant was required to plead within two days thereafter. Morison's Tenn. Plead. & Pract. 13. And see sec. 4240 of the Tennessee Code (Shan. 6078). And under the express terms of sec. 29 of the Judicial Code, it was necessarily required to file its petition for removal within the same time. Having, however, failed so to do, and not having filed its petition for removal until several days thereafter, the petition for removal came too late. Kansas City Railroad v. Daughtry, 138 U. S. 298, 303, 11 Sup. Ct. 306, 34 L. Ed. 963; Lewis v. Cincinnati Rv. (D. C.) 192 Fed. 654, 657. I am hence of the opinion that the defendant's petition for an order of removal was properly denied by the learned Circuit Judge in the State court.

An order will accordingly be entered granting the plaintiff's motion to remand the suit to the State court.

UNITED STATES v. FENTON et al.

(District Court. D. Montana. October 25, 1920.)

No. 3634.

Criminal law \$\infty\$395\(-\text{Forfeited liquors can be used in evidence after seizure}\)

without process.

Intoxicating liquors and the automobile in which they are being unlawfully transported are already forfeited to the United States, so that the forcible seizure of such property without process by officers of the United States, even if irregular, was not a seizure of the property of defendants, and did not violate Const. Amends. 4 and 5, so that the whisky and automobile so seized were competent evidence against accused, notwithstanding their motion for return of the property.

George Fenton and another were convicted of unlawfully transporting whisky, and moved for a new trial. Motion denied.

W. W. Patterson, U. S. Atty., of Helena, Mont. Jos. P. Donnelly, of Havre, Mont., for defendants.

BOURQUIN, District Judge. Defendants were convicted of unlawfully transporting in an auto, some 130 quarts of whisky, the auto

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and whisky were adjudged forfeited to the United States, and defendants move for a new trial upon the ground that their arrest and the seizure of the whisky and car were without process, in violation of the Fourth and Fifth Amendments, and unlawful; that the evidence at the trial was the whisky and the testimony of the delinquent officers; and that defendants preserved their rights by motion before trial (heard at trial and decision reserved) for return of the whisky and auto.

From the evidence it appears the arrest and seizure were about 75 miles south of the boundary line; that the officers had heard that several unnamed persons and autos were that night coming with whisky smuggled from Canada; that to capture them they located themselves 20 yards apart along the road; that about 3:30 a. m. defendants' auto slowly approached from the north; that the officer nearest turned a flash light upon them and ordered them to halt, which they refused to do; that so likewise ordered the second and third officer, as defendants reached and passed them; that when the auto was a length or so past the first officer he fired to puncture the tires; that when it was about 10 feet past the third officer he overtook it, mounted the running board, and was ordered off by defendants with gun display; that the officers, with display of weapons, forced defendants to stop, arrested them, searched, found the whisky, some of which was visible before search, in part of Canadian brand, and seized auto and whisky.

Defendants were taken in commission of a misdemeanor, if not of a felony. Whether or not, in the circumstances of time, place, common knowledge of whisky running, information of the officers, and the incidents of the arrest, the misdemeanor was committed "in the presence" of the officers (see In re Morrill [C. C.] 35 Fed. 267, and 5 Corp. Jur. 416), whether or not defendants were subject to arrest without process as at common law, as night walkers or prowlers reasonably subject to suspicion, whether or not the officers had reasonable grounds to believe defendants had committed a felony, whether or not the arrest and search are lawful, or either or both amendments violated, defendants' motions must be denied.

An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle the offender to a return of the property, nor to exclusion of its use in evidence against him. The auto and whisky, by virtue of the National Prohibition Act (41 Stat. 305), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have. See U. S. v. Stowell, 133 U. S. 16, 10 Sup. Ct. 244, 33 L. Ed. 555, and cases; Taylor v. U.

S., 3 How. 205, 11 L. Ed. 559; Boyd v. U. S., 116 U. S. 623, 6 Sup.

Ct. 524, 29 L. Ed. 746.

Silverthornes Case, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, and cases therein cited, apply to search and seizure of the offender's papers and property and use thereof in evidence, and not to those of others, of which the offender has unlawful possession. The first violates both amendments; the second, neither, so far as return of the seized articles and their exclusion as evidence are concerned.

The instant case is of the second category. Orders will be en-

tered accordingly.

UNITED STATES v. HOLDEN et al.

(District Court, N. D. New York. October 21, 1920.)

1. Eminent domain =148—Owner receiving rents pending condemnation not

entitled to interest on value of land.

The owners of lands, who receive the rents and profits therefrom during the time occupied in fixing the amount of compensation, should not be allowed interest on the valuation of their land from the date of filing of the map, for the inconveniences to which they were subjected during the time so occupied are presumed to have been considered and allowed for in fixing the amount of compensation.

2. Eminent domain \$\iiint 148\to 0\text{wuer, not losing use of land, not entitled to interest pending proceedings.}

The owner is not entitled to interest pending the proceedings, unless he proves that he has in fact suffered loss of the use of the lands by reason thereof.

3. Eminent domain 148-Owner failing to collect rents, not entitled to

interest on pending proceedings.

In proceedings to condemn land to provide a 400-foot channel through the "Narrows" at Lake Champlain, the owner of a tract taken, which was unproductive, except that two houses thereon produced a rental, was not entitled to interest on the award from the date of the filing of the petition, where the government agents merely secured permission, and went into possession for the purpose of surveying, and in no way interest with the occupation of the premises by the tenants, and collected no rent from them, although the owner made no effort to collect the rents himself.

Condemnation proceedings by the United States, opposed by Clarence E. Holden and others. On application by the named owner for interest on an award. Application denied.

Dennis B. Lucey, U. S. Atty., of Ogdensburg, N. Y. O. A. Dennis, of Whitehall, N. Y., for Holden.

COOPER, District Judge. This application for interest on an award in compensation proceedings is made by Clarence E. Holden, one of the owners of land at Whitehall, which was taken by the government to provide a 400-foot channel through what is known as the "Narrows" at Lake Champlain. Holden agreed to take \$12,000 for his property, and now upon the confirmation of the award he demands interest from

the date of the filing of the petition on the 3d day of May 1919. While the tract of land in question covers a large area, for the most part it is a swamp and unproductive, with the exception of two rocky promontories, both of which are over 70 feet above the sea level. On one of these knolls are two buildings, for which Holden received \$25 a month as rental.

- [1] The owners of lands, who receive the rents and profits therefrom during the time occupied in fixing the amount of compensation, should not be allowed interest on the valuation of their land from the date of filing of the map, for the inconveniences to which they were subjected during the time so occupied are presumed to have been considered and allowed for in fixing the amount of compensation. Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.
- [2] The owner is not entitled to interest pending the proceedings, unless he proves that he has in fact suffered loss of the use of the lands by reason thereof. Town of Hingham y. U. S., 161 Fed. 299, 88 C. C. A. 341, 15 Ann. Cas. 105; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. See, also, United States v. Town of Nahant, 153 Fed. 525, 82 C. C. A. 470.
- [3] The government agents, by securing permission and going into possession for the purpose of surveying, in no way interfered with the occupation of the premises by the tenants. They collected no rent, and had no authority to collect any, because the title to the property was not in the government. According to the affidavit of the claimant himself, he made no effort to collect the rents of his own houses, and when, in August, 1919, the tenants offered to pay him the rent up to that time, he refused it, and at their request received the sum of \$45, claiming that he held it subject to government demand.

The claimant having made no effort to collect the rents since that time, and he being the only one entitled to do so, he must look for redress to the tenants to secure the balance of the income and profits to which he ordinarily would have been entitled. As the land is not productive, and never has been productive, he has lost nothing by the government entering upon the land, and so is not entitled to interest.

The application for interest is therefore denied.

STANDARD CHEMICAL & OIL CO. v. N. P. SLOAN CO.

(Circuit Court of Appeals, Fifth Circuit. November 4, 1920.)

No. 3476.

1. Associations = 14—Sale contract held subject to rule fixing percentage of

estimated output.

A contract between two members of a voluntary association for the sale of the season's output of the seller, estimated at a stated quantity, is subject to the rule of the association that the seller is required to deliver at least 85 per cent. of the estimate, where the contract did not contain an express exception from that rule, as required by another rule of the association permitting specific written contracts at stated special conditions.

2. Accord and satisfaction @=21—Unexecuted accord does not bar recovery.

A plea of accord and satisfaction does not bar recovery for failure to deliver the quantity of goods sold, where the defendant's own testimony that plaintiff agreed to accept a specified shipment in full satisfaction of its demands also showed that the goods in that shipment were rejected by plaintiff, with defendant's acquiescence, because of their condition.

3. Arbitration and award ← 22 (5) — Accord and satisfaction, not presented to arbitrators, no defense to award.

A plea of accord and satisfaction is not a defense to counts based on an award by arbitrators, where the defendant had neglected its opportunity to present that defense to the arbitrators.

4. Arbitration and award €=16(4)—Agreement not revoked, unless notice is given arbitrators.

An agreement for arbitration, even if revocable by act of the parties, is not revoked, unless there is notice thereof to the arbitrators; defendant's failure to sign the submission not being sufficient.

5. Arbitration and award 55—Award by weight not beyond submission as to number of bales.

Where the question submitted to the arbitrators was whether the seller should deliver a stated number of bales to the buyer, an award fixing the number of pounds which should have been delivered according to the average weight of the bales is not beyond the submission.

6. Arbitration and award \$\infty\$ 60—Award held not uncertain, because quantity

already delivered was not stated.

An award finding that the seller should have delivered a specified quantity under its contract, but stating that the amount delivered was not shown before the arbitrators, but could be determined by the parties and deducted from the amount which should have been delivered, to ascertain the amount yet to be delivered, is not invalid for uncertainty.

Appeal and error = 1073 (7)—Verdict on award not excessive, where evidence authorized larger verdict on contract.

A verdict and judgment based on an award by arbitrators cannot be held excessive, where the evidence was ample to sustain a verdict and judgment on a count for damages for breach of contract, the amount of which would have been larger than the judgment rendered.

In Error to the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

Action by the N. P. Sloan Company against the Standard Chemical & Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 256 Fed. 451, 167 C. C. A. 579.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes $268~\mathrm{F.{-}15}$

Fred S. Ball and E. R. Beckwith, both of Montgomery, Ala., for plaintiff in error.

John London and George W. Yancey, both of Birmingham, Ala.,

for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. The basis of this suit is a contract evidenced by the following letter and acceptance:

"N. P. Sloan Company, Cotton and Cotton Linters.

"No. 101.

Philadelphia, Pa., 6/23/15.

"Confirmation of Purchase from Standard Chemical & Oil Co., Troy, Ala.

"Gentlemen: We confirm the following purchase made this day from you: "Quantity—Next season's production of linters estimated 2,000 bales.

"Product-Linters.

"Quality-Clean average mill runs.

"Price-3c. f. o. b. Troy.

"Terms—Sight draft bill of lading attached. "Delivery—100 and 200 bale lots as produced.

"Special-Linters to be packed in bales not to exceed 27" x 54" and not to

weight more than 550 pounds or less than 400 pounds.

"Any difference between buyer and seller, which cannot be settled direct, shall be settled by arbitration at Dallas in accordance with the rules and regulations of Interstate Seed Crushers' Association.

"N. P. Sloan Company,
"By W. H. Dunn, Secy.

"Accepted: Standard Chemical & Oil Co.,
"By Frank L. Jones, Manager."

The plaintiff in error, Standard Chemical & Oil Company (herein called the defendant), delivered to defendant in error, N. P. Sloan Company (herein called plaintiff), 1,324 bales of cotton linters, and claimed full compliance with its obligations under the contract, because it delivered its entire season's production. On the other hand, plaintiff claims it was entitled to 1,700 bales, or 85 per cent. of the contract estimate of 2,000 bales.

In August, 1916, plaintiff bought the 376 bales representing the difference in controversy, and paid 8½ cents per pound. It was admitted at the trial that plaintiff lost the difference of 5½ cents per pound. In the years 1915 and 1916 the parties were members of a voluntary association called the Interstate Cotton Seed Crushers' Association. In the seventh count plaintiff sued for damages for breach of contract, alleging the advance in price of the linters and the consequent loss to it, and pleaded the following rules of the association:

"Rule 38. All transactions in cotton seed products among the members of this association shall be governed by the above rules, but nothing herein contained shall be construed as interfering in any way with the rights of members to enter into specific written contracts stating special conditions. Either party to a trade may demand a formal written contract as soon as the trade is completed. Such contracts, unless specially excepted, being subject to all the rules of this association."

"Rule 15, Section 3. When a sale is made of season's or balance of season's output of linters, the seller must ship and the buyer must receive all the linters seller makes to the end of the season: Provided, that when estimated number of bales is stated in contract, or in confirmation of sale or purchase, the buy-

er may demand and seller must ship, or may ship whether demanded or not, 15 per cent. in excess of estimated quantity, if he makes a sufficient number of bales to enable him to do so, and buyer must receive and pay for same at contract price. Should seller not make the quantity estimated, he shall deliver the number of bales made, and shipment of 85 per cent. of the estimated quantity shall be deemed a fulfillment of the contract. The limitation of each season shall be the 31st of July, so that each season's output of linters shall include everything made up to July 31st."

In the eighth and ninth counts plaintiff sued on an arbitration and award, and pleaded the following rules of the association:

"Rule 36. Section 1. In case of differences between members of this association concerning transactions in cotton seed products that cannot be amicably adjusted promptly, same shall be settled by arbitration upon the application of either, and the secretary shall call such arbitration at such places as he sees best, promptly upon notice of such request. And it is fully understood and agreed by and between the members of this Association that any award of any of the regular arbitration committees of this association made under these rules, whether such arbitration is held by agreement or 'ex parte,' shall be binding upon all the parties affected thereby," etc.

"Rule 36. Section 7. Should a member fail or refuse to submit to the demand of another member for arbitration or delay or obstruct such demands for five days after proper notice, the chairman of the permanent committee on arbitration, upon receipt of such complaint, shall proceed at once to satisfy himself as to the facts, and, these being satisfactory, shall immediately proceed with the arbitration ex parte, and the decision so rendered shall be of full force and effect, the complainant to pay the ex parte fee, adding the amount to the award of the committee, if in his favor."

The defendant pleaded specially to the seventh count the provision, in rule 38 above quoted, that the parties might make special contracts. A replication was filed to this plea, to the effect that no exception was stated in the contract sued on. The defendant also pleaded by way of accord and satisfaction to all of the counts of the declaration that it had delivered to plaintiff 213 bales of linters of a grade not covered by the contract, to which plaintiff was not entitled, upon agreement that they would be accepted in full compliance with the contract, and in settlement and satisfaction of the differences between the parties. and also pleaded separately to the eighth and ninth counts that at the time of the arbitration there were no matters of difference between the parties.

There were no disputed questions of fact, except upon the question of accord and satisfaction. It was either admitted or shown by the uncontradicted evidence that the arbitration was had in accordance with the rules of the association. The defendant did not sign the letter of submission, but it received it, and had due notice of the arbitration, which proceeded ex parte. The letter of submission contains the

following:

"This article of agreement, made and entered into this the 4th day of

August, A. D. 1916, witnesseth:

"That, whereas, differences and controversies are now existing and pending between N. P. Sloan Company, Philadelphia, Pa., and Standard Chemical & Oil Co., Troy, Ala., in relation to completion of contract for linters as per original contract attached.

"The question to be decided by the arbitration:

"Whether Standard Chemical & Oil Company shall pay N. P. Sloan Company loss incurred in replacing 376 bales of linters, balance due on contract as per proof submitted.'

The following award resulted:

"The Interstate Cotton Seed Crushers' Association.

"Dallas, Texas, August 28, 1916.

"N. P. Sloan Co., Philadelphia, Pa., v. Standard Chemical & Oil Co., Troy, Alabama. (Ex Parte.)

"The question to be decided by the arbitration: 'Whether Standard Chemical & Oil Company shall pay the N. P. Sloan Company loss incurred in replacing 376 bales of linters, balance due on contract as per proof submitted."

"The verdict of the committee is that for the fulfillment of this contract the Standard Chemical & Oil Company should deliver to the N. P. Sloan Company a minimum quantity of 1,700 bales of linters, of an average weight of 475 pounds per bale, or 807,500 pounds, of three cents (3c.) per pound.

"There is no evidence presented to the committee as to the quantity actually delivered, but this is known to buyer and seller, and deducting this quantity from the 807,500 pounds will give the pounds still due, and the purchase of the N. P. Sloan Company, against the deficiency claimed establishing the price the Standard Chemical & Oil Company should pay the N. P. Sloan Company, an amount equal this deficient number of pounds, at the price delivered New York, less the freight from Troy, Ala., and the contract price. "Costs of this arbitration to be paid by the N. P. Sloan Company, and in-

cluded in their claim against the Standard Chemical & Oil Company.

"P. G. Claiborne, Chairman.

"J. W. Allison, "W. F. Pendleton, "J. S. Le Clereq."

The 1,324 bales plaintiff received under the contract contained 657,814 pounds, leaving a deficiency, according to the award, of 149,-686 pounds. The loss to plaintiff at 5½ cents per pound was therefore \$7,858.51, from which should be deducted the freight charges of \$546.-35, making the net loss \$7,312.16. At the close of the evidence the court directed a verdict in favor of the plaintiff for this sum, with interest.

[1, 2] The defendant's plea to the effect that the contract was not subject to section 3 of rule 15 above quoted is not sustained, because there was no special exception, as required by rule 38. As to the seventh count there remains to be considered the plea of accord and satisfaction. The testimony of the defendant's manager was to the effect that an agent of the plaintiff demanded of the defendant the delivery of 213 bales of linters which were below the grade and quality provided in the contract, and that defendant would not agree to deliver the inferior grade, except in entire satisfaction of the contract; that the plaintiff agreed to take these inferior linters, called "hull fibers," if defendant would repick and put them in good condition. But the general manager of defendant testified that, after the linters were picked and repacked, "it rained, and they shipped them on to the compress. and when they got to the compress they were wet, and were compressed in that condition, which made them in pretty bad shape": that after the "hull fibers" were shipped to Savannah plaintiff accepted only 86 bales, and that defendant, not only acquiesced in the rejection of the balance, but refunded to plaintiff the purchase price thereof. It

follows from defendant's own account of the transaction that there was no accord and satisfaction, because the accord was never executed. 1 R. C. L. 199. The seventh count was not demurred to, the pleas were affirmative ones, they were not proven, and plaintiff was entitled to recover for breach of the contract.

The eighth count, which was on the arbitration and award, does not differ materially from the fifth count. It omits the averment, contained in the fifth count, that the plaintiff bought the number of bales which the defendant failed to deliver, and it pleads in more detail the rules of the Association. This court held, when this case was before it on a former writ of error, that, though an agreement to arbitrate may not be binding because revocable, yet if the parties submit the controversy to arbitration, the award is binding, in the absence of fraud or other improper conduct on the part of the arbitrators, and the fifth count was held to state a good cause of action. 256 Fed. 451, 167 C. C. A. 579.

[3] The plea of accord and satisfaction, even if it had been proven, must fail as to the counts based upon the award; for the defendant neglected its opportunity to present that defense to the arbitrators. Brewer v. Bain, 60 Ala. 153; McJimsey v. Traverse, 1 Stew. 244, 18 Am. Dec. 43.

[4] Defendant contends that the agreement to arbitrate was revoked. It is true defendant failed to sign the submission, and declined to authorize the purchase of linters on its account; but that would not constitute a revocation. Revocation comes about by the act of the parties or by operation of law. It is not argued that there is any revocation here by operation of law, and before there could be revocation by the act of the parties, even if the claim of the defendant be conceded, there would have to be notice to the arbitrators. 2 R. C. L. 369; Williams v. Branning Mfg. Co., 153 N. C. 7, 68 S. E. 902, 31 L. R. A. (N. S.) 679, 138 Am. St. Rep. 637, 21 Ann. Cas. 954.

[5] It is objected again that the award went beyond the submission. The argument on that point is that the submission only authorized the arbitrators to decide whether the defendant should pay the plaintiff the loss incurred in replacing 376 bales of linters, and that the arbitrators under the submission should only have given an affirmative or negative answer. The award is reproduced above. Instead of speaking in terms of bales of linters, it deals in pounds, and fixes the average

weight per bale.

[6] Again it is urged that the award is uncertain. The answer to that is: "Id certum est, quod certum reddi potest." It was agreed at the trial that defendant had failed to deliver 376 bales, if the con-

tract required delivery of 1,700 bales.

[7] Objection was also made to the amount of the verdict. The verdict and judgment were based upon the award; but as we have already held, and as the court below held in its opinion, the evidence was ample to sustain a verdict and judgment on the count for damages for breach of contract. Indeed, the amount recoverable under the seventh count is larger than the judgment rendered. The plaintiff was

entitled to 376 more bales of cotton linters than it received, and at the minimum of 400 pounds per bale the loss would have been in excess of the amount recovered.

The judgment is affirmed.

FIRST TRUST & SAVINGS BANK v. SMIETANKA, Internal Revenue Collector.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)

No. 2743.

1. Statutes €=245—Tax law construed in favor of taxpayer.

All doubts concerning the scope and meaning of a tax law are to be resolved in favor of the taxpayer.

Prior to amendatory act of September 8, 1916, where a decedent's estate produces an increment payable only at times and to persons not presently determinable, such increment was not, during a tax year, income of that tax year, assessable under Internal Revenue Act Oct. 3, 1913.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by First Trust & Savings Bank, trustee under the last will and testament of Otto Young, deceased, against Julius F. Smietanka, as collector of Internal Revenue for the First District of Illinois. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

John P. Wilson, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and A. L. Boulware, of Washington, D. C., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error, as trustee under the will of Otto Young, filed a declaration to recover income taxes assessed against the estate under the Internal Revenue Act of October 3, 1913 (38 Stat. 167), and paid under protest. A general demurrer was sustained, and judgment for costs followed.

Otto Young's will, after disposing of portions of the income during the lives of his widow and four daughters and until his youngest sur-

viving grandchild should attain the age of 21, provided:

"6. When the last survivor of my daughters shall have deceased and the youngest surviving child of my daughters shall have attained the age of twenty-one years, all of said trust estate then remaining in the hands of said trustee shall be divided in equal shares between my grandchildren, the surviving issue of any deceased grandchild to receive the share which such deceased grandchild would have been entitled to receive if then living. * * * The excess, if any, of the income of said trust estate, over and above the payments hereinbefore provided to be made therefrom, shall be accumulated in the hands of said trustee and form a part of said trust estate, subject to the

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

like control and power of disposition on the part of said trustee as the principal of said trust estate."

If a decedent's estate produces an increment which is payable only at times and to persons not now determinable, is such increment during a tax year an income of that tax year, which is assessable under the Internal Revenue Act of October 3, 1913? Provisions essential to the answer are as follows:

Paragraph A, subd. 1: "There shall be levied * * and collected annually [a tax] upon the entire net income * * * accruing from all sources in the preceding calendar year

"[1] To every citizen of the United States, whether residing at home or

abroad, and

"[2] To every person residing in the United States, though not a citizen thereof, * * * and

"[3] A like tax * * * upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."

Paragraph A, subd. 2: "In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied

* * and collected upon the net income of every individual an additional income tax of * *

Paragraph B: "Subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include * * * income * * * growing out of * * * interest in real or personal prop-

erty * * * and income derived from any source whatever."

Paragraph D: "Guardians, trustees, * * * and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals."

Paragraph E: After providing for withholding the normal tax at the source, and making various requirements concerning returns and assessments, this paragraph continues: "The tax herein imposed upon annual gains, profits, and income not falling under the foregoing and not returned and paid by virtue of the foregoing, shall be assessed by personal return, under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury."

Paragraph G (a): "The normal tax hereinbefore imposed upon individuals likewise shall be levied * * * upon the entire net income * * * accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not in-

cluding partnerships."

- [1] Inasmuch as all persons and property within the jurisdiction of a sovereignty are subject to taxation, and since the property cannot speak and the persons have no direct voice in wording the tax laws, it is a fundamental duty of the law-givers to make the scope of a tax law definite and its meaning clear; and therefore all doubts respecting scope and meaning are to be resolved in favor of the taxpayer. Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211.
- [2] By citing this rule we do not imply that there is in the act of 1913 an ambiguity which must be construed against the government. In our judgment nothing could be clearer than the absence of any legislative intent to tax a property increment which during the tax year

had no owner in being who received or was entitled to receive any of such increment. Paragraph A lays a tax each year upon the net income accruing in the preceding calendar year. Paragraph B defines net income as that which comes in from any interest in real or personal property and from any other source whatever. Subdivision 1 of paragraph A and paragraph G (a) condition the levy upon the fact that the income, either actually or potentially, and with full right of immediate disposition, comes into the hands of either a citizen, wherever resident, or a person who is a resident, but not a citizen, or a person who is neither a citizen nor a resident, but who owns property or carries on business here, or a corporation, joint-stock company, or association, or insurance company, organized in this country.

Otto Young's estate consists, say, of a great commercial building in a great commercial city; the net rentals, after payment of insurance, local taxes, maintenance and operation, exceed the amount required by the trustee to pay the annuities to the widow and children; at some remote period the estate as it may then exist is to be turned over to persons now unknown, possibly not now in existence; and in the meantime the estate is growing in value by reason of the rise in real estate and also by the accumulation of rentals. But neither the real estate as valued at Young's death, nor the increase in value, nor the accumulation of rentals, is a citizen or person or corporation, joint-stock company or association, or insurance company, mutual or stock. In no calendar year preceding a levy was there any sort of being to whom the trustee could pay or account for the accumulations of rentals. Paragraph D of course did not lay upon the trustee the duty of returning these accumulations as part of its own income. That paragraph required the trustee to report what it received for another who, if acting in his own behalf, would be called upon to show what he had received or was entitled to receive, with full power of immediate disposition, during the preceding calendar year. Paragraph E, the only other part of the act referred to by government counsel, plainly adds nothing to the "tax imposed," but is concerned only with methods of administration.

Our reading of the act accords with the many and uniform rulings of the Treasury Department from the passage of the act down to July 26, 1915. Treas. Dec. No. 1906, issued November 28, 1913; Income Tax Regulations No. 33, articles 70, 71, 74 and 75, issued January 5, 1914; Treas. Dec. No. 1943, issued February 4, 1914; Treas. Dec. No. 2090, issued December 14, 1914; Rulings on January 15 and 30, and February 9 and 27, 1915, in Income Tax Service 1915 on pages 379, 396, 426, 438; and the opinion of the Attorney General rendered to the Treasury Department on February 12, 1914, in income Tax Service 1914 at page 260.

In Treas. Dec. No. 2231, issued July 26, 1915, the Department declared that—

"Any part of the annual income of trust estates not distributed becomes an entity and as such is liable for the normal and additional tax, which must be paid by the fiduciary. When the beneficiary is not in esse and the income of the estate is retained by the fiduciary, such income will be taxable to the

estate as for an individual and the fiduciary will pay the tax both normal and additional."

This ruling was the cause of the present and other similar suits. It illustrates the not unnatural tendency of tax officers to increase the revenues by implications and strained constructions. The department's first rulings were in harmony with the natural import of the language used by Congress; its later ruling does more than violate the canon that doubts and ambiguities are to go against the government, for it is based, not upon any uncertainty in the terms of the act, but upon a metamorphosis of a body of property into a person, and upon exactions contrary to the exemptions in the act of 1913. If the unascertained residuary legatees were now at hand to receive from the trustee the accumulations of the preceding calendar year, they might be such in number as that nothing but the normal tax on the share of each in excess of his personal exemption could be assessed; but the department, by converting an estate into a personal entity, cuts off all personal exemptions and by adding the shares together subjects each share to the rates of surtaxes that are calculable on the sum total. If the residuary legatee were a charitable or educational institution, the department's method would add to the detriment due to the testator's postponement of the benefit the taxes and surtaxes throughout the period of postponement. Congress recognized that such alterations and amendments were legislative and passed the amendatory act of September 8, 1916 (39 Stat. 756), levving a tax upon undistributed income added to the principal of trust estates.

The judgment is reversed, and the cause remanded for further pro-

ceedings in consonance with this opinion.

FIRST TRUST & SAVINGS BANK v. SMIETANKA, Internal Revenue Collector.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)
No. 2767.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the First Trust & Savings Bank, trustee under the agreement of John H. Barker, deceased, against Julius F. Smietanka, as Collector of Internal Revenue for the First District of Illinois. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Walter Jacobs, of Chicago, Ill., for plaintiff in error. Charles F. Clyne, of Chicago, Ill., for defendant in error.

Before BAKER and ALSCHULER, Circuit Judges, and FITZHENRY, District Judge.

BAKER, Circuit Judge. This is an action by plaintiff in error to recover income taxes assessed under the Internal Revenue Act of October 3, 1913 (38 Stat. 167), and paid under protest. After the court had sustained a general demurrer to the declaration, plaintiff in error declined to plead further, and thereupon judgment for costs was entered.

In a similar case between the same parties, involving another trust estate, No. 2743, 268 Fed. 230, herewith decided, the statute is set forth, and the reasons given why the ruling and action of the Treasury Department cannot be upheld.

The judgment is reversed, and the cause remanded for further proceedings in consonance with this opinion.

SIMS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1920. Rehearing Denied December 6, 1920.)

No. 5475.

Criminal law \$\infty\$=1036(1)\$—Objections to evidence must be made at the trial.

In prosecution of physician for violation of Harrison Anti-Narcotic Act (Comp. St. §§ 6287g-6287q) by selling morphine without a dealer's license, the defense being that the morphine was given in good faith as part of morphine habit treatment, testimony by government officers that when they searched accused's office they found eight or ten bottles of morphine and three or four bottles of cocaine, being pertinent as to whether accused was dealing in the drugs, was not open to the objection on appeal that it was inadmissible, because the search was unlawful, where no such objection was made at the trial.

2. Poisons 5-9-Record of disposition of narcotics admissible.

In prosecution of physician for violation of Harrison Anti-Narcotic Act (Comp. St. §§ 6287g-6287q) by selling morphine without a dealer's license, the defense being that the morphine was given in good faith as part of morphine habit treatment, it was proper for accused on cross-examination to be required to exhibit the record of his disposition of narcotics, it being the record required by law to be kept, as the testimony was competent on the issues both of good faith and of the character of business conducted by accused.

 Criminal law = 1038(1), 1056(1), 1129(1)—Vocal emphasis of certain word in instructing jury not reviewable, in the absence of trial objection,

exception, or assignment of error.

In prosecution of physician for violation of Harrison Anti-Narcotic Act (Comp. St. §§ 6287g–6287q) by selling morphine without a dealer's license, the defense being that the morphine was given in good faith as part of morphine habit treatment, the appellate court will not consider the objection that the trial court placed peculiar emphasis or stress upon the word "dealer" in his instructions to the jury, where no such objection or exception appeared at the trial or in the assignments of error, and the appellate court is given no basis from which to determine the existence or measure of such verbal stress.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

W. H. Sims was convicted of violating the Harrison Anti-Narcotic Law, and brings error. Affirmed.

H. T. Walker, of Muskogee, Okl., for plaintiff in error.

Foster V. Phipps, Sp. Asst. U. S. Atty., of Muskogee, Okl. (Archibald Bonds, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and JOHNSON, District Judge.

STONE, Circuit Judge. Error from conviction for violating section 2 of the Harrison Anti-Narcotic Law (38 Stat. 785 [Comp. St. § 6287h]). The assignments of error are based upon the overruling of a motion to quash the indictment, the admission of evidence, insufficiency of the evidence to sustain conviction, and error in the charge to

the jury.

The motion to quash was founded on the claim of invalidity of the Harrison Act. Every contention presented in support of the motion is answered by the cases of United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, Webb v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. E. 497, Thompson v. United States, 258 Fed. 196, 169 C. C. A. 264 (8th C. C. A.), and Hughes v. United States, 253 Fed. 543, 165 C. C. A. 213 (8th C. C. A.).

The rulings upon evidence claimed to have been erroneously admitted will be better understood, if a brief summary of the issues and the evidence in the case is made. The indictment was in two counts—the first charging that Sims, without license as a dealer in morphine, sold divers unknown persons morphine between July 1, 1918, and November 1, 1918; the second charging sale, without license as a dealer of morphine, to J. C. Lamar on August 28, 1918. The first count was with-

drawn by the charge. Conviction was upon the second count.

[1, 2] Sims was a colored man practicing medicine at Muskogee. Sims had a government license to dispense such drugs as a physician in his practice, but none as a dealer. Noting that Sims was purchasing large quantities of morphine and opium derivatives from druggists, an anti-narcotic inspector suspected that he was unlawfully using This inspector secured the services of I. C. Lamar, a morphine addict. This inspector, accompanied by another inspector and a deputy marshal, searched Lamar and ascertained that he had no drugs with him. They then gave him \$15 in marked money and kept him in view constantly until he entered the stairway leading to Sims' office. In five or ten minutes Lamar returned with a sealed bottle containing about 55 grains of morphine, which was taken from him, marked for identification, and retained by one of the inspectors until the trial. After procuring the morphine from Lamar, the officers went up at once into Sims' office and found him in possession of the marked money. Sims admitted on the stand giving Lamar a bottle containing about 55 grains of morphine and receiving \$15 from him. fense was that Lamar had come to him for treatment for the morphine habit, and that the morphine was given for that purpose only, and the money received as part payment for the treatment. The explanation of the large quantity of morphine was that Lamar represented that he would be away from town for several days, and this quantity was to cover the period of absence. The method of treatment was by progressively reducing the average consumption by one grain a day until the patient was reduced to one or two grains a day, when an intensive treatment of baths, purgatives, and other drugs was to be employed for a few hours. Lamar swore that there was no understanding nor arrangement for any treatment, but that he simply bought the drug. Sims swore that he questioned Lamar as to his age, length of drug habit, and average daily consumption. The broad issue thus presented to the jury was whether Sims had given the morphine to Lamar as part of a treatment in good faith for the morphine habit.

With the foregoing outline in mind, consideration will be now given to the evidence claimed to have been erroneously admitted. The first objection goes to the identification by Lamar of the bottle of morphine received from Sims. This identification was clear, positive, and unshaken on cross-examination. Not only Lamar, but the officers, positively identified the bottle and contents which had been bought and remained under seal. Besides, Sims admitted giving Lamar at that time that amount of morphine in a bottle.

Another assignment is that Lamar was permitted to testify as to the plan between him and the officers as to the trip to Sims' office. This

objection is frivolous.

Another assignment is that the officers were permitted to testify that, when they went up to Sims' office, they searched it and found eight or ten bottles of morphine and three or four bottles of cocaine. This was pertinent upon the question of whether Sims was dealing in the drugs. The objection that this search was unlawful comes too late to affect the admissibility of this testimony, since no such objection was made at the trial.

Another assignment is the refusal of the court to strike out an answer by the deputy marshal to the effect that the addicts who went to Sims were "both male and female and white and black." The claim advanced is that this aroused race prejudice, and ruled the verdict. We find no basis whatsoever for this claim in any part of this record.

The final assignment as to admission of evidence is that Sims, on cross-examination, was required to exhibit the record of his disposition of narcotics. This was the record required by law to be kept. Whatever the weight of this testimony, its competency is clear on the issues both of good faith and of the character of business conducted by Sims.

The assignments that the verdict is contrary to the law and evidence and based upon insufficient evidence are not sound. The issue of fact was clear-cut, and supported by substantial testimony. The claim that the verdict was the result of race prejudice is unfounded.

[3] The charge is assailed because (as stated in the printed argument) "of the peculiar emphasis, utterance, stress, or force which the court placed upon the word 'dealer' in his instructions to the jury. This emphasis or stress of voice by the court doubtless called the jury's special attention to the idea of a 'dealer' in this case to the detriment of the rights of the defendant." No such objection or exception appears at the trial or in the assignment of errors, and we are given no basis from which to determine the existence or measure of this verbal stress.

The final assignment urged here is a refusal of a request to charge as to the criminal intent. This matter was abundantly covered in the charge given.

The judgment is affirmed.

CITY OF CHICAGO v. S. OBERMAYER CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)

No. 2783.

1. Courts \$\infty\$ 366 (11) — Federal courts governed by state decisions as to state Constitution and statutes.

Federal courts accept as conclusive the decisions of the highest court of the state with respect to the meaning and effect of state Constitutions and statutes on right to interest on recovery for diminution of value by closing of street.

2. Eminent domain \$\infty\$148\to Interest not allowable prior to verdict on damages. In view of Hurd's Rev. St. III. 1917, c. 74, § 2, in property owner's action against city to recover compensation pursuant to Const. Ill. 1870, art. 2, § 13, for diminution in value of property caused by closing a street to vehicle traffic, it was error to allow interest from the time of the street closing, for, the damages being unliquidated, interest was allowable only from the date of the verdict and on the amount thereof.

3. Eminent domain €=145(2)—Special benefits from track elevation may

be considered as against special damages.

In property owner's action against a city for causing diminution in value of ms property by closing a street on which the property was located to vehicle traffic by track-elevation improvement authorized by ordinance, it appearing that on other neighboring and parallel streets vehicle subways were provided, the jury could consider, as against plaintiff's special damages, his property's special benefits, in that vehicle traffic there to along such parallel streets was, by the improvement, rendered safer, speedier, and more convenient.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the S. Obermayer Company against the City of Chicago. Judgment for plaintiff, and defendant brings error. Reversed.

George Kandlik, of Chicago, Ill., for plaintiff in error. H. S. Mecartney, of Chicago, Ill., for defendant in error.

Before BAKER and PAGE, Circuit Judges, and SANBORN, District Judge.

BAKER, Circuit Judge. Obermayer Company, an Ohio corporation, sued Chicago for causing a diminution in value of its factory site and buildings on Eighteenth street by closing that street to vehicle traffic. Trial by jury; verdict and judgment for Obermayer Company.

Chicago in 1907 passed a track-elevation ordinance. At that time 16 double-track railways crossed Eighteenth street at grade. Elevation of tracks at the place in question, wholly upon the railway companies' rights of way, was done in June, 1910. A subway for pedestrians was constructed at Eighteenth street, but none for vehicles. This trackelevation improvement, however, involved other streets north and south of Eighteenth. Along streets parallel with Eighteenth street vehicle as well as pedestrian subways were provided. None of Obermayer Company's property was taken. In front of the factory the street was neither taken nor obstructed.

[1] Assignments of error present questions arising from the Constitution and statutes of Illinois. Federal courts accept as conclusive the decisions of the highest court of the state with respect to the meaning and effect of the state Constitution and statutes upon state matters—such as holding realty within the state. Wilcox v. Hunt, 38 U. S. (10 Pet.) 378, 10 L. Ed. 209; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; United States Mortgage Co. v. Sperry, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. Ed. 969.

[2] Section 13 of article 2 of the Illinois Constitution of 1870

provides:

"Private property shall not be taken or damaged without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law."

By their verdict the jurors said that Obermayer Company's property had been damaged to the extent of \$5,000. They arrived at this amount by ascertaining the difference between the value of the property immediately before and the value immediately after the improvement was made. In entering judgment on this verdict, the court, on Obermayer Company's motion and over Chicago's objection, added interest for nine years at 5 per cent., \$2,250.

In Illinois the statute (Rev. Stat. Ill. c. 74, § 2) allows interest on—"all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment."

In Chicago v. Allcock, 86 III. 384, decided in 1877, the Supreme Court of Illinois held in effect that the state Constitution left the Legislature free to provide for interest, or not, as it saw fit; that the statute allowed no interest on unliquidated damages; that in such cases interest began first to run from the date of the verdict and upon the amount thereof. In that suit Chicago had built a water tunnel under Allcock's property without his consent, the settling of the surface of his land seriously damaged his buildings, and the action was to recover the damages so sustained.

As the Illinois Constitution was adopted in 1870, and the Allcock decision respecting the interest statute was rendered in 1877, Obermayer Company, coming over from Ohio and buying this Illinois realty in 1888, is not in a very good position to ask us, even if we had the right, to listen to the contention that "substantial justice" requires the overturning of the Illinois law as interpreted by the Illinois Supreme Court. When asked to change its stand, the Illinois Supreme Court,

in Geohegan v. Union Elevated Rld. Co., 266 Ill. 482, 107 N. E. 786, Ann. Cas. 1916B, 762, decided in 1915, solemnly accepted the Allcock Case as the settled law of the state.

"Money withheld by vexatious delay" cannot apply to Chicago's conduct in aiding the jury to ascertain the unliquidated damages; but, if it could, the delay is chargeoble to Obermayer Company. No declaration was filed till April, 1912. Then it was not till June, 1914, that Obermayer Company had on file a nondemurrable declaration. Not till December, 1918, did Obermayer Company move to have the cause put on the trial calendar. Trial was reached in April, 1919. No part of the nine years, for which interest was added, is chargeable to Chicago. Allowance of interest in such circumstances would be awarding Obermayer Company a premium on its own delays.

If this interest question were the only error assigned, the mandate would be to vacate the judgment and enter a new one for the amount of the verdict, with interest from its date. But Chicago has presented an assignment that attacks the verdict itself.

[3] By offers of proof and requests for instructions on what evidence was in, Chicago claimed the right to have the jury consider special benefits as against special damages. Obermayer Company was presenting only the injury that resulted to its property by reason of the partial closing of Eighteenth street. When Eighteenth street was open, persons in vehicles had access along that street to Obermayer Company's plant by driving over grade crossings; and tracks at grade likewise crossed parallel streets. When the track elevation was completed, although vehicle traffic could not pass under the railroad tracks at Eighteenth street, the theory of Chicago in offering its proofs and instructions was that vehicle traffic to and from Obermayer Company's plant along parallel streets in the immediate vicinity was rendered safer, speedier, and more convenient, and that thereby Obermaver Company's property had received special benefits from the improvement in the very respect in which the property had been specially damaged. This theory of Chicago's legal right is in accordance with West Side Elevated Ry. Co. v. Stickney, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, Brand v. Union Elevated Ry. Co., 258 Ill. 133, 101 N. E. 247, L. R. A. 1918A, 878, Ann. Cas. 1914B, 473, Geohegan v Union Elevated Ry. Co., 266 Ill. 482, 107 N. E. 786, Ann. Cas. 1916B, 762, and numerous earlier cases therein cited.

Chicago is entitled to a new trial; but we do not feel sure that the attack upon the verdict was not included merely as a makeweight in obtaining a reversal of the judgment. Chicago is directed to file with the clerk within 10 days its election to take a mandate for a new trial or for a corrected judgment upon the verdict.

The judgment is reversed.

GROBLEWSKI v. JOHN CHMIELL CO.

(Circuit Court of Appeals, First Circuit. October 27, 1920.)

No. 1475.

 Judgment \$\infty\$=951(1)—Presumption that decree was on merits may be overcome by record.

While a decree dismissing a suit in equity without words of qualification is presumed to be rendered on its merits, that presumption is overcome when the record shows that the court did not pass upon the merits, but dismissed the bill on some other ground.

Judgment \$\infty\$ 570 (12) — Dismissal for want of prosecution not bar to subsequent suit.

A decree reciting that no replication had been filed to the answer, and dismissing the bill in accordance with equity rule 66, which entitles the defendant, when a replication is not filed to an order for dismissal of the suit as of course, is a dismissal for want of prosecution, which cannot be pleaded in bar to a subsequent suit for the same cause.

Appeal from the District Court of the United States for the District of Massachusetts; Edgar Aldrich, Judge.

Action by Albert G. Groblewski against the John Chmiell Company. Decree for defendant, and plaintiff appeals. Reversed and remanded.

Lucius E. Varney, of New York City (Emery, Booth, Jannev & Varney, of New York City, on the brief), for appellant.

George A. Rockwell, of Boston, Mass., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is the same case that was before this court in 264 Fed. 325, decided May 9, 1919. It was there held that the decree appealed from was interlocutory, and not final, as there were other grounds of complaint set out in the bill, not disposed of by the decree. Since then a decree has been entered in the District Court, dismissing the bill as to all issues raised by the pleadings and not covered by the interlocutory decree, and making the latter decree final. It is from this final decree that the present appeal is taken.

In 1910 the plaintiff sued the defendant's predecessor in title for infringement of the trade-mark "Zmijecznik" and for unfair competition in the use of the same. In that action the Circuit Court for the District of Massachusetts, on June 23, 1910, entered the following decree:

"This cause came on to be heard on motion of defendant, and it appearing that defendant's answer was filed on May 2, 1910, that said answer was excepted to, that no replication was filed on or before the next succeeding rule day thereafter, to wit, June 6, 1910, and that no replication is now on file:

"Now, therefore, upon consideration thereof, and in accordance with rule 66, it is ordered, adjudged, and decreed that the bill of complaint be, and the same hereby is, dismissed, with costs."

The grounds of complaint in the present suit are the same as those in the 1910 action, and the parties are the same or privy in title. The defendant pleaded the 1910 judgment as a defense to the suit, and, on May 20, 1918, the District Court entered the following decree:

"That the bill of complaint be, and the same hereby is, dismissed, with costs, as to all the issues common to this cause and to the cause of Albert G. Groblewski v. John Chmielnicki, Equity No. 688, in this court, in which a final decree was entered. * * *"

Former equity rule 66, referred to in the decree of June 23, 1910, is as follows:

"Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or a judge thereof shall, upon motion, for cause shown, allow a replication to be filed nunc pro tune, the plaintiff submitting to speed the cause, and to such other terms as may be directed."

The question presented is whether the court erred in holding that the decree of June 23, 1910, was a bar to this action.

[1] In deciding this question we will first consider whether the decree of June 23, 1910, was an adjudication of the issues then in controversy on their merits; for, if it was, the matters involved in the present action are res judicata, and the decree of dismissal was proper. In Swift v. McPherson, 232 U. S. 51, 55, 34 Sup. Ct. 239, 241 (58 L. Ed. 499) Mr. Justice Lamar, in discussing a similar question said:

"Ordinarily, such a question is answered by a mere inspection of the decree—the presumption being that a dismissal in equity, without qualifying words, is a final decision on the merits. That presumption of finality, however, disappears whenever the record shows that the court did not pass upon the merits, but dismissed the bill because of a want of jurisdiction, for want of parties, because the suit was brought prematurely, because the plaintiff had a right to file a subsequent bill on the same subject-matter, or on any other ground not going to the merits. The scope of such decree must in all cases be measured, not only by the allegations of the bill, but by the ground of the demurrer or motion on which the dismissal was based. Hughes v. United States, 4 Wall. 232, 237; Mayor of Vicksburg v. Henson, 231 U. S. 259."

The rule is well established that a decree of dismissal which is absolute in terms—that is, is not accompanied by words of qualification—is presumed to be rendered on the merits and constitutes a bar to further litigation of the same subject-matter between the same parties. Durant v. Essex Co., 7 Wall. 107, 19 L. Ed. 154. But in Swift v. Mc-Pherson, supra, it is pointed out that the presumption disappears whenever the record shows that the court did not pass upon the merits, but dismissed the bill on some ground not going to the merits.

[2] We think the 1910 decree shows on its face that it was not based on the merits of the controversy, but on the plaintiff's failure to prosecute the action. The decree states that it was entered on the motion of the defendant, because of failure of the plaintiff to file a replica-

tion, and that the entry was made under rule 66, which provides that in such case "the defendant shall be entitled to an order, as of course, for a dismissal of the suit." If the defendant, in the absence of a replication, could have set the case down for hearing on bill and answer, it appears from the decree that he did not do so.

A decree dismissing a bill for want of prosecution cannot be pleaded in bar to a subsequent suit for the same cause. 1 Daniell, Ch. Pl.

Pr. (6th Am. Ed.) 811, c. VIII, § II, and cases above cited.

The decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellant.

OZELŁO v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)
No. 2753.

 Criminal law \$\infty\$1032(5)—Insufficiency of indictment cannot be first urged on appeal.

In prosecution under the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), the objection could not be raised on writ of error that the indictment charged merely in the language of the statute that defendants caused intoxicating liquors to be transported, without stating in what manner or through what instrumentality it was caused to be done; the indictment not having been challenged by demurrer or otherwise, and defendants not having required, by bill of particulars, amplification of the charge.

- 2. Intoxicating liquors \$\iff 222\$—Indictment sufficiently negatived exceptions.

 An indictment under the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), charging the unlawful transportation of "wine," sufficiently negatived the exception excluding "ethyl alcohol tor governmental, scientific, sacramental, medicinal, mechanical, manufacturing and industrial purposes."
- 3. Intoxicating liquors ☐17—Reed Amendment constitutional.

 The Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a) is constitutional.

4. Criminal law \$\iftharpoonup 995(7)\$—Sentence to county jail not improper.

In prosecution for violation of Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), sentence of confinement in certain county jail, which was within the district, was not objectionable, as not specifying any state, as Rev. St. § 5546 (Comp. St. § 10547), authorizing the Attorney General to arrange for the confinement of prisoners in a suitable jail out of the district, if there is no suitable jail in the district, indicates that, where there is a suitable jail in the district, confinement shall be there, and, even if it turned out that the jail designated was not a suitable place, this would not vitiate the sentence, but the Attorney General might designate another.

In Error to the District Court of the United States for the District of Indiana.

James Ozello was convicted of violating the Reed Amendment, and brings error. Affirmed.

F. J. Mattice, for the United States. Benjamin E. Cohen, of Chicago, Ill., for plaintiff in error. Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge. The writ attacks a judgment rendered on a general verdict of guilty on an indictment of two counts found under the so-called "Reed Amendment" (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a)—the first count charging that defendants "did cause certain intoxicating liquor, to wit, 200 gallons of wine, to be transported from Chicago, in the state of Illinois, into the state of Indiana, the laws of which latter state then and there prohibited the manufacture or sale therein of intoxicating liquors for beverage purposes, and said liquor not being transported for scientific, sacramental, medicinal or manufacturing purposes, * * *" and the second count charging a conspiracy to violate a law of the United States through the intended commission of an act substantially as described in the first count.

There is no bill of exceptions, and as to the judgment we have to deal only with the sufficiency of the indictment, challenged for the first time by the writ of error herein. Insufficiency is charged, in that (1) it is not enough in such an indictment to charge merely in the language of the statute that the defendants caused intoxicating liquors to be transported, without stating in what manner or through what instrumentality it was caused to be done; (2) the indictment fails to negative a further exception to the operation of the act, made by an amendment thereto of October 3, 1917 (Comp. St. Ann. Supp. 1919, § 10387e); (3) the "Reed Amendment" is unconstitutional.

[1] As to the first, the indictment is in the words of the statute, and not having been challenged by demurrer or otherwise, and the defendants in the indictment having failed to avail themselves of the right in proper case to require by bill of particulars amplification of the charge, we do not think that after verdict the indictment is subject

to attack on such ground.

[2] While what is said of the first contention might quite as well be applied to the second, it seems further that the charge in the first count, that the transportation was of intoxicating liquors, consisting of "wine," impliedly negatives the further exception, which was made by the amendment of October 3, 1917, excluding also "ethyl alcohol for governmental, scientific, sacramental, medicinal, mechanical, manufacturing and industrial purposes." We do not understand that the term "wine," as generally understood, would include the article specified in this further exception, and so by no possibility could there be any confusion or misconception as to the nature of the charge in this respect, whereby persons indicted and convicted might thereafter be prejudiced in case they were again charged with the same offense.

[3] As to the constitutionality of the "Reed Amendment," whereon the indictment is predicated, we need only to say that this is not now a question open in this court, since the recent determination by the Supreme Court that it is constitutional. United States v. Hill, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337. In a later case (United States

v. Simpson, 252 U. S. 465, 40 Sup. Ct. 364, 64 L. Ed. 665), decided by the same court last April 19th, the Hill Case was followed, and a transportation of liquor into the state of Colorado by automobile for the personal use of the one transporting it was held to be a violation of the "Reed Amendment," notwithstanding such a transportation did not violate the laws of Colorado.

[4] Objection to sentence to confinement in the Marion county jail for six months, without specifying any state, is not well taken. Section 5546, Rev. Stat. U. S. (Comp. St. § 10547), authorizes the Attorney General to arrange for the confinement of prisoners in a suitable jail out of the district wherein they were convicted, in case there is no suitable jail within the district, impliedly indicating that primarily, where there is a suitable jail in the district, the confinement shall be there. Marion county is within the district, and in the absence of anything appearing to the contrary it will be presumed that there is a county jail in that county which is suitable for the confinement of prisoners therein. But under that section, even if it turned out that the county jail of Marion county was not a suitable place therefor, this would not vitiate the sentence, but the Attorney General might designate another "suitable jail in a convenient state or territory" wherein the sentence may be served.

The judgment of the District Court is affirmed.

HOLLAND v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1920.)

No. 5431.

 Criminal law = 1036(8), 1044—Insufficiency of evidence not considered, where no demurrer or motion to direct verdict.

In cases involving life or liberty, the Circuit Court of Appeals will not permit an error in procedure, even though it be substantial, to result in manifest injustice with consequent loss of liberty or of life; but, where the evidence reveals no injustice in the result reached, an assignment of error to the insufficiency of the evidence will not be further considered, there having been no demurrer to the evidence, nor motion to direct a verdict.

 Indians \$\iff 38(1)\$—Charge as to whisky found on accused's premises not error.

In trial for introducing liquor into that part of Oklahoma formerly a part of Indian Territory, there being evidence that, when the automobile used was mired, 1,500 half pints of Y. label whisky were unloaded therefrom and hauled in a wagon to the town where accused lived, and that two days later officers found 513 half pints of Y. label whisky concealed in accused's house, a charge that the jury might consider the amount of whisky, the places where it was found, the identity of labels, and the possession of such an amount, as bearing on the question of introduction into the state of intoxicants, was not error.

3. Indians \$\infty\$ 38(1)—Charge on introducing liquor held proper.

In trial for introducing liquor from outside the state, there was no error in the court's saying, in the course of the charge, that it was unlawful to sell whisky in the state, where the charge was clear and definite

that the offense necessary for the jury to find was the introduction of whisky from out the state.

4. Criminal law ∞ 829 (1)—Charge already covered properly refused.

A charge requested after retirement of the jury, and covered in all essentials by the charge as given, was properly refused.

In Error to the District Court of the United States for the Eastern

District of Oklahoma; Robert L. Williams, Judge.

C. B. Holland was convicted of introducing liquor from outside the state of Oklahoma into that part of the state that was formerly Indian Territory, and brings error. Affirmed.

E. E. Sams, of Nowata, Okl., W. A. Chase, of Tulsa, Okl., and Archibald Bonds, of Muskogee, Okl., for plaintiff in error.

Foster V. Phipps, Special Asst. U. S. Atty., of Muskogee, Okl.

Before HOOK and STONE, Circuit Judges, and JOHNSON, District Judge.

STONE, Circuit Judge. Error from introducing liquor from outside the state of Oklahoma into that part of the state that was formerly

Indian Territory.

[1] The 12 assignments of error may be summarized as follows: Insufficient evidence; errors in the charge to the jury; and erroneous refusal of a request to charge. The contention as to the sufficiency of the evidence is that the introduction from outside the state was not proven. The record is barren of any demurrer to the evidence, all of which was offered by the government, or of any request for a directed verdict. It is true that in cases involving life or liberty this court will not permit an error in procedure, even though it be substantial, to result in manifest injustice, with consequent loss of liberty or of life; but the entire evidence has been carefully studied, revealing no injustice in the result reached. Therefore we must decline to further consider this point in the assignments of error.

[2] The objections to the charge, as given, are that the jury was told it might consider the amount of whisky, the possession of this amount in Oklahoma, and the labels on the bottles in determining whether the whisky had been introduced from out the state. The pertinency of these parts of the charge is best understood from a brief statement of some of the evidence: Holland and another, early Sunday morning, November 19, 1918, were going south in an automobile in Craig county, Okl. At a point some 16 or 18 miles south of the Kansas line the car mired in a mud hole for the second time, necessitating the unloading of the contents. Fifteen hundred half pints of Yellowstone label whisky were unloaded therefrom into a wagon and that day hauled to the town of Delaware, where Holland lived. Two days later officers searched his They found three concealed places for storing whisky. In one of these, located in the wall, they found 513 half pints of Yellowstone whisky. The same day the officers found a "sack of whisky" in the house of the other occupant of the car.

The court, in substance, charged the jury that it might consider the

amount of whisky, the places where it was found, the identity of labels, and the possession of such an amount of whisky, all as bearing upon the question of introduction into the state of intoxicants. He especially cautioned the jury that possession itself was not enough to prove introduction, but was simply a circumstance to be considered in connection with all of the testimony. The above was by no means all, or even the strongest, testimony as to unlawful introduction; but each was a circumstance having more or less bearing upon that question, and properly for the consideration of the jury.

[3] It is also claimed that the court instructed the jury that it was unlawful to sell whisky in Oklahoma, and the inference is that the jury would thereby be led to convict for sale in Oklahoma, irrespective of introduction from another state. No objection nor exception to this portion of the charge was made. If made, they would have been baseless of error, for, while the court in the course of the charge did say that it was unlawful to sell whisky in Oklahoma, yet the charge is absolutely clear and definite that the offense necessary for the jury to

find was the introduction of whisky from out the state.

[4] Complaint is made that the court refused a request to the effect that possession of the whisky in Oklahoma would not "within itself" be evidence of unlawful introduction, but that the necessity would still remain for other proof of such introduction. The request was made after retirement of the jury, and was covered in all essentials by the charge as given.

The judgment is affirmed.

GAMMAGE V. INTERNATIONAL AGRICULTURAL CORPORATION.

(Circuit Court of Appeals, Fifth Circuit. October 18, 1920. Rehearing Denied November 8, 1920.)

No. 3488.

Master and servant \$\infty\$ 318(1)—Owner directing method of work by inde-

pendent contractor liable as master.

Where a contractor agreed to assume all liability for injuries to himself and his workmen doing the work, but the owner of the property refused to permit the work to be done in the manner selected by the contractor, and required the work to be done in a manner specially directed, and with a rope furnished by the owner, the relation of owner and independent contractor was changed to that of master and servant, so that the owner is liable for injuries to the contractor, received because of the defective condition of the rope.

In Error to the District Court of the United States for the Southern

District of Georgia; Beverly D. Evans, Judge.

Action for personal injuries by C. R. Gammage against the International Agricultural Corporation. Judgment for defendant, sustaining a demurrer to the petition, and plaintiff brings error. Reversed.

J. E. Sheppard, of Americus, Ga. (W. T. Lane & Son and Shipp & Sheppard, all of Americus, Ga., on the brief), for plaintiff in error.

Marion Smith, of Atlanta, Ga. (Miller & Jones, of Macon, Ga., and Little, Powell, Smith & Goldstein, of Atlanta, Ga., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiff in error was plaintiff below and sued to recover damages for personal injuries. He alleged in his petition that on July 2, 1917, he entered into a contract with defendant in error to paint the latter's building and to furnish the necessary tackle and equipment; that on the succeeding day he was proceeding in the usual way, with the necessary tackle and equipment, to perform the work agreed upon; that in doing the work he made use of a platform which was held by ropes, and that these ropes were fastened to steel hooks, which in turn rested on the top of the building; that one side of the building had been painted by the use of this equipment, and that as plaintiff and his employes were about to attach the hooks to the roof on the north side of the building, Parker, the superintendent of defendant, objected, and stated that he would not allow the hooks to be attached to the roof of the building, and directed that one of the hooks which held up the platform on which the painters worked should be attached to a beam extending out from the building, and that the other hook should be attached to a rope extending into the building; that plaintiff did not have a rope suitable for this purpose, whereupon Parker, for the defendant, furnished one which he stated was safe, and directed that it should be used; that in obedience to this requirement plaintiff used the rope so furnished, and which it is alleged was not sound, but had been exposed to sulphuric or other acids, and had become brittle and unsafe; that plaintiff was entirely ignorant of the effect of acids on ropes, and also ignorant of the fact that the rope had been so exposed; that from a casual examination the rope appeared to be sound; that Parker knew the rope had been exposed to the acids, but failed to inspect it, and recklessly directed its use. was then alleged that the rope furnished by defendant broke while plaintiff and his employés were suspended by it a distance of about 80 feet from the ground; and that plaintiff was injured.

The contract between plaintiff and defendant contained a paragraph

as follows:

"Party of the second part [plaintiff] agrees to assume all liability for injury to himself, his workmen, or damage to property."

Defendant filed a demurrer, which was sustained, and the petition dismissed. Plaintiff sued out writ of error.

The argument of defendant in error is to the effect that the release from liability is valid, except as against criminal negligence, unless it is prohibited by statute. It is then asserted that criminal negligence is not alleged, and that in Georgia there is no statutory prohibition against the release relied upon. These contentions need not be denied. However, it is our opinion that the petition alleges facts which changed the relation of owner and independent contractor to that of master and servant. Doubtless the defendant could have objected to the particular

method adopted by plaintiff, without effecting a change in the contract between them; but when it assumed to require the adoption of a particular method, to the exclusion of all others, that liberty of action which the independent contractor is entitled to assert ceased to exist,

and the ordinary relation of master and servant was created.

The effect of this interference, as to Gammage's employé, Slappey, who was killed in the same accident in which Gammage was injured, was before this court in the case of International Agricultural Corporation v. Slappey, 261 Fed. 279, where the right of recovery was upheld. Of course, Gammage's case was not then before the court; but now that it is we quote with approval the following from the opinion by Judge Grubb in the Slappey Case:

"If the jury believed the plaintiff's evidence, they were authorized to find from it that Parker interfered with the means and method of doing the painting in a way that would establish the relation of employer and employes between the defendant and Gammage and his men, at least to the extent of the interference, and notwithstanding the terms of the written contract, and that to this interference the accident that killed decedent was traceable."

The judgment is therefore reversed.

DRAKE v. TENNESSEE, A. & G. R. CO.

(Circuit Court of Appeals, Fifth Circuit. October 12, 1920.) No. 3532.

1. Courts \$\infty\$ 405(5)—Contention that jurisdictional plea was waived raises

other than jurisdictional question.

Where plaintiff contended, on writ of error from a judgment dismissing his petition for want of jurisdiction, that defendant by first pleading to the merits had waived its plea to the jurisdiction, another question besides that of jurisdiction is involved, and the writ of error is rightly in the Circuit Court of Appeals.

2. Abatement and revival \$\sime\$84-Plea to jurisdiction cannot be made after

time by amending plea on other ground.

Under Civ. Code Ga. 1910, §§ 5641, 5664, requiring a dilatory answer to be filed at the first term, and making a plea to the merits without plea to the jurisdiction an admission of the jurisdiction, a railroad company, which filed in time a plea in abatement based on the order of the Director General of Railroads, could not, after answering to the merits, set up a plea to the jurisdiction based on the citizenship of defendant, by way of amendment to its former plea.

In Error to the District Court of the United States for the North-

ern District of Georgia; William T. Newman, Judge.

Action by W. M. Drake against the Tennessee, Alabama & Georgia Railroad Company. From a judgment dismissing the petition for want of jurisdiction, plaintiff brings error. Reversed.

George Westmoreland, Jas. L. Anderson, and Sidney Smith, all of Atlanta, Ga., for plaintiff in error.

Samuel B. Smith, of Chattanooga, Tenn., and G. E. Maddox, of

Rome, Ga., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This suit was brought in Georgia for damages for personal injuries received by plaintiff in error, a citizen of Tennessee, against defendant in error. The petition alleged that defendant in error was a corporation under the laws of Georgia. This allegation was at first admitted by defendant in error, in its answer on the merits. At a subsequent term of court, defendant in error, by leave of court and over the objection of plaintiff in error, filed a plea to the jurisdiction of the court, the substance of which was that it was first incorporated under the laws of Alabama, though a few days later it was also incorporated under the laws of Georgia. It is claimed that the legal effect of this plea, if true, is that defendant in error is a citizen of Alabama, and that, consequently, the District Court in Georgia is without jurisdiction. The District Court allowed the plea and dismissed the petition for want of jurisdiction.

[1] Defendant in error contends that only the question of jurisdiction is involved, and that therefore review can be had only in the Supreme Court. On the other hand, plaintiff in error insists that defendant in error, by first pleading to the merits, waived its plea to the jurisdiction. Another question besides that of jurisdiction is involved, and therefore, in our opinion, the writ of error is rightly here. Boston & Maine R. R. v. Gokey, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed.

1002.

[2] Undoubtedly the general rule is that a plea to the merits bars all dilatory pleas. In Georgia a dilatory answer must be filed at the first term, and if defendant pleads to the merits, without pleading to the jurisdiction, "he thereby admits the jurisdiction of the court." Code Georgia 1910, §§ 5641 and 5664; White et al. v. Ga. Electric Co., 136 Ga. 21, 70 S. E. 639; Bray et al. v. Peace, Adm'r, 131 Ga. 637, 62 S. E. 1025. It is true that a plea to the jurisdiction was filed at the first term, which set up the order of the Director General, requiring suits to be brought where the plaintiff resided or where the cause of action accrued, and that the citizenship of the defendant in error was pleaded by way of amendment thereto. But reliance on the order of the Director General was expressly abandoned, and only the question of citizenship insisted upon. In Quillian v. Johnson, 122 Ga. 49, text 54, 49 S. E. 801, 803, the Supreme Court of Georgia said:

"Entirely new and distinct grounds for abating an action cannot, of course, be set up at the trial term under the guise of an amendment to a plea in abatement filed in due time; a party cannot accomplish by indirection what the law declares it is not his privilege to do at all."

The justice of this rule is apparent in the case before us. The plea in abatement now relied upon was not filed until a new suit would have been barred by the statute of limitations.

We are of opinion that the District Court erred in entertaining the plea to the jurisdiction filed by way of amendment, and the judgment

is therefore reversed.

TEE PEE RUBBER CO., Inc., v. I. T. S. RUBBER CO.

(Circuit Court of Appeals, Sixth Circuit. July 15, 1920. On Petition for Rehearing, December 7, 1920.)

No. 3419.

 Patents = 328—Reissue 14,049, claims 7, 9, and 10, for rubber heel, held not infringed.

The Tufford reissue patent, No. 14,049, for a rubber heel, claims 7, 9, and 10 construed, and the peculiar concavity indicated by the suction effect of the construction shown *held* a limitation of all claims essential to show invention over that of a prior patent; also *held* not infringed.

2. Patents \$\iiin\$ 168(2)—Estoppel and construction by Patent Office record.

When applicant put a construction upon a claim phrase in order to distinguish from a reference and get an allowance, he should be held to that construction.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge. Suit by the I. T. S. Rubber Company against the Tee Pee Rubber Company, Incorporated. From an order granting a preliminary injunction, defendant appeals. Reversed.

Frederick P. Fish, of Boston, Mass. (C. P. Goepel, of New York City, and J. L. Stackpole, of Boston, Mass., on the brief), for appellant.

F. O. Richey, of Elyria, Ohio, and Charles A. Brown, of Chicago, Ill., for appellee.

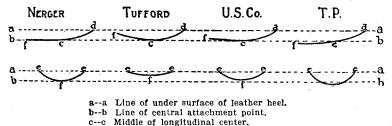
Livingston Gifford and Charles S. Jones, both of New York City, amici curiæ.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. This is an appeal from an order for preliminary injunction against infringement of the Tufford reissued patent No. 14,049, dated January 11, 1916, for rubber heel. This is the fourth branch of the litigation on this patent which has reached this court. In Fetzer v. I. T. S. Co., 260 Fed. 939, 171 C. C. A. 581, and in U. S. Rubber Co. v. I. T. S. Co., 260 Fed. 947, 171 C. C. A. 589, we construed various claims of the patent and held that they were valid and infringed. In Elyria Co. v. I. T. S. Co. (C. C. A.) 263 Fed. 979, we decided that the form of heel there involved did not infringe. Reference to these opinions will make it unnecessary to repeat here the general situation.

[1] We have thought that the presence in most of the claims of the phrase "concavo-convex on every line of cross section" imported into them a requirement that the upper surface of the heel be "saucer-shaped" rather than "scoop-shaped," and the present case presents, for its first problem, a question of the application of these definitions. It is quite clear to us that the lift of the present defendant, the "T. P." heel, must, unlike that of the United States Rubber Company, be classified with that of the older patent to Nerger, rather than with Tufford.

Every test suggested in our former opinions and every theoretical principle of operation requires this conclusion. Because there has been misunderstanding of the principle upon which we intended to distinguish, and for a clearer presentation of the matters to be considered, we here insert drawings indicating the longitudinal cross section and the transverse arch at the breast, each coincident with the upper surface, of the four varying forms of lifts so far involved in the litigation.1



d--d Center of rear upper edge. e--e Upper breast corners of transverse arch. f--f Center of breast edge.

In order that these lines should truly represent their relative situation, they are shown in each case as they will be when the upper edge of the lift is horizontal; i. e., when the lift is placed up against the horizontal bottom of the heel (indicated by the dotted line a a) ready for attachment, but before applying any distorting pressure. As we pointed out in the Fetzer Case, 260 Fed. 940, 171 C. C. A. 581, some such common basis for positioning of the various lifts must be adopted, or there can be no intelligent comparison of the different forms. If the lifts are merely rested loosely upon the flat surface of a counter or desk, and are allowed to position themselves, it is obvious that whether the upper surface will hold water like a saucer, or allow the water to run out like a scoop, will be dependent, not at all upon the form of that surface, but rather upon how the weight of rubber may happen to be distributed, so as to fix the center of gravity, or upon such irregularities as there may be on the under surface. On this rather natural, but deceptive, test, the T. P. will rock rearwardly into such a position that the top seems to be saucer-shaped; but when the test is corrected, to bring it to the common standard, the above drawings make it clear that on the longitudinal cross section, the lowest spot is at the breast, and is not centrally disposed.

Not only is this theoretically true, but inspection and careful measurement of the numerous exhibits now presented show that every one of the I. T. S. and the U. S. Co.'s lifts has a low spot centrally disposed.

¹ The drawing of the line in the Nerger patent is criticized by Tufford as not definite enough to rely upon. We therefore adopt the form insisted upon by Tufford as the true one, as indicated by the Nerger heels manufactured.

The inserted drawings are inaccurate representations of the exhibits, in that, in the latter, the depth of the point c below the line a a varies, while in the drawings this is arbitrarily made equal; but the relative shapes of the upper concavities are correctly indicated.

while in every one of the T. P. lifts the distance from the top plane to the longitudinal center of the upper surface constantly increases as the breast is approached, and is greatest at that point. Applying the practical test of whether liquid is retained in this cavity when the top edges are made horizontal, we find that there is no such retention; it all runs out, except that minute quantity which will not flow over a relatively dry surface. The affidavits which state the contrary result must be based upon an abnormal positioning of the lift, unless water has lost its inherent tendency to run down hill.

We do not overlook that Nerger's upper central longitudinal line, from center to breast, is horizontal, while the T. P. is a curve; but this is immaterial, as it is a downward curve—not upward—and so is even further away from Tufford than Nerger is. If Nerger is to be distinguished, because horizontal, the T. P. is yet more to be distinguished, because more than horizontal. There is no escape from the conclusion that the T. P. lifts do not infringe those claims of the patent which call expressly for the concavo-convex form on every line of cross section.

It is said that claims 7 and 9 do not contain this limitation, and that therefore a broader question is presented. Claims 5, 6, and 8 have, for one element, "a body portion of concavo-convex form on every line of cross section." Claim 7 (and the same is true of claim 10) describes this element as "a body portion, the attaching face of which is concave and the tread face of which is convex on every line of cross section." It is now urged that in claim 7 the descriptive restriction, "on every line of cross section," applies only to the immediately preceding "convex" and not at all to the more remote "concave." This is to say that these claims contemplate a structure which, upon its lower or tread surface. should be convex on every possible cross section, but on the upper surface need not be of corresponding form, but might be of any shape which would generally respond to the word "concave." Grammatically, this construction is possible, but we think it unnatural. No such variant is suggested in the specification or the file wrapper proceedings, and, as indicated hereafter, we should regard that construction as a departure from the principle of Tufford's invention, as that principle is imported into claim 7 by the later requirement in that claim that there must be uniform pressure upon the edge all around when the central portion is forced up into position. We think the form of this phrase used in claims 5, 6, and 8, and the form used in 7 and 10, as above quoted, are intended to express precisely the same thought.

[2] Claim 9, as it is found in the patent, is quoted in the margin.² So far as concerns the particular phrase so far treated, this claim requires only that the attaching face should be concave and the tread con-

² Claim 9: A heel lift of resilient material comprising a body portion, the attaching face of which is concave and the tread face of which is convex, the concave face of the lift being unbroken and lying entirely below a plane passing through the rear upper edge and the breast corners of the lift, whereby, when the convex tread face is depressed to flatten said lift a suction will be created between the lift and the heel to hold the attaching face of the lift throughout its entire extent in contact with the exposed face of the heel.

vex. If these words could have the broad quality or meaning to which they would often be entitled, the T. P. lift would in this respect respond, in the common sense of the words, and perhaps in the technical sense. It would not be impossible to speak of the scooped-out upper surface of the T. P. lift as "concave." It is said that the presence of the steel reinforcing plate in Nerger prevented the suction effect which this claim calls for, and hence that this claim is rightly to be distinguished from Nerger in that particular, and would be infringed by a lift, even though it were in Nerger's exact form, without the reinforcing plate. For the purpose of this opinion we may assume, without intending thereby to decide, that the mere omission of this plate from Nerger would be invention, if the lift then would accomplish a useful new result. That assumption does not end the question; the actual limitations of claim 9, expressed or necessarily implied from its language, remain, and their true interpretation makes important a resort to the file wrapper history. Although there is some confusion, caused by the redrafting of a body of claims, rather than by preserving their individual identity, this one is fairly traceable to claim 10 in the application as filed, which was:

"A heel lift, formed of yieldable material and provided with a normally convex tread face and a normally concave attaching face, defining a suction area, whereby, when the lift is positioned on the flat surface of a heel and pressure is applied to the convex face of the lift, the (margin) entire attaching face of said lift will be retained in engagement with the (margin) face of the heel by the action of the suction area."

This claim, with others, was rejected. Thereupon applicant amended by adding, as No. 11, a claim which, in still other language, led to the functional statement:

"The attaching face forming an extended suction area to hold the lift in intimate contact with a shoe heel when flattening pressure is applied to the convex tread face of the lift."

These claims were again rejected on the same reference, and on reference to Ferguson. See opinion in Fetzer Case, 260 Fed. 943, 944, 171 C. C. A. 581. Thereupon applicant added to his specifications a statement of the suction effect, whereby the lift would be held against the heel while the workman was nailing it on, and amended claims 10 and 11 by substituting "entire attaching face" for "margin," and claim 11 by substituting "face" for "member." These claims were all rejected on reference to Nerger. Applicant canceled them all, and substituted the following under the numeral 8, being the immediate antecedent of issued 9 (as filed, it contained the words in parentheses and omitted those in italics):

(8) 9. "A heel lift of resilient material comprising a body portion, the attaching face of which is concave and the tread face of which is convex (and normally held in such form by its inherent resiliency only), the concave face of the lift being (free from projections), unbroken, and lying entirely below a plane passing through the rear upper edge and breast corners of the lift whereby, when the convex tread face is depressed to flatten said lift, a suction

³ The words in parenthesis are the original form; those in italics were substituted by an early amendment.

will be created between the lift and the heel to hold the attaching face of the lift throughout its entire extent in contact with the exposed face of the heel."

This again was rejected, with the statement by the examiner that Nerger's rubber heel lift had an upper surface concave on any line of cross section and tread surface concentric thereto, that Nerger fully responded to all of these claims, except as applicant omitted the reinforcing plate, and that there was no invention in the mere omission of the plate. The examiner also said that the temporary adhesion and suction, relied upon to draw the lift into contact with the heel before nailing down, were not disclosed in the specification, and in any event would not occur, because the nail holes would prevent a vacuum. The statement of nondisclosure was true, as the amendment to the specification which had been introduced, describing this preliminary suction effect, had been, by another amendment, erased. Applicant then amended the specification by inserting the matter found in lines 83-99 of page 2 of the specification as issued, and redrafted and revised the claim, so that it took the amended form shown above. After some further discussion, the claim in this form was allowed.

Mindful of the danger of giving too great weight to the mere arguments of the attorneys in Patent Office proceedings, we pass by the repeated statements and arguments which show the clear understanding of the attorneys that the "saucer shape" was of the essence of Tufford's invention, and coming to the insertion or retention in claim 9 of language which must be interpreted, we find that Tufford was presenting a combination which was expressly distinguished from Nerger by the phrase "normally held in such form by its inherent resiliency only," and was perhaps distinguished from Nerger by the further requirement that the upper face was of such concave shape and so smooth that the flattening of the concavity would give a suction which would hold the entire extent of the surface of the lift in contact with the exposed surface of the heel. Being rejected upon a repeated reference to Nerger, he amended by striking out one clause and inserting another. He erased "normally held in such form by its inherent resiliency only." He thereby ceased to rely upon merely the absence of Nerger's plate as distinguishing. He inserted the requirement that the concave face should be below the plane passing through the rear upper edges and the breast corners of the lift. We have held, in the U.S. Rubber Co. Case, 260 Fed. 948, 171 C. C. A. 589, in effect, that this insertion of itself would not distinguish from Nerger; hence we can now only say that its addition at this time serves to emphasize that the suction effect was thus presented and relied upon as the substantial feature distinguishing from, and showing invention over, Nerger. In effect, the Patent Office said:

"To omit Nerger's plate is not invention, and, unless you have some better distinction than that, we will not grant you a patent."

Tufford replied:

"The important distinction is in the shape and kind of concavity of the upper surface. I have a concavity which, by its flattening, produces an effective suction over the entire surface; Nerger has not that kind of a concavity;

and I am, in claim 9, distinguishing by calling for an unbroken concave face lying entirely below a certain plane, and of such shape that [whereby] this extent of suction, thus effective, will be created."

We can see no reason why the settled principle of estoppel does not apply to this situation. Unless Tufford had put into his claim, originally or by amendment, language which distinguished from Nerger as to the shape of the upper concavity, he would not have received his patent, and he must be held to the restriction which he has thus ac-

cepted.

This construction of claim 9 does leave as much distinction between that claim and some others as there otherwise might be; but, even then, the case is the common one where the applicant has used in different claims different forms of expression for slightly varying ideas, and it is quite conceivable that there should be forms of concavities not geometrically perfect which would, nevertheless, bring the substantial result called for by claim 9; indeed, we so held in the U. S. Rubber Co. Case.

Nor can we think this construction of claim 9 overnice. Rather is it merely confining Tufford to his actual invention. We quite agree with Judge Brown in his conclusion (I. T. S. Co. v. United Lace, etc., Co. TDist. of R. I., June 11, 1920] 266 Fed. 375), that Tufford's meritorious advance was in the effect he secured, and we think this was an effect of which suction is not the operative element, but is rather the symptom. Tufford aimed at a lift of such material, and with a surface so shaped that the flattening of the center would produce an automatic intensive sealing at all the edges, including the breast. Merely omitting the plate from Nerger would not get this result, because Nerger's shape was not right. Nerger's breast edge, without the plate, would not seal, except as nails might be driven in far enough and near enough to the edge, so that they would produce the sealing pressure, even if the lift were flat. The omitting of Nerger's plate by itself will not get the desired result; the reshaping of Nerger's upper surface is also necessary; both must co-operate; and hence the construction which we give to claim 9 is essential to its validity.

Referring to this suction effect as an indication or symptom of the presence of the essence of the invention, we are satisfied that the T. P. lifts do not have it in substantial extent, either theoretically or practically. Theoretically they cannot. The depth of the transverse arch at the breast is such that, when this part of the face is pressed up flat, there is a strong tendency for it to spring down away again and resume the transverse arch form. To resist and overcome this there must be a greater force applied on the longitudinal arch, caused by the pressing up of its center. This greater force cannot exist when the transverse arch in its normal shape, to which it tries to return, is deepest at the breast (unless the effect of this condition is in some way neutralized). Referring back to the drawings, it seems quite plain that, if the center is driven up and nailed to the heel (but without compressing the rubber between the nail head and the leather heel), the effect will be: In Nerger, it will tend to cause the line c f to lie up flat against the heel, and the "retractive" counterforce from the transverse arch at the breast will

tend to make an opening at this point. In the T. P. heel, line c f will become an arch, fastened up at one of its ends only, and the other end will not be held up with any more force, but with less, than if the arch were a horizontal line. In both the Tufford and the United States Rubber Company heels, the natural tendency of both ends of the longitudinal arch to return to shape and to take a higher place than the center will produce a maximum amount of pressure at the breast.

Practical experiments with the samples submitted confirm these theories. It must not be forgotten that perfectly plane surfaces of rubber will adhere by suction to a hard smooth surface, like glass, if sufficient pressure is applied to squeeze out any air that might be between them. That is not the kind of suction to which Tufford refers. He refers to the kind which will be more persistent, and which will arise under imperfect conditions, because the sealing pressure is hardest at the edge where the air would naturally come in. We do not find that any one of the T. P. samples submitted will adhere by auction to a smooth surface, even momentarily, as the result of merely flattening, and without a general squeezing pressure. Observation shows that, as the concavity is flattened by pressure at the center, when the center comes into contact with the heel, the breast arch still remains open, or tends to, and only additional pressure and compression at the center, further distorting the shape, firmly close the breast. With any release of pres-

sure, the breast springs open first, or tends to.

We are satisfied that, whether it should be said to be due to the depth of the transverse arch at the breast or to the fact that in its normal form the longitudinal surface does not rise from the center to the breast (which we think two forms of expression for the same fact), the performance of the T. P. lift, in respect to this general theory of a sealing pressure strongest at the breast edge, does not follow Tufford, but rather Nerger. Merely by the central attachment Tufford gets the strongest sealing pressure at the breast, while with the same center attachment the T. P. gets no substantial pressure at this point, and it can get a further and effective sealing only by further fastening or nailing near to the breast edge. Samples have been presented, comprising lifts fastened to a board, and showing an irregular edge in the board sealed by the breast edge of the Tufford and T. P. lifts in apparently the same manner; but this effect is produced in the Tufford lift (in some measure) by its kind of concavity, and in the T. P. by driving the fastening nails nearer the edge, and continuing the driving until the rubber is compressed by the head of the nail and thereby squeezed into the irregularities. We get measurably the same effect with the O'Sullivan flat heel: hence this test is not persuasive.

We conclude that claim 9 is not infringed, and we think the preliminary injunction against the patent infringement should not have been issued. The order, therefore, will be reversed, and the case remanded

for further proceedings in accordance with this opinion.

On Petition for Rehearing.

PER CURIAM. As shown by the opinion in this case, we reached the conclusion that the Tee Pee lifts did not have the peculiarly shaped surface, called saucer shape, which was characteristic of the Tufford invention, but had, rather the scoop shape which served to classify them with the earlier Nerger device. This conclusion was fortified by observation of the samples submitted, and by certain manipulation by us of the exhibits, as recited. From these, we inferred that the Tee Pee lifts did not have that automatic, intensive sealing at the edges which was symptomatic of the Tufford invention, as we interpreted the claim under discussion. Upon application for rehearing, counsel for plaintiff now challenge the accuracy of the observation and experiments recited in the opinion, and insist that they can, by experiment in open court, if permitted a reargument, demonstrate that the Tee Pee lifts will adhere by suction and will have this intensive sealing, even at the center of the breast edge.

Since counsel have not had the opportunity, we must, in passing on the rehearing petition, assume that they would be able to succeed in their proposed experiments; and, if what was said in the opinion on this subject were vital to the conclusion reached, a rehearing should be permitted. However, we do not regard it as vital. The fact remains that the upper surface of the Tee Pee lift is not concave, in the sense in which that word was used by Tufford in order to distinguish from Nerger and get his patent allowed. If it may be true that sufficiently skillful manipulation of the Tee Pee lifts will make them, for a time and in a degree, act like the Tufford lifts, and if it should therefrom be inferred that this distinction in shape between Tufford and the Tee Pee is immaterial, the further inference will be inevitable since the Tee Pee must be classed with Nerger as to this shape—that there was no substantial distinction in this respect between Nerger and Tufford, and that Tufford and the Patent Office were wrong in the theory upon which alone issue of the Tufford patent was procured.

The application for rehearing is denied.

CINCINNATI MILLING MACH. CO. v. OAKLEY MACH. TOOL CO. et al.

(District Court, S. D. Ohio, W. D. September 28, 1920.)

1. Patents \$\infty\$ 328-1,075,285, for cutter-setting dial, held valid and infringed.

The De Leeuw patent, No. 1,075,285, for a cutter-setting dial, held valid and not anticipated; also infringed.

2. Patents = 27(2)—Placing ordinary scale of graduations in new place on machine held invention.

Plaintiff had for a long time manufactured a cutter grinder with different scales of graduation on different places on the machine, to adjust adjustable parts for different argles of grinding. Held, that its patent for placing an ordinary scale of graduations upon part of the machine, namely, the spindle, to which it had never been applied, to adjust the parts for the proper grinding angle, was not void for lack of invention, on the ground that the ordinary scale of graduations had previously been used in all kinds of places, on all kinds of instruments, for the placing of graduations on the spindle introduced a new element into the combination by making the spindle perform a new function; that is, made it an instrument of measurement.

3. Patents ← 27(1)—Adoption of common expedients in making new use may be invention.

The mere adoption of common expedients in adapting an existing machine to a new use is nevertheless invention, where the thought of the adaptation is new.

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Patents 328—1,071,634, for tooth rest, held not infringed.
 Tooth rest patent of De Leeuw, No. 1,071,634, held not infringed.

In Equity. Suit by the Cincinnati Milling Machine Company against the Oakley Machine Tool Company and others. Decree for plaintiff.

Albert F. Nathan, of New York City, for plaintiff. Wood & Wood, of Cincinnati, Ohio, for defendants.

PECK, District Judge. The patents in suit have to do with devices used in the sharpening, by grinding, of those cylindrical metal-cutting tools known as milling cutters.

- [1] 1. The De Leeuw Patent, No. 1,075,285, for a Cutter Setting Dial.—In the machine to which this patent relates, the essential elements are a grinding wheel and a spindle head for holding the tool to be ground, mutually adjustable with relation to each other, so as to bring the grinding wheel to act upon the edge of the tooth at the desired angle. The machine is also equipped with an adjustable arm, bearing what is known as a tooth rest, upon the end of which the tooth is supported while ground. It is highly important that the proper angle be given to the cutting edge of the tooth. This is known as the clearance angle. Prior to De Leeuw's invention, the method of getting this angle was by adjusting the respective elevations of the grindstone and the edge to be ground. In order to do this with accuracy, the manufacturers published tables showing the various angles of clearance that would result from various elevations, respectively. These tables necessarily had to cover the range of the various diameters of grinding wheels and cutters to be ground and of the angles of clearance to be obtained. They were complex, incomplete, difficult of usage, and in practice necessarily produced certain minor errors. The result was that the operators of machines were apt to disregard them and rely upon experience and the eye.
- [2] De Leeuw solved this difficulty by the realization that the arc through which the edge is rotated from the plane of the cutter's axis will measure the angle of clearance imparted by the grindstone to that edge, provided the grindstone cuts in a vertical plane. He also realized that the grindstone always cuts on a line tangent to its circumference at the point of contact, and that, if that point is in the horizontal plane of the grindstone's axis, it will cut at right angles thereto; that is to say, vertically. His method was therefore to bring the edge into the plane of the axis of the milling cutter, rotate it the desired number of degrees, and bring the grindstone to it in such a way that the point of contact would be in the horizontal plane of the grindstone's axis. In using what is known as a cup wheel, the last movement was unnecessary, because the cup wheel always cuts vertically. To utilize this mathematical formula, it was essential that there should be means for measuring the arc of rotation of the cutter. That he supplied by putting graduations upon the spindle and an indicating mark on the housing adjacent thereto. The gist of his patent is this scale of graduations upon the spindle, in combination with the other features of the machine. All of those other features are old, except that the tooth rest in the new

device has a greater range of adjustability than any theretofore used. The result of placing these graduations upon the spindle was to enable the operator to utilize De Leeuw's formula, and to set the cutter to be ground at any desired angle, easily, accurately, and without reference to charts or tables, but by simply turning the spindle the number of degrees desired for the clearance angle.

It is insisted by defendants that in placing graduations upon the spindle there was no invention. It seems clear that the graduations introduced a new element into the combination; that is to say, an instrument of measurement. The spindle performed a new function; it not only held one end of the cutter as theretofore, but it measured the arc of the cutter's rotation. This new measuring function of the spindle enabled the operator to use the machine in a manner theretofore impossible, and produced a new and highly useful result. The adding of the graduations was not the mere expected skill of the calling. The best proof of this is that, although the machine had been upon the market for some 30 years, during which a simple and accurate means of setting to given angles had been highly to be desired, and in which time there had been some groping toward it (particularly in the device of Chase, hereafter to be mentioned), and although the machine had been operated by many presumably highly skilled in their calling, the result had never theretofore been attained.

[3] It is also urged by defendants that placing the graduations upon the spindle was a mere duplication of parts. There were, it is true, upon the old machine four other rotary adjustments, each of which was provided with graduations. The head spindle itself had two other rotary motions, one upon a vertical axis, and the other upon a horizontal axis transverse to that of the spindle. Both of these were provided with graduations which could be, and were, used, prior to De Leeuw's invention, for obtaining clearance angles in grinding a straight tool; that is to say, an end edged tool. Although the purpose of these graduations was, in a measure, kindred to that of those added by De Leeuw, yet they could not be made to perform the same function; that is, to obtain the clearance angle of the tooth edge of a cylindrical cutting tool. The defendant cites to this point Houser v. Starr, 203 Fed. 264, 272, 121 C. C. A. 462, 470 (C. C. A. 6). It is there said:

"The fact that no one had before combined all these features, which fact, while not controlling, is often persuasive to show invention, cannot prevail against a clear case of the mere adoption of common expedients in adapting an existing machine to a new use, and in a case where the thought of adaptation is not new."

The last clause of the sentence quoted seems to exclude the present case. Here the adaptation contemplated was the measurement of the arc of the cutter's rotation. The thought of the utility of such measurement, and of the result obtainable thereby, was new. The graduations were introduced to serve this new adaptation. Therein lay the invention. The mere placing of the graduations upon the spindle would have been well within the expected skill of the ordinary operator of this machine, had the idea of their adaptation entered his mind. Bullock Electric Mfg. Co. v. General Electric Co. (C. C. A. 6) 149 Fed. 409, at page 420, 79 C. C. A. 229, recognizes the same rule.

Had it been possible to find the clearance angle for a milling cutter by use of the graduations on the transverse axis of the old spindle head, the subsequent placing of additional graduations for the same purpose upon the longitudinal axis would have been within the rule that mere duplication is not invention. But such was not the case. De Leeuw gave to the art a machine capable of doing what no grinder for milling cutters had ever done. He did this by solving a mathematical problem and adding the necessary instrument of measurement to the machine to enable the operator to use his solution. That he used an existing part as the basis of his instrument of measurement enhanced the value of his achievement. This was invention, and he was entitled to the reward of a patent for it.

It is argued, also by defendants, that De Leeuw's invention was anticipated by various publications and devices. Chase's instrument, a description of which was published in the American Machinist of April, 1903, was an attempt toward the simplification of the task of setting a milling cutter in the grinder at the correct angle. With reference to grinding with the cup wheel he did measure the arc of rotation of the cutter, but he did not do it by graduations on the spindle. He used the cumbersome method of temporarily mounting a beam on the axis of the spindle and measuring the arc of rotation of the beam at a distance from the axis equal to the radius of the cutter to be ground, and setting the tooth rest at the point so found. This measurement he made by setting up a scale at the end of the beam. His method was clumsy compared to De Leeuw's, and resulted in a certain slight error, because the tooth rest would not, in practice, occupy the actual position determined for it, but had to be moved to get it out of the way of the grindstone. With reference to disc-wheel grinding, Chase's method did not measure the arc of rotation of the cutter at all. this point Chase departed from that essential of De Leeuw's method, viz. grinding always in a vertical plane. He resorted to the expedient of measuring off the necessary arc of rotation upon the circumference of the grindstone and grinding at a point below the plane of its horizontal axis. Chase's work only serves to illustrate the complete darkness of the prior art as to the simple method introduced by De Leeuw.

The closest to an anticipation shown by the evidence is the work of one Irvin Newsome, then a machinist, upon one of plaintiff's old grinders in a factory at Madison, Wis. He operated entirely with the cup wheel, and observed that, having once obtained the correct clearance angle for a certain tool, he could again give to it, or to another like tool, the same setting in the machine by rotating it through the same distance. To enable himself to do this he made half a dozen marks upon the spindle and a starting mark upon the housing. His marks did not represent degrees, or any other standard system of measurement, but simply the amounts of rotation he had theretofore given other tools to produce the result. He worked at the machine during part of the year 1910, and during this period made and used his marks. He showed his employer what he had done, and asked to have the spindle taken off and graduations regularly milled upon it. His employer did not do so. When Newsome ceased to work upon the machine during

the year aforesaid, the matter was dropped. Apparently no one else used, or was able to read, his marks; and he himself, at the date of the trial, had forgotten what angles they represented, and stated that he would now be unable to make use of them. This was not an instance of public use so far persisted in as to become an established fact, accessible to the public or contributing definitely to the sum of knowledge; nor was it complete and capable of producing the result which De Leeuw produced, because Newsome's scale was not graduated, in the accurate sense of the term. Gayler et al. v. Wilder, 10 How. 477, 13 L. Ed. 504; Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821: Walker on Patents, sec. 71.

The Conradson patent cited by defendant shows no graduations adapted to finding the degree of clearance in grinding a cylindrical cutting tool, although it does show graduations adapted for finding such angle with reference to a straight or end edged tool. It is therefore no nearer to the patent in question than was the very machine which

the patentee improved.

No evidence is found in the record of a true anticipation.

therefore held that the De Leeuw patent aforesaid is valid.

The defendant's device has a graduated ring upon the spindle-head housing adjacent to the spindle, not fixed, but movable, but which necessarily must remain stationary during the measurement of the arc. The indicating mark is upon the spindle. Thus the position of graduations and indicating mark upon spindle and spindle housing, respectively, as found in the plaintiff's device, are reversed in the device of the defendant. Neither this reversing nor the placing of the graduations upon the movable ring is sufficient to avoid infringement. No one before De Leeuw provided graduations upon the parts constituting the spindle-head combination for measuring the rotation of the spindle, and the patent awarded him is entitled to a construction sufficiently broad to protect his invention as described in the claims. Accordingly the patent is held to be infringed by the defendant's device.

[4] 2. As to the Tooth Rest Patent of De Leeuw, No. 1,071,634: It is necessary, after the position of the cutting edge has been determined by means of the graduations above referred to, that the tooth should be there supported by an arm or bracket known as a tooth rest. The cutter must, however, be free to rotate upon its axis between the spindles, in one direction, so as to bring the next tooth to position at the grinding wheel. Prior to the patent in question support for the tooth allowing such movement was furnished by mounting upon an arm a blade of sufficient flexibility to permit the passage of the tooth during the necessary rotation. This flexible blade was usually held in a shank carried by a slotted arm bolted to the table of the machine, and always had certain range of adjustability. The plaintiff's tooth rest is described as "universal"—that is, adjustable to any position, being provided with two adjustable arms, as well as the tooth rest proper, and its shank. The adjustable feature of the arm was anticipated in the former art, and extending the range of adjustability as shown was within the ordinary skill of any competent mechanic.

As to the tooth rest proper, the patentee abandoned the flexible

blade and made his tooth-supporting member of what is known as "clapper-box" construction, viz. a rigid blade pivoted to the end of the arm, spring-pressed, provided with a stop to retain it in position. Defendant's device, so far as the universally adjustable arm is concerned, is identical with that of the plaintiff. Defendant, however, did not adopt the clapper-box construction for the tooth rest proper, but, with certain modification, adhered to the ancient method of using a flexible blade. Defendant makes his blade thin near its base and flexible at that point only, instead of throughout, or near its tip, and incases the whole in a metal tube, the inner surface of which acts as a stop. The rigidity of the tooth rest, which De Leeuw secured by the clapper-box construction defendant secures by making the upper portion of the blade stiff and nonyielding. In his specification De Leeuw says:

"The tooth rest proposed by this invention is a considerable departure from the principles heretofore utilized in such devices; that is to say, instead of employing a flexible blade having its shank rigidly fastened to the supporting arm or member, this invention utilizes a rigid blade having a pivotal mount on the arm and resiliently spring-pressed into a normal relation therewith whereby it may yield to permit of the passage of a tooth."

The defendant's tooth rest is very accurately described by so much of the above language as refers to the prior art, from which the inventor claimed to depart, and consequently the defendant's tooth rest cannot be an infringement of the aforesaid patent within any construction that could fairly be placed upon it. The patent itself shows little or nothing not theretofore known; but, as it is now held to be not infringed, it is not necessary to pass upon its validity.

3. It is claimed that the defendants have been guilty of acts amounting to unfair competition, for which increased damages should be awarded to the complainant. Ludwigs v. Payson Mfg. Co., 206 Fed. 60, 124 C. C. A. 194. It is, however, not found that they have been shown to be guilty of conduct warranting such assessment.

The usual decree may be taken in accordance herewith for injunc-

tion and an accounting.

WESTINGHOUSE ELECTRIC MFG. CO. v. BINGHAMTON RY. CO. Petition of PHELPS.

(District Court, N. D. New York. October 27, 1920.)

 Receivers \$\iff 95\$—Consent to contract which will save expense subject to Public Service Commission's approval.

The court will authorize its receiver to enter into a contract with another corporation for the construction of a power and transmission line, which will enable the receiver to secure power for the operation of the property at a great saving, though the contract requires the issuance of securities, which cannot be done until the approval of the state Public Service Commission is secured, since it is not probable that such approval will be withheld after the court authorizes its receiver to act.

Railroads \$\iff 62\$—Electric railway company can build power transmission line.

Under Railroad Law N. Y., §§ 8, 17, authorizing a railroad corporation to hold property to aid it in the construction, maintenance, and accommodation of its railroad, and to condemn from time to time property for

additions, betterments, and facilities necessary or convenient for its maintenance, an electric railway company has authority to acquire real estate and contract for the construction of a power transmission line from the state line to its line of railway.

In Equity. Suit by the Westinghouse Electric Manufacturing Company against the Binghamton Railway Company. Petition of William G. Phelps, as receiver of the Binghamton Railway Company, for authority to execute a contract for the construction of power transmission line. Authority granted.

The receiver of the Binghamton Railway Company, William G. Phelps, petitions for an order of this court authorizing him as such receiver to execute a proposed contract between the Scranton, Montrose & Binghamton Railroad Company and the said Binghamton Railway Company, the main object and purpose of which is to bring about the construction of a power transmission line from the said state line to the village of Endicott, Broome county, state of New York, into and through which village the Binghamton Railway Company's line of railway now extends, and the purpose of which is to cheapen the cost of power in operating the Binghamton Railway Company's system.

Keenan, Brink & Harrison, of Binghamton, N. Y., for receiver. Locke, Babcock, Spratt & Hollister, of Buffalo, N. Y., for bondholders' committee and Fidelity Trust Co. of Buffalo.

Harry C. Reynolds, of Scranton, Pa., for Scranton, M. & B. R. Co.

RAY, District Judge. The Binghamton Railway Company is a corporation organized under the laws of the state of New York, and is engaged in operating a street railway line, the total trackage of which is about 50 miles and extends from the city of Binghamton easterly to Port Dickinson and westerly to the village of Union. It now generates its own power, and to enable it to do so uses coal procured from the coal fields of Pennsylvania, mainly from the anthracite region in the immediate vicinity of the city of Scranton, Pa., but uses some bituminous coal, which is obtained from the western part of the state of Pennsylvania.

The Scranton, Montrose & Binghamton Railroad Company is a corporation organized and existing under the laws of the state of Pennsylvania, and has its principal offices at the city of Scranton, in the state of Pennsylvania, which city is about 60 miles from the city of Binghamton. The said Scranton, Montrose & Binghamton Railroad Company is a street surface railroad company, and owns more than 90 per cent, of the capital stock of the said Binghamton Railway Company. The said Scranton, Montrose & Binghamton Railroad Company has already constructed and has in operation a power transmission line extending from the city of Scranton aforesaid to Brookside, in the state of Pennsylvania, where its generating power plant is located. The said Pennsylvania corporation has already constructed its power transmission line from Brookside, Pa., to the state line, at a point about 7 miles distant from the village of Endicott, and has acquired certain rights of way for the building of its transmission line from the state line, through the towns of Vestal and Union, in the county of Broome,

state of New York, to Endicott. The proposed agreement, a copy of which is filed with this memorandum of opinion, sets out these matters

fully and quite clearly.

By reason of its accessibility to the coal mines in the state of Pennsylvania, the Pennsylvania company is able to generate power for the operation of street railway lines at much less cost than that of the Binghamton Railway Company, and it was stated on the argument, and is set forth in the papers, and has not been questioned or denied, that if the proposed agreement is executed and carried out the result will be a saving to the Binghamton Railway Company of at least \$50,000 per year in the cost of power necessary for the operation of its line of railway.

Since the appointment of the receiver in the action above entitled, who is now operating the Binghamton Railway Company and its system, it has applied for and finally secured authority to increase its rate of fare from 5 to 6 cents, and the Pennsylvania Company has advanced money to pay interest on the bonded indebtedness of the Binghamton Railway Company to the extent of approximately \$90,000. This last fact is not set forth in the papers, but the statement was made upon the oral argument, and is not denied, and has appeared to the court in other proceedings. The Binghamton Railway Company is now paying its operating expenses and necessary current repairs from its income. The saving in the cost of power above mentioned will be beneficial to the Binghamton Railway Company, as well as to its stockholders and holders of bonds issued by said company and secured by a mortgage on its property, given to the Fidelity Trust Company of Buffalo, N. Y., as trustee named in said mortgage, under which the bonds referred to were issued. The total bonded indebtedness of the Binghamton Railway Company approximates \$2,374,000. Its outstanding indebtedness, not secured by mortgage or other liens, approximates \$400,000.

Mr. Babcock states that he has no objection to authority being given the receiver to apply to the Public Service Commission for authority to enter into the contract, but urges that the court should refrain from passing directly upon the merits of the question at this time. He urges that he does not see how the New York company can procure authority from the Public Service Commission to make the contract at this time; the New York corporation being in the hands of the court and a receiver. He urges that, being in the hands of a receiver and of the court, the New York corporation cannot now take a single step in the way of raising money till it is reinvested with its property, and he also insists that in his judgment the Public Service Commission ought not to and will not grant it any authority to bind itself to raise money till after the receivership is ended or the receiver discharged.

[1] If, as is alleged and not denied, the execution of the agreement proposed and its execution will result in a saving of \$50,000 annually in operating the Binghamton Railway Company, it seems to me that the application ought to be granted, and that the granting of such application cannot result in any injury whatever to the bondholders referred to, represented by the bondholders' committee and by Mr. Babcock. The extension of the power transmission line from the state line to the village of Endicott, about 7 miles, under the proposed agreement, is to be paid for in the first instance by the Pennsylvania company, and no money will be taken from the hands of the receiver or from the treasury of the New York corporation for that purpose. The proposition is that the New York corporation shall issue certain obligations, payable in the future, to reimburse the Pennsylvania corporation the cost of this outlay. The Pennsylvania Company is to furnish power over this transmission line at a reduced cost, which will fully compensate the New York corporation, if the agreement is executed and carried out, and the result is that the New York corporation is in ured, but benefited, and the Pennsylvania corporation gets no benefit, except compensation for its outlay, and which is to come in the future. If there be any profits on the power furnished, then, of course, it would be benefited to the extent of that profit; but there is nothing before the court to show that the Pennsylvania company would derive any such profit, and there is nothing in the papers or before the court to indicate that the proposed agreement is not in all respects just, equitable, and fair.

It is the duty of this court to conserve the property of the Binghamton Railway Company now in the hands of its receiver, and to authorize such action as will be a benefit to the company and its bondholders and the general creditors of such Binghamton Railway Company. There has not been a suggestion that the bondholders will be in any way injured or their rights prejudiced by the execution of the proposed agreement. It has not been suggested that the rights of the trustee under the mortgage referred to, the Fidelity Trust Company of Buffalo, will be in any wise prejudiced by the execution of the proposed agreement. The receiver cannot proceed further than to execute the agreement without the approval of the Public Service Commission, and it seems to me that it would be folly to send this receiver to that commission for authority to execute the agreement without the approval of the court, when the court is of the opinion that the authority ought to be granted, and that the interest of the Binghamton Railway Company, its creditors, and bondholders, demand that the agreement should be executed and the necessary authority granted, not only by

this court, but by the Public Service Commission.

[2] It is urged by Mr. Babcock that the execution of the proposed agreement by the Binghamton Railway Company would be ultra vires, in so far as it contemplates the participation of that company in the construction of and payment for a power transmission line from the state line between the two states to the village of Endicott, inasmuch as this transmission line in the state of New York would cut across country from the village of Endicott to the state line, there to take power generated by the Pennsylvania company. If it be true, and I do not think it is, that the Binghamton Railway Company has not power under its charter to construct a transmission line to the state line, there to take power necessary for the operation of its road, I think legislative authority on application would be granted by way of amendment to its charter, which would enable it to take all necessary action to make the agreement effectual. If the state line were one-fourth of a mile dis-

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tant from the present line of the Binghamton Railway Company, and the Pennsylvania company's transmission line extended to such state line, can it be the law is such that this New York corporation, under a suitable agreement protecting the rights of both parties, could not build a transmission line from Endicott, or Binghamton, or any other point on its line, to connect with the Pennsylvania company's transmission line and take power necessary for the operation of the cars of the New York corporation?

To my mind it is immaterial that the distance is 7 miles, instead of 7 rods. In my judgment, under its present charter powers, the New York corporation has the right and power to take such measures and do such things as are necessary for the operation of its line of road as a street railway. The obtaining power is one of those things necessary to its very life and existence. Primarily it is a street railway line, but power is as necessary to the operation of such a road as is the pur-

chase and ownership of a car in which to carry passengers.

Sections 8 and 17 of the Railroad Law of the state of New York (Consol. Laws, c. 49) provide as follows:

Section 8: "Subject to the limitations and requirements of this chapter and of the Public Service Commission Law every railroad corporation, in addition to the powers given by the general and stock corporation laws, shall have power: * * * 2. Acquisition of Real Property. To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; and to acquire by condemnation such real estate and property as may be necessary for such construction, maintenance and accommodation in the manner provided by law, but the real property acquired by condemnation shall be held and used only for the purposes of the corporation during the continuance of the corporate existence."

Section 17: "All real property required by any railroad corporation for the purpose of its incorporation or for any purpose stated in this chapter shall be deemed to be required for a public use, and may be acquired by such corporation. If the corporation is unable to agree for the purchase of any such real property, or of any right, interest or easement thereon, required for any such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of any such owner cannot be ascertained, it shall have the right to acquire title thereto by condemnation. Every railroad corporation shall have the power from time to time to make and use upon or in connection with any railroad either owned or operated by it such additions, betterments and facilities as may be necessary or convenient for the better management, maintenance or operation of any such railroad, and shall have the right by purchase or by condemnation. to acquire any real property required therefor, and it shall also have the right of condemnation. * * * ""

ST. JOSEPH RY., LIGHT, HEAT & POWER CO. v. PUBLIC SERVICE COM-MISSION OF STATE OF MISSOURI et al.

(District Court, W. D. Missouri, C. D. November 10, 1920.)

No. 14.

1. Public service commissions \$\infty\$2-Federal court cannot fix rate in suit

attacking rates established by state commission.

In a suit in the federal court attacking as confiscatory rates of a public utility fixed by a state commission, the court has no rate-making power, but is limited to an adjudication of the reasonableness or unreasonableness of the rate ordered.

2. Public service commissions \$\iiii 17\text{-Valuation of property on prewar costs} is erroneous.

A valuation by a state public service commission of a public utility's investment, based on the original cost where that was ascertainable, and otherwise upon prices during the prewar period, is not a reasonable method of fixing the valuation in view of the greatly increased costs since the war and of the greater rate of returns earned by other enterprises.

In Equity. Suit by the St. Joseph Railway, Light, Heat & Power Company against the Public Service Commission of the State of Missouri and others to enjoin the enforcement of a rate prescribed by the commission. On final hearing. Injunction granted.

Robert A. Brown, of St. Joseph, Mo., for complainant. Richard Perry Spencer, James D. Lindsay and Frank W. McAllister, all of Jefferson City, Mo., J. T. Gose, of Shelbina, Mo., and L. V. Stigall, of St. Joseph, Mo., for respondents.

VAN VALKENBURGH, District Judge. Complainant owns and operates an electric street railway, light, and power plant, and in connection therewith a steam heating plant, in the city of St. Joseph, Mo. In the summer of 1919 complainant filed with the Public Service Commission in the State of Missouri its application for an order allowing it to charge a straight eight cents street car fare in lieu of a five cents fare then charged and collected by it. It also asked permission to charge increased rates for steam heat. No increase in light or power rates was asked. On October 1, 1919, the commission heard evidence in support of this application. A further hearing was held on the 10th day of October, 1919. The matter having been submitted to the commission upon the evidence heard and upon the briefs of counsel. the commission on the 20th day of November, 1919, made its report and order allowing the complainant a maximum cash fare of seven cents, with ticket fares of two for thirteen cents, and for passengers between five and twelve years of age a cash fare of four cents, or ticket fares of eight for twenty-six cents. The commission refused to allow any increase in complainant's steam heating rates.

The applicant is a Missouri corporation, organized in November, 1895, and at the present time has an authorized capital stock of \$6,000,000, consisting of \$2,500,000 preferred and \$3,500,000 common

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

stock. It has a funded debt comprising first mortgage bonds, first and refunding bonds, and car trust certificates, aggregating \$5,805,000.

The commission's engineers and accountants valued complainant's property as a whole at \$5,784,883.07; its railway department at \$3,388,436.58, its light and power department at \$1,786,814.25, its Savannah Interurban property at \$333,250.32, and its steam heating department at \$276,360. Substantially adopting these figures, the commission in its report and order fixed the value of complainant's property as a whole for rate-making purposes at the sum of \$5,800,000, its railway department at the sum of \$3,395,000, and its steam heating department at \$197,500. Upon this valuation the commission said in its report:

"Table No. 6 shows that the property as a whole earned an amount during the year ended June 30, 1919, equivalent to 2.67 per cent. on \$5,800,000 for return, surplus and contingencies.

"It is estimated that under the increase in street railway fares granted herein, that the property as a whole will earn an amount equivalent to 5.4 per cent. on \$5,800,000 for return, surplus and contingencies. We are confident that this return can be increased through increased operating efficiency of the generating plant, and by the increased use of one-man cars."

It may be stated in passing that a return of 5.4 per cent., which must provide also for surplus and contingencies, has not been regarded by courts and commissions generally as a reasonable return for a public utility, and still less so now under existing conditions. The commission apparently looks for some indefinite increase of this percentage through changed methods of operation suggested by the commission. This is, of course, entirely speculative, and the principle falls nearly, if not quite, within the disapproval of the Supreme Court and of this court as constituting an invasion of the right of the company to conduct and manage its own affairs subject to a proper exercise of the power of regulation. Kansas City, C. C. & St. J. Ry. Co. v. Barker (D. C.) 242 Fed. 310, and cases cited. The engineers and accountants for complainant, as shown by the record, valued complainant's property as a whole at \$11,521,639; the railway department at \$7,195,333, the Savannah Interurban property at \$588,392, the light and power department at \$3,228,362, and the steam heating department at \$509,-552. We thus find a difference in total valuation between \$11,521,639 tendered by complainant and \$5,800,000 adopted by the commission for rate-making purposes, or \$5,721,639. Complainant's figures are arrived at upon the basis of present day reproduction cost without al-The commission took the original cost lowance for depreciation. when obtainable, and, when not obtainable, average prices for a fixed period of five years before war prices prevailed, going back approximately to the year 1910. It also allowed cost price for additions and betterments made since present prices have prevailed, but it appears that no improvements or betterments of consequence have been made since that time. It will be observed that the valuation fixed by the commission barely exceeds complainant's funded debt; so that the return expected by the commission to be earned by complainant at 5.4 per cent., if realized, would substantially cover only the interest upon such indebtedness.

There was no substantial difference of opinion between complainant's engineers and accountants and the engineers and accountants for the commission except as to the method of valuation and as to the question of what would constitute a reasonable return upon any given valuation. It was conceded at the argument that complainant's figures were correct upon their theory, and that the commission's figures were substantially correct upon the theory upon which they proceeded; therefore, while complainant's valuation may be too high, because no allowance is made for depreciation and elements of reduction uniformly recognized, nevertheless there must remain a very large amount of valuation to which complainant would be entitled unless the standard adopted by the commission is the correct one, which would have a decisive effect upon the reasonableness of the return possible from the rates allowed by the commission.

[1] It seems unnecessary to consider any phase of this case except that of valuation, because, in my judgment, that consideration is conclusive upon the reasonableness of the present rates. Complainant, in its bill, charges that the same are inadequate, unreasonable, and confiscatory, and prays injunctive relief against their enforcement. Of course, the power of this court is limited to an adjudication upon this

point; it being invested with no rate-making power.

[2] It is my judgment that the great weight of authority is against the adoption of a standard of original cost as a controlling basis for determining present value. The present fair value is the object to be attained. Nor do I think it permissible substantially to restrict the inquiry to a period antedating present cost prices. In Joplin & Pittsburg Railway Co. v. Public Service Commission of Missouri et al., 267 Fed. 584, in this same division of this court, before Stone, Circuit Judge, Wade, District Judge, and the writer of this opinion, we said:

"It appears upon the face of the report [of the commission] that great, if not undue, emphasis was laid upon the original cost of the property * * * at a period greatly antedating that with which this investigation must deal; nor can we say that the present period of high prices is so temporary or abnormal that it may practically be disregarded in arriving at the value of complainant's properties. No one can say what degree of depression may ultimately come, but it is reasonably certain that the cost of the properties now under consideration will never again approximate figures prevailing in the years before the World War."

The Supreme Court of New Jersey in an opinion filed August 7, 1920, in the case of Elizabethtown Gaslight Company v. Board of Public Utility Commissioners, 111 Atl. 729, still further elaborates this view, citing Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 39 Sup. Ct. 454, 63 L. Ed. 968, in support of its conclusions. It is there said:

"To what extent the increase in prices may be due to an inflation of the currency or to any particular cause we do not know. What we do know is that the dollar of 1919 and the dollar of 1920 is worth less than the dollar of 1916 and still less compared with the dollar of the average year from 1911 to 1916."

The complainant in this case has to pay wages and buy materials at present advances. In such case, a percentage of return in an active business in which the risks, hazard, and cost of operation had been increased is much less than the same percentage in previous years. In Lincoln Gas Co. v. Lincoln, supra, it is said:

"The court notices judicially that, principally owing to the war, costs of labor and supplies have advanced greatly since the ordinance was adopted, and largely since the case was last heard in the court below, and that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper return for capital in gas plants and other public utilities a few years ago furnishes no safe criterion for the present or the future."

In the very recent case of United States ex rel. Kansas City Southern Railroad Co. v. Interstate Commerce Commission, 252 U. S. 178, 40 Sup. Ct. 187, 64 L. Ed. 517, decided by the Supreme Court March 6, 1920, it appears that Congress has given legislative recognition to this same principle, and the court ordered the commission to make its valuation in compliance with the act of Congress. While the decision in that case was predicated upon the express provisions of the act, nevertheless we find in it a recognition, both by Congress and by that court, of the necessity of adapting the standard of rate-making bodies to conditions existing at the time the power is to be exercised.

It follows that the method of valuation adopted by the commission in the case at bar was wrong, and that the resulting computation necessarily reduced the total valuation of complainant's property so substantially as to make the rates based thereon inadequate and practically confiscatory. For this reason, it will be unnecessary to resolve other questions presented by the briefs. By common consent this was deemed the crucial question. The court does not undertake to lay down any hard and fast rule in the premises. Many elements must enter into the final determination of a question of this nature. It is sufficient that the procedure disclosed by this record leads unavoidably to the conclusion that the relief prayed must be granted.

It is so ordered.

UNITED STATES v. PHILADELPHIA KNITTING MILLS CO.

(District Court, E. D. Pennsylvania. November 5, 1920.)

No. 4832.

Internal revenue 57—Corporation's right to deduct salaries from taxable profits depends on bona fides, not reasonableness, of salaries.

A corporation's right to deduct from its taxable profits salaries paid to officers depends, not on how much of such salaries represented reasonable compensation for the services rendered, but on how much of the salaries were paid, not for services, but by way of distribution of profits.

At Law. Action by the United States against the Philadelphia Knitting Mills Company. Plaintiff was nonsuited. Sur motion to take off nonsuit. Motion denied.

Charles D. McAvoy, U. S. Atty., and T. Henry Walnut, Asst. U. S. Atty., both of Philadelphia, Pa.

Walter B. Saul, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. It is not a little difficult to express in concise form the real question involved in this controversy. defendant paid the tax, to the payment of which it was admittedly liable, based upon its gross profits, less certain "ordinary and necessary" expenses, including the salary of its president. The plaintiff, deeming the amount of this salary to be inordinate and out of all proportion to the value of the services rendered, asserts the right to allow a deduction on this account, limited to what the plaintiff deems to be reasonable compensation. The real position of the plaintiff is not quite what is thus broadly implied, because there is implied the right of the United States to supervise the pay rolls of taxpayer corporations, not with a view to determine the integrity of the accounts, but with a view to regulate wages and salaries, so far as the payment of them enters into the tax assessment. As soon as the real ground of controversy was disclosed at the trial, the trial judge expressed himself to be of the opinion that the plaintiff could recover on its theory of the case only by introducing some evidence from which the finding could be made that payments made ostensibly for salary were in whole or in part not really made on salary account, but in distribution of profits. This modification of the plaintiff's theory of the case was accepted by counsel for the United States for the purposes of the trial. When, therefore, the motion for a nonsuit was made, the ruling was limited to the sole question of whether there was any evidence that the salary paid to the defendant's president was a distribution of profits in whole or in part to him as a stockholder under the guise of a salary payment.

It must always be kept in mind that the share of the tax which such a taxpayer is required to pay is measured by profits received, and not by the amount of business done, or by the profits which under a better management might have been received. The case is an easily imaginable one that those interested in what is called a close corporation, and which, in every respect, except its formal organization, is a partnership, might resort to the expedient of distributing profits by fixing a scale of salaries proportioned to the shares or interests of its officers in the corporation. To encourage and promote devotion to the interests of the employer, and to increase the efficiency of employés, the plan of giving employés a share in profits along with stockholders has become more or less common. In the case of a corporation taxpayer, the tax is measured by the profits which flow to the corporation from the business in which it is engaged, and this is not affected by what the corporation, through its managers or the action of its stockholders, may do with its profits after they have been received. When the employé is only an employé, and not in any sense a stockholder, the argument is at least a plausible one that what he receives he receives as compensation for his services, and it is none the less compensation for services, whether it is received in the form of a fixed salary or on the sliding scale, controlled by commissions or measured by the profits which through his effort come to the corporation. When the stockholder is only a stockholder, and in no sense an employé, what he received, whatever it may be called, is clearly given to him as profits. When, however, the one to whom the payment is made is both employé and stockholder, the difficulty of characterizing the payments made to him is increased; but the essential difference between what is compensation for services and what is a distribution of profits has

not changed.

The position to which counsel for the United States returns, asserting the right of the United States to have a jury determine what is fair compensation for the services rendered, and that all beyond this sum is a distribution of profits, is, it seems to us, an untenable position, because it is clearly the right of the employer to fix and determine what he shall pay, assuming, of course, that the employé is willing to accept of what is thus fixed. He may be unduly, or indeed unwisely, liberal, but an error of judgment of this kind cannot affect his right. We say the position is untenable, not upon the ground that Congress could not limit what should be allowed for deductions by reason of executive salaries, but on the ground that Congress has not thus far, and by the tax acts in question, established any such limitation. Nothing short of the legislative strong hand could fix any such limitation. There is practically no guide to determine what should be paid, or measure of payment, other than the judgment of those whose money is being paid. To object to a salary, for illustration, of \$25,000, which a corporation might well deem it to be to its interest to pay to one man as its president, because other men might be found willing to accept the position for \$5,000, or even for \$1,000, would be recognized at once as an objection without weight.

On the other hand, freedom to pay over the profits of a corporation to its stockholders under the guise of paying salaries is recognized to be fraught with danger of an evasion of the tax laws. In order to determine what may be done and what may not be done, recourse can be had only to the drawing of the line indicated. That line is drawn by an answer to the question how much, if any, of what is paid to a stockholder, is paid by way of a distribution of profits. This question can only be answered by a finding based upon evidence, and, if there is no evidence, there can be no finding. Whenever, in the wisdom of Congress, this protection to the United States is deemed inadequate to prevent escape from just taxation, Congress may by a simple enactment limit the deductions which may be made on account of pay-

ments of salaries to stockholders.

The motion to take off the nonsuit is denied, and an exception is allowed to plaintiff.

FORBES et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 5, 1920.)

No. 3520.

1. Courts 342-District Court has jurisdiction to condemn for military

reservation in suit at law; "appeal."
Though Act July 2, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. § 6911a), requires proceedings for condemnation for military purposes to conform to state laws, the United States District Court is not deprived of its jurisdiction under Judicial Code, § 24 (Comp. St. § 991), over such proceedings as a suit at law by the United States, brought in conformity with Code Ala. 1907, §§ 3860, 3862, 3865, 3868, 3869, 3875, 3879, 3882, by the fact that such provisions authorize institution of the proceedings in the probate court, with appeal to the circuit or city court, and trial de novo, and there are no corresponding federal courts, so that there can be no "appeal," which generally indicates a method whereby a party obtains the examination of his rights in a tribunal other than that in which the suit was brought or in which it was pending.

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, Appeal.]

2. Eminent domain = 198(1)-Right to condemn cannot be first raised at

iury trial.

Where proceedings to condemn land for military purposes were brought in the United States District Court, the owners could question the right to condemn at the hearing for the appointment of commissioners, which corresponded to the hearing in the probate court under the Alabama Code, but could not first present that question at the trial before a jury, after the award of the commissioners, though they could have raised it in proceedings in the state circuit court on appeal from the probate court, where they had a right of trial de novo and trial by jury.

3. Eminent domain \$\iiin 262(5)\$—Averment of authority of Secretary of War not jurisdictional to condemnation for military purposes, and omission not ground for reversal.

In proceedings under Act July 2, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, \$ 6911a), to condemn land for military purposes, the failure of the petition to allege that the Secretary of War caused proceedings to be instituted is not such a jurisdictional defect as to require reversal of judgment, even if such omission would render the petition defective. if objection had been taken thereto before verdict.

4. Evidence \$\infty\$ 83(1)—Authority presumed for institution of proceedings by district attorney.

Where the district attorney, a sworn law officer of the United States, in his official capacity instituted a suit for condemnation for military purposes, it must be presumed that he did his duty and exacted the performance of all that was necessary to make what he did legal, including action by the Secretary of War causing the proceedings to be instituted.

5. Witnesses 379(6)—Tax assessment sheet held admissible to impeach owner's testimony.

After the owner of land had testified as to its value in proceedings to condemn it for military purposes, a tax assessment sheet returned by him, showing the valuation to be less than he stated, was admissible to impeach his credibility, where there was evidence that it was made at his instance or was expressly acquiesced in by him as a proper valuation, though under Acts Ala. 1915, p. 386, the valuation is determined by the tax officials.

Eminent domain \$\iff 220\)—View by jury after testimony is within discretion of court.

In proceedings to condemn land for military purposes, where the testimony was conflicting as to the character and situation of the land and the elements entering into its value, it was not an abuse of the trial court's discretion to permit the jury to view the premises after the examination of witnesses was concluded.

7. Eminent domain \$\iiint 220\$—Change of condition by United States held not to make view improper.

The fact that the United States had changed the condition of a part of the land taken for military purposes does not show that it was error for the court to permit the jury to view the premises, where those changes did not affect the elements of valuation and damages concerning which the testimony was conflicting.

In error to the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

Condemnation proceedings by the United States against A. G. Forbes and others. Judgment permitting condemnation and assessing damages (259 Fed. 585), and defendants bring error. Affirmed.

See, also, 250 Fed. 299.

Fred S. Ball and E. R. Beckwith, both of Montgomery, Ala., and Sidney J. Bowie, of Birmingham, Ala., for plaintiffs in error.

Thomas D. Samford, U. S. Atty., of Opelika, Ala., and Wiley C. Hill, Sp. Asst. Atty. Gen., of Montgomery, Ala., for the United States.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was a petition filed in January, 1918, in the District Court by the District Attorney in the name of the United States (defendant in error here), praying the condemnation of the fee and all interest of the plaintiffs in error, A. G. Forbes, the Interstate Casualty Company, and the Capital National Bank, respectively the owner of, and the holders of mortgages on, described lands, being one quarter section and three half sections in Montgomery county, Ala., which the petitioner alleged were needed for a military training camp. The respective parties will be herein referred to as the plaintiff and the defendants. After the petition was filed, the court by order set a day for hearing the application, and directed that 10 days' notice of the application and of the day appointed for hearing the same be given the defendants by personal service by the marshal. On the day so appointed, personal service having been duly made and all parties being present or represented, and no objection to the petition being made by the defendants or any of them, the court, after evidence of the truth of the allegations of the petition had been adduced, granted the petition, and appointed three commissioners to assess the damages and compensation to which the defendants were entitled. After the commissioners had made an award, the defendant Forbes gave written notice of an appeal from such award and from the court's order of condemnation, demanding "a trial de novo in said cause, with a trial by jury." The court ruled that the defendants were entitled to have the damages and compensation assessed by a jury, which was done, but decided that they were not then entitled to raise objections to the petition by demurrer or to interpose the pleas tendered thereto. The action of the court in making the last-mentioned ruling is a principal subject of complaint in this court.

[1] The Act of Congress of July 2, 1917, entitled "An Act to authorize condemnation proceedings of lands for military purposes,"

contains the following provision:

"That hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, and military training camps, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted." 40 Stat. 241 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6911a).

That act also contains, among other provisions, one authorizing the Secretary of War to accept on behalf of the United States donations of lands required for the purposes mentioned in the above-quoted part of the act, and another authorizing the immediate taking possession of lands, etc., sought to be acquired in time of war for any of such purposes. By the Alabama general statute providing for the condemnation of lands for public uses, a written and verified application for an order of condemnation, stating the name and residence of the applicant, the uses or purposes for which the land is to be taken, and the interest or easement therein to be acquired, is to be made to the court of probate of the county in which such land, or a material portion thereof, may be situate. On a day appointed, to be at least 10 days after service by the sheriff or other legal officer on all owners of land sought to be condemned of notice of the application and of the day appointed for hearing the same, that court must hear the allegations of the application, and any objections that may be filed to the granting thereof, and any legal evidence touching the same, and make an order granting or refusing the application. If the application be granted, in whole or in part, the judge of probate must appoint three citizens of the county, possessing prescribed qualifications, to assess the damages and compensation to be paid to the owner or owners of the land. Either party may appeal from the order of condemnation to the circuit or city court of the county, "and on such appeal the trial shall be de novo"; and upon the trial in the court to which the appeal is taken an order of condemnation in accordance with the application is to be made, on the payment into court of the sum ascertained and assessed by the verdict of the jury and the costs of the suit. Code Ala. 1907, §§ 3860, 3862, 3865, 3868, 3869, 3875, 3879, 3882.

The proceeding provided for by the above-mentioned act being a suit at law, and the District Court being a court having original jurisdiction of all suits of a civil nature, at common law or in equity, brought by the United States (Metropolitan R. Co. v. District of Columbia, 195 U. S. 322, 25 Sup. Ct. 28, 49 L. Ed. 219; Judicial Code, § 24 [Comp. St. § 991]), that act authorizes the bringing of the suit in that

court, and its terms show that it was contemplated that, if a condemnation suit is so brought, the case throughout, from the filing of the application until judgment on a verdict of a jury assessing damages, if trial by jury is demanded, is to remain in that court, by which alone all action required to effect the condemnation sought is to be taken. The provision of the act that the proceedings provided for are "to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted" is not to be so construed as to defeat the purpose of the act to vest in the District Courts of the United States jurisdiction of the condemnation proceedings provided for, and is not to be given the effect of requiring a compliance with a state practice which is inapplicable to such a proceeding authorized to be brought, and brought, in one of those courts. Luxton v. North River Bridge Co., 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194. The provision of the Alabama statute for a trial de novo does not purport to create the anomaly of a party to a cause having the unconditional and unqualified privilege of having his rights passed on twice by the same court. That provision was made applicable only in the event of the authorized removal by appeal of a condemnation suit into a court other than the one in which it was brought. There is no such removal when such a suit is brought in the District Court of the United States. That court supervises the commissioners appointed to assess the damages, and also the trial by jury had at the instance of a party who is dissatisfied with the award of the commissioners.

[2] The right to condemn had been adjudged before the question of compensation was dealt with. Though the defendant Forbes obtained an assessment of the damages and compensation by a jury as a result of his giving notice of appeal and demanding a trial de novo and with a jury, there was no such appeal as could have been taken if the proceeding had been instituted in the court of probate of Montgomery county. In legal parlance the word "appeal" indicates a method or means whereby a party obtains an examination of his rights by a tribunal other than the one in which the suit or proceeding affecting those rights was brought, or in which it was pending before a removal of it was sought or effected. A provision for a trial de novo in a court to which a case is removed by appeal is not applicable, where the case must remain, until final judgment, in the same court in which it was brought. We are of opinion that the provision in question cannot properly be given the effect of entitling a landowner to two trials by the same court for the determination of the question of granting or refusing the application for a condemnation. The notice given to the defendants in pursuance of an order made on the day the petition was filed was an invitation to them to make on the day appointed for the hearing, or on another day to which the hearing might have been continued, any objections desired to be made to the granting of the application. That hearing by the court was for the express purpose of determining whether the application should be granted or refused. The defendants were afforded full opportunity then to demur to the petition or to plead any matter relied on as a defense. They waived the right to interpose defenses by failing, without legal excuse, so far as appears, to make them at the proper time.

[3, 4] In argument in behalf of the defendants it was contended that the failure of the petition to aver that the Secretary of War caused the proceedings to be instituted was such a jurisdictional defect as requires a reversal of the judgment. There is nothing in the act to indicate that the determination by the Secretary of War that particular land is needed for a purpose mentioned in the act is required to be evidenced otherwise than by the institution of proceedings for the condemnation of that land for such purpose. It seems that if the petition was subject to objection because of the above mentioned omission of averment, its statement of the cause of action relied on was defective only in a respect which was cured by the verdict. Lincoln v. Iron Co., 103 U. S. 412, 26 L. Ed. 518. But the contention may be adversely disposed of on another ground. The bringing of the suit was an official act of the district attorney, a sworn law officer of the United States. In the absence of anything indicating the contrary, it is to be presumed that that official, in instituting the proceedings, did his duty, and that he exacted the performance of all that was required to make what he did legal and proper, including action by the Secretary of War causing the proceedings to be instituted. United States v. Commonwealth, etc., Trust Co., 193 U. S. 651, 24 Sup. Ct. 546, 48 L. Ed. 830; Jones, Commentaries on Evidence, § 45.

[5] Over objection by the defendants a tax assessment sheet returned by the defendant Forbes for the year 1917, in which possession of the land in question was taken by the government, was admitted in evidence. That instrument showed a valuation of the 1,093 acres at \$16.395. Under the law of Alabama a person liable to taxation is not required to put a value on his property, a full and complete list of which he is required to return; the assessed value being determined and entered on the list by tax officials. Acts Ala. 1915, p. 386. The defendant Forbes was a witness in the trial, and testified that in 1917 the land was worth greatly more than the valuation stated in his assessment sheet for that year indicated. There was evidence tending to prove that the valuation of the land stated in that instrument was made at his instance or was expressly acquiesced in by him as a proper valuation. Under the circumstances mentioned we think that it was permissible to treat the valuation stated in the assessment sheet as a declaration or admission by Forbes, and that evidence of such declaration or admission inconsistent with his testimony in the trial was admissible as shedding light on his credibility, whether it was or was not admissible for another purpose. Birmingham Mineral R. Co. v. Smith, 89 Ala. 305, 7 South. 634.

[6] After the conclusion of the examination of witnesses in the trial, the jury, pursuant to an order of the court, to which the defendants objected, viewed the land sought to be condemned. We are not of opinion that the record shows that the making of that order was an abuse of the court's discretion. It is a common practice in condemnation proceedings for the court, in the exercise of its discretion, to permit the triers of fact to see the property the value of which is to

be assessed by them. Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 249 Fed. 385, 161 C. C. A. 359; Jones, Commentaries on Evidence, §§ 406, 407. There was conflicting testimony as to the quality of the land, and as to its topography and other physical features and surroundings affecting the question of its value. Testimony given in behalf of the defendants had some tendency to prove that as to part of the land its topography and its location with reference to two railroads and to growing suburbs of the city of Montgomery were such as to make it capable of development for residence or industrial purposes, other than agricultural, and that its adaptability to such uses was an element of value to be taken into consideration. It well might be that a view by the jury of the land and its surroundings would materially help them in the task of passing intelligently on conflicting claims of the parties as to the presence or absence of features or elements affecting its value.

[7] From the fact that the condition of part of the land had been materially changed since possession of it was taken by the government, it does not follow that it was an abuse of discretion to permit a view by the jury after such change was effected, though the value to be assessed was that of the land as it was when it was so taken. Many, if not most, of the features and circumstances that would be disclosed by a view of the land remained as they were before the government took possession; and it well may be supposed that the effect of the evidence as to conditions before the government took possession was not destroyed as a result of the jury seeing part of the land in its changed condition.

The conclusion is that there was no reversible error in any ruling complained of. The judgment is affirmed.

WOODSTOCK OPERATING CORPORATION v. YOUNG (two cases).

(Circuit Court of Appeals, Fifth Circuit. October 21, 1920.)

Nos. 3581, 3582.

1. Trial &==2—Court has discretion to consolidate actions by parents for death of son.

It is within the discretion of the trial court to consolidate for trial separate actions by the mother and the father of a minor, to recover for their losses occasioned by the death of the son, since each right of action arose out of the same transaction and involved in a large measure the same evidence.

2. Pleading \$\infty\$=205(1)—General demurrers properly overruled, if petition states any cause of action.

General demurrers to petitions, which challenge no particular averment of the petitions, were properly overruled, unless the petitions stated no cause of action.

3. Parent and child \$\infty\$7(3)—Injury in dangerous employment without parent's consent actionable.

A petition by a father for the loss of his son's earnings, which alleged that his minor son was employed without his consent and placed at

(268 F.)

dangerous work, as a result of which he was injured, sufficiently states a cause of action to withstand a general demurrer.

 Master and servant ≈ 258(7)—Petition held to allege negligence as to minor employé.

Petitions which charged negligence by defendant in putting a minor son of plaintiffs to work on a dinkey engine equipped with defective brakes, and not equipped with gate or railing around the working platform, in operating with brakes which would not work, because equipped with defective lubricator, in employing an unskilled, incompetent engineer to operate the dinkey engine over a defective track, and in failing to warn a minor, who was inexperienced, of the dangers, charged a failure of the master to perform duties incumbent on him, under Civ. Code Ga. 1910. § 3130.

5. Trial \$\iiint 420\to Directed verdict waived by defendant introducting evidence.

Defendant cannot assign error to the refusal of his motion for directed verdict at the close of plaintiff's evidence where he introduced testimony after the overruling of his motion.

Master and servant 286(2)—Negligence as to minor employé held question for jury.

Evidence that plaintiff's minor son, employed by defendant, was directed to work on the engine from which he fell, and that the engine and track were defective and the engineer incompetent, held sufficient to require submission of the issue of defendant's negligence to the jury.

7. Courts \$\iiiist\$ 366(23)—Construction of state statute by state court is binding.

The construction of Civ. Code Ga. 1910, § 4424, giving a mother right of action for death of her son, on whom she was dependent and who contributes to her support, as giving a right of action, if there was partial dependency on contribution, and even though the child's earnings are legally due the father is binding on the federal courts.

8. Death \$\infty\$=103(1)—Mother's dependency on son held question for jury.

Evidence that plaintiff's deceased minor son at the direction of his

Evidence that plaintiff's deceased minor son at the direction of his father, gave his wages to plaintiff, his mother, who used them with the wages of the father in the support of the family, consisting of the father, mother, and five children, held sufficient to take to the jury the question whether the mother was dependent on the deceased son and whether he contributed to her support.

9. Parent and child € 7(14)—Request on manumission by father held not supported by evidence.

In an action by a father for the loss of the earnings of his minor son, evidence that the father had directed the son to turn his wages over to his mother did not warrant giving a requested charge that, if the father had permitted his son to collect his own wages and appropriate them to his own use, the father would have no cause of action.

10. Trial \$\iiins 260(1)\$—Requests covered by court's charge need not be given.

It was not error to refuse requests to charge the jury, where all of them which were free from objection were fully and fairly covered by the charge, which correctly stated the several issues presented.

In Error to the District Court of the United States for the Northern District of Georgia; Samuel H. Sibley, Judge.

Separate actions by Mrs. J. C. Young and by J. C. Young against the Woodstock Operating Corporation, consolidated for trial. Judgment for plaintiff in each action, and defendant brings error. Affirmed.

W. P. Acker, of Anniston, Ala., and Arthur Heyman, of Atlanta.

Ga., for plaintiff in error.

William W. Mundy, of Cedartown, Ga., Sidney Holderness, of Carrollton, Ga., and G. E. Maddox, of Rome, Ga., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The above cases are, respectively, a suit by the mother and father of Carl Young. That of the mother is to recover the full value of her son's life, under the provisions of the Code of Georgia (1910) § 4424, which gives to a mother the right to recover the full value of the life of the deceased for the death of a child resulting from a crime, or criminal or other negligence, upon which child she is dependent, and who contributes to her support, where said child leaves no wife, husband, or child. The second suit is by the father of said Carl Young to recover for the loss of the services of said minor from the time of his death until he would have reached

the age of 21 years.

The petitions in each case averred: That deceased was killed on April 15, 1918, being then 17 years of age, by being run over by a dinkey engine, used by the Woodstock Operating Corporation, in operating an iron ore mine. Said engine was used in pushing and pulling ore cars between the ore beds and defendant's washer. That without the knowledge and consent of his parents deceased was employed in the capacity of fireman. That the fireman is required to work on a platform in front of the boiler firebox about 2½ feet long by 2½ feet wide, but there is no bar, chain, or other protection to prevent the fireman from falling off said platform, should he slip or become unbalanced because of the débris on the floor, or as a result of the dinkey running into a depression on the track, or by reason of the sudden acceleration or checking of its speed. That on April 15, 1918, Carl had just finished puting coal into the furnace of one of the defendant's dinkies and shaping up the fire, and was straightening up from a bended posture, when the engineer suddenly ran the dinkey, which was being operated backward, into a depression, without giving Carl any warning, which caused Carl to be pitched forward on the track in front of the dinkey in plain view of the engineer, who saw him while in the act of falling and attempted to apply the brakes, which were not in working order, and could not be applied, and the dinkey ran over Carl's body, causing various injuries which produced his death. That said work was doubly hazardous at the time of Carl's death, because the engineer was backing, making vibrations greater, rendering Carl's footing more dangerous, with nothing for him to fall and catch against. as the ore cars were in front of the engine. That the defendant put on him the triple duty of firing two dinkey engines and attending to the switch; the defendant being short both a fireman and a switch tender.

The acts of negligence charged were: The employment of deceased and placing him at an unsafe place for work, without the knowledge or consent of his parents. Putting him to work on said dinkey; it being contended that said dinkey was not reasonably safe to be operat-

ed in the exercise of reasonable care. Permitting its track to become unsafe, by allowing it to sink on one side, thus creating a perilous position for the fireman when said dinkey reached said place, and allowing deceased to operate said dinkey as a fireman over said track. Putting said deceased to work as a fireman on said dinkey without plaintiff's consent, said dinkey being equipped with defective brakes, and not being equipped with a gate, bar, or chain to prevent the fireman falling as the result of an unusual or sudden movement while being operated over a dangerous, uneven, and unsafe roadbed. Having an inexperienced, unskilled, and incompetent engineer operating said dinkey at the time Carl received his injuries. That the brakes were defective, and would not work, because equipped with a defective lubricator, which failed to oil them, and because an inexperienced engineer had placed too much water in the engine. That the brakes would not work, because one of the hanger rods supporting the brakes and holding them in position was broken, and that it was chained and wired up, and prevented a quick and proper action of the brakes, and they would not hold tight enough to stop the train promptly; also that the engine was not equipped with a steam gauge, so that the engineer in charge could apply the quantity of steam to hold the brakes or to know the quantity of steam.

The defendant demurred to each petition, also answering the same, denying the allegations of the petition, also pleading specially that at the time the deceased received his injuries he was not discharging the duties for which he was employed, nor was he in his proper place, having assumed a position on the dinkey for his own convenience, and not in pursuance of any work that he was employed to do; that the injuries were the result of his own negligence; also that, if the death of deceased was the result of negligence on the part of the engineer, such negligence was the act of a fellow servant, and that the parents

of deceased could not recover.

As to the mother, it was specifically denied that she depended on deceased for support or that he contributed to her support. With reference to the suit of his father, it was especially insisted that the father had manumitted his son, allowing him to seek work where he pleased and to appropriate for his own use the entire proceeds of his labor. The cases were consolidated for trial over the objection of

the defendant, and this is assigned as error.

[1] The power to consolidate two cases pending in the same court rests in the sound discretion of the court. Mutual Life Insurance Co. v. Hillmon, 145 U. S. 292, 12 Sup. Ct. 909, 36 L. Ed. 706; Lewis v. Baltimore, etc., R. Co., 62 Fed. 218, 221, 10 C. C. A. 446. In this case the right of action of each of these plaintiffs arose out of the same transaction and involved in a large measure the same evidence. It was clearly within the discretion of the court to have consolidated these cases for trial. Denver City Trainway Co. v. Norton, 141 Fed. 599, 73 C. C. A. 1.

[2] Error is also assigned in overruling the demurrers filed to the petitions. These demurrers were general, and no particular averment of the petitions was challenged by special demurrer. Unless, therefore,

the petitions stated no cause of action, the general demurrers were properly overruled.

[3] In the father's case the petition alleged that his minor son was employed without his consent and placed at dangerous work. This alone was sufficient to withstand a general demurrer. Braswell v.

Garfield Cotton Oil Co., 7 Ga. App. 167, 66 S. E. 539.

[4] Each petition charged negligence in putting the deceased to work on a dinkey equipped with defective brakes, and being required to work in an unsafe place, because the dinkey was not equipped with a gate, bar or chain to prevent a fireman falling therefrom as a result of a sudden or unusual movement; again that the brakes would not work, because equipped with a defective lubricator, and because one of the hanger rods was broken, thus interfering with the prompt action of the brakes. Further negligence was charged in the employment of an engineer operating said dinkey, alleged to be unskilled, inexperienced, and incompetent; again in having a defective track over which said dinkey was operated; also failure to warn this minor, who was alleged to be inexperienced, of the dangers incident to the employment.

Each of these conditions was alleged to have caused or contributed to the killing of said deceased. These allegations charged a failure of the master to discharge duties which were incumbent on him. Code of Georgia (1910) § 3130: Ocean Steamship Co. v. Matthews, 86 Ga. 418, 12 S. E. 632; Ingram v. Lumber Co., 108 Ga. 194, 197, 33 S. E. 961; Hobbs v. Small, 4 Ga. App. 627, 629, 62 S. E. 91. The petitions therefore stated a cause of action, and were not subject to be dis-

missed on general demurrer.

[5] Error is assigned on the failure of the court to direct a verdict for the defendant on motion made at the close of the plaintiff's testimony, and renewed at the close of the entire testimony. The defendant, having introduced testimony after the overruling of the first motion, cannot assign error on its denial. Pennsylvania Co. v. Clark (C.

C. A.) 266 Fed. 182.

[6] The refusal to direct a verdict at the conclusion of the entire testimony was not error. There was sufficient evidence to require the submission of the case to the jury. The deceased was a minor, who had been engaged for a short time in firing another smaller dinkey engine. On this day he was directed to help coal both dinkey engines and turn the switch, and there was evidence that he was also instructed to fire both dinkey engines between the switch and the washer. He was engaged in firing the larger engine when he fell therefrom and was killed. There was no proof that he had any knowledge of any of the alleged defects in this engine, which he was firing, apparently for the first time, on the day he was killed. There was some evidence of the several acts of negligence charged and of their effect in producing the death of the deceased. This was sufficient to require the submission of the questions of negligence to the jury. Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 606, 12 Sup. Ct. 905, 36 L. Ed. 829.

The principal ground urged in argument in support of this motion in the mother's case was that the evidence did not show that the mother was dependent upon the deceased and that he contributed to her support in any particular. Her suit is based on the statute of Georgia (Code of 1910, §§ 4424, 4425), which provides:

"A mother, or, if no mother, a father, may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, and who contributes to his or her support, unless said child leave a wife, husband, or child. Said mother or father shall be entitled to recover the full value of the life of said child. The word 'homicide,' used in the preceding section, shall be held to include all cases where the death of a human being results from a crime or from criminal or other negligence. * * * The full value of the life of the deceased, as shown by the evidence, is the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased had he lived."

- [7] This statute has been repeatedly construed by the Supreme Court of Georgia, and its construction thereof is binding on this court. It is well settled that a partial dependency and contribution is sufficient to authorize recovery by the mother of the full value of the life of the deceased child. Savannah Electric Co. v. Bell, 124 Ga. 663, 53 S. E. 109. Nor is the fact that the child's earnings are legally due to the father any reply. It is immaterial that he may be legally entitled to the child's earnings. If the mother actually gets the benefit of the child's labor, with or without the father's consent, she is dependent upon that child, and he contributes to her support within the meaning of this statute. Fuller v. Inman, 10 Ga. App. 680, 689, 74 S. E. 287; Savannah Electric Co. v. Bell, 124 Ga. 663, 664, 53 S. E. 109.
- [8] The evidence was that the family, which lived together, consisted of the father of the deceased, his mother, the deceased, aged 17, a brother, aged 14, and four sisters, aged respectively 19, 16, 11, and 4 years. The father was an engineer, earning from \$200 to \$225 per month. Deceased, by his father's direction, turned over his earnings to his mother, who used them herself, and did some work about the home after he came from his employment. The mother testified:

"It took all the money that the father and Carl made to clothe, feed, and take care of the family, and pay our debts (for doctor bills, drug bills, and different things), and then there was not enough."

This evidence was quite sufficient to require the submission to a jury of the question whether the mother was dependent on the deceased son, and if he contributed to her support within the meaning of the statute above quoted. In a case which has been repeatedly cited with approval the Supreme Court of Georgia held:

"The father, mother and minor children all resided together and were mutually dependent upon the labor of the family for support. The deceased child, although not 16 years of age, performed some labor, and it or its proceeds went into the common stock. Evidence to prove all this, or which tended to prove it, was admissible and if this condition of affairs was established, the deceased son might well be considered as contributing substantially to the support of his mother. Members of the same household who live by their common labor and its proceeds have a mutual dependence one upon another. Certainly so unless it be affirmatively shown that a particular member consumes as much, or more, of the common stock than he contributes to it. Even that would not be a conclusive test, for the services of a child to a mother or of a mother to a child may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependence may be in respect to personal

services of this nature." Augusta Ry. Co. v. Glover, 92 Ga. 132, 144, 18 S. E. 406, 414.

Where a father sought to recover for the homicide of a minor son, the Supreme Court of Georgia, while holding that, where a father is earning enough for his own support, he cannot be said to be dependent on a minor son, although he is chargeable with the maintenance of others, for the support of whom and himself his earnings are insufficient, held that there was a difference in considering whether a mother was dependent on the earnings of a minor whose earnings went into the common stock. As to her the court said:

"A mother without property is an essentially dependent member of a household consisting of her husband, herself, and their children. She may render many valuable services and perform many onerous duties, but when it comes to obtaining the necessaries of life—food, clothing, fuel, and the other essentials to human existence—she is, in the very nature of things, dependent upon each and every member of the family whose labor produces money or supplies." Georgia Railroad Co. v. Spinks, 111 Ga. 571, 574, 36 S. E. 855, 856.

The case at bar is very different from the case of Trammell v. Southern Ry. Co., 182 Fed. 789, 105 C. C. A. 221, relied on by the plaintiff in error. In that case a mother sued for the homicide of a minor son, who worked in his father's drug store. His services were worth from \$75 to \$80 per month. His only relation to the support of the mother or her dependency was this labor in his father's business. The father's income from his business was from \$250 to \$300 per month, and the entire expenses of the family, including those of the plaintiff, which were paid by the proceeds of the drug business, were from \$100 to \$150 per month. It was held under these facts that dependency of the mother on the son, or contribution by him to her support, was not proven.

The present case comes within the rulings of the Supreme Court of Georgia first above quoted, and the question was therefore properly

submitted to the jury.

The court correctly charged the jury as to what constituted dependency on the deceased, and contribution by him to her support, and that if she was not dependent on her son wholly, or partially, as defined, she could not recover, although he gave her his earnings and she put them in the general fund. Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406.

Several assignments of error deal with the admission and rejection

of evidence. We find no error in the rulings complained of.

[9] Error is assigned that the court should have charged the jury that if it appeared from the evidence that the father, J. C. Young, had permitted his son to go out and seek employment, and collect his own wages, and appropriate such wages to his own use, such action on the father's part would amount to manumission of his son, and the plaintiff, J. C. Young, would have no cause of action against the defendant. The court properly refused this charge, because there was no evidence that plaintiff Young had authorized the deceased to appropriate his earnings to his own use. On the contrary, the only evidence was that the minor had asked his father for direction as to what he should

do with his wages, and was directed to turn them over to his mother. A charge not warranted by the evidence, or some view thereof, is erroneous. Wilmington Mining Co. v. Fulton, 205 U. S. 60, 76, 27 Sup. Ct. 412, 51 L. Ed. 708. The court fully and correctly instructed the jury as to the effect of a general authority by the father to the son to seek employment as evidence of a consent to such employment.

[10] While a number of requests to charge the jury were made and refused, there is none of them, which was free from objection, that was not fully and fairly covered by the charge of the court, which is contained in the record. Iron Silver Mining Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712; Beaver Hill Coal Co. v. Lassilla, 176 Fed. 725, 100 C. C. A. 283; Norfolk & Portsmouth Traction Co. v. Rephan, 188 Fed. 276, 284, 110 C. C. A. 254.

The jury were instructed that, if the homicide was caused by the negligence of the fellow servant, and not by the negligence of the master, that the master would not be liable; also that the acts of negligence charged must have been the proximate cause of the death

of the deceased.

At defendant's request the jury were instructed that if they believed from the evidence that the engineer, Shiflett, was inexperienced and unskillful, and such inexperience and lack of skill contributed as a proximate cause to the death of Carl Young, and was so obvious that a person of ordinary intelligence, working with him for the time deceased so worked, would have observed it, and said deceased continued to work with said Shiflett, he could not, if living, recover, and his father and mother could not; also as to each of the alleged defects in the track or machinery, if in the exercise of ordinary care the deceased should have known of such defects, the deceased, if living, could not recover, and his parents could not.

The charge correctly stated to the jury the several issues presented by the case and the questions raised by the requests of the defendant,

which were not given.

There was evidence to support the verdict, and the judgment of the District Court is therefore affirmed.

DIXON et al. v. COX et al.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1920.) No. 5468.

 Indians = 18—Statute gives Secretary of the Interior power to determine heirship of allottees.

Act June 25, 1910, granting the Secretary of the Interior jurisdiction to determine the legal heirs of intestate Indian allottees, is constitutional and valid, and the decisions thereunder by the Secretary are final and conclusive, and not subject to collateral attack, or reviewable by the courts, in the absence of showing of fraud, error of law, or gross mistake of fact.

 Indians \$\inserthings 18\$—One decision as to heirship of allottee did not exhaust Secretary's power.

A decision by the Secretary of the Interior, under Act June 25, 1910, that a certain claimant was not the sole heir of an Indian allottee, did

not exhaust his power to determine who were the heirs, so as to render void his later decision that the claimant was the sole heir.

3. Indians \$\iflical{\iflical{\iflical{\iflical{\iflical{O}}}}}\$18—Conclusiveness of Secretary's decision as to heirship stated. Whether or not the weight of evidence in substantial conflict sustains one or the other side of an issue of fact is a question on which the decision of the Secretary of the Interior, under Act June 25, 1910, as to heirship of Indian allottee, is generally final and conclusive; but his decision, like that of other quasi judicial tribunals, may be avoided by a suit in equity for fraud inducing it, for error of law on facts found, conceded, or established beyond dispute at the hearing, or on the ground that at the close of the hearing there was no evidence to support his finding on a material issue of fact which controlled the result; but for one to attack the findings of fact, as not supported by substantial evidence, he must allege and prove, not only that there was a mistake in the finding or findings, but the evidence before the Secretary from which the alleged mistake resulted.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Suit by Roth Dixon and another against Jesse H. Cox and others. From a decree of dismissal, plaintiffs appeal. Affirmed.

Thomas L. Sloan, of Walthill, Neb., for appellants.

Karl J. Knoepfler, of Walthill, Neb. (Harry L. Keefe, of Walthill, Neb., Albert W. Jefferis and George M. Tunison, both of Omaha, Neb., T. S. Allen, U. S. Atty., of Lincoln, Neb., and B. H. Dunham and Herman Aye, both of Omaha, Neb., on the briefs), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and VAN VALKENBURG, District Judge.

SANBORN, Circuit Judge. This appeal challenges a decree of dismissal of the complaint by the plaintiffs, Roth Dixon and Frank Dick. to avoid an adjudication of the Secretary of the Interior under the Act of Congress of June 25, 1910, 36 Stat. 855; that the allotment of the 160 acres in controversy to Joseph Cox, an Indian of the Omaha Tribe, under the Act of August 7, 1882, 22 Stat. 341, descended, subject to the dower of Dora Cline Cox, to Jesse H. Cox; and to obtain a decree that the defendants, who claim under that decision and under a patent founded thereon, issued February 2, 1918, to Jesse H. Cox, hold the legal title under that patent in trust for the plaintiffs, who claim that this allotment descended to them through William P. Cox, a son of Joseph. The issue whether this land descended to Jesse H. Cox or to the plaintiffs was heard, considered, and decided by the Secretary of the Interior after full argument upon a mass of evidence taken by and in the presence of counsel for the respective parties in interest. The history of the case is interesting, but the details of that history are not material to its disposition. The right answers to these two questions necessarily determine the decision that this court must render, and therefore other matters discussed by counsel are laid aside. Did the Secretary of the Interior have jurisdiction to hear, consider, and conclusively determine the issue between these contestants, whether the title to this land descended to Jesse H. Cox or to the plaintiff, and,

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if he had such jurisdiction, did the complaint or proof in this suit set forth a cause of action in equity to avoid the Secretary's adjudication for fraud, error of law, or absence of substantial evidence to sustain his conclusion?

[1] The material provisions of the Act of August 7, 1882, 22 Stat. 342, relative to these questions are:

Section 5. That the Secretary of the Interior should make an allotment of 160 acres of land out of the tract described in the act to each Indian of the

Omaha Tribe who was the head of a family.

Section 6. That he should cause patents to issue therefor "in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever: * * * Provided, that, the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered."

Section 7. "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal,

of the state of Nebraska."

The allotment and patenting of the lands under this act was completed on December 29, 1884, and such a trust patent as is described therein was issued to Joseph Cox on that day. On December 27, 1886, he died intestate. By the Act of June 25, 1910, 36 Stat. 855 (Comp. St. § 4226), Congress provided:

"That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

After notice and hearing and in strict accordance with the terms of this act the Secretary of the Interior finally ascertained and decided that, subject to the dower of Dora Cline Cox, the allotment of Joseph Cox, an Indian of the Omaha Tribe, who died intestate before the expiration of his trust period and before the issuance of a fee-simple patent, descended to Jesse H. Cox, and pursuant to that decision he issued on February 2, 1918, to Jesse H. Cox, as heir of Joseph Cox, the fee-simple patent of the United States to this land, subject to the dower interest of Dora Cline Cox.

Counsel for the plaintiffs concedes that the United States, during all the time between the allotment of the land in 1884 and the issue of the fee-simple patent in 1918, held it in trust for the benefit of Joseph Cox and his heirs, and that the Secretary of the Interior had jurisdiction of the administration of the land and of the execution of this trust. He argues, however, that immediately upon the death of Joseph Cox the right to the use thereof and to the ultimate title thereto immediately

vested in the plaintiffs, or in William P. Cox, under whom they claim as his heir or heirs, and that neither the Congress nor the Secretary could lawfully deprive them of that right. He insists that the proceeding before the Secretary, by virtue of which the title to and the use of the land were adjudged to Jesse H. Cox, deprived the plaintiffs of their right to the land and its use, and this without due process of law. He does not rest these claims on the ground that the plaintiffs did not have notice of the claim of Jesse H. Cox that was to be adjudged by the Secretary, or that they did not have notice of the time or place of the hearing; but he rests it upon the ground that the Secretary, the tribunal which heard and decided the issue of heirship, had no lawful authority so to do.

A careful consideration of the brief and the argument has led to the conclusion that these and all the other contentions presented by counsel for the plaintiffs rest upon the single proposition that the Act of Congress of June 25, 1910, which in terms empowered the Secretary finally and conclusively to ascertain and decide who were entitled as heirs of Joseph Cox to the use and title to his allotment, was unconstitutional and void, because that was a judicial question, which the Congress under the Constitution had no power to intrust to the final decision of an executive or administrative department or officer. If that proposition is not sound, then there was no unlawful deprivation of the plaintiffs of any of their rights, they suffered no lack of due process of law, there was no unconstitutional or void act of Congress, and no lack of jurisdiction in the Secretary. In support of his proposition that this act of Congress was beyond the power of that body, counsel cites Choate v. Trapp, 224 U. S. 670, 32 Sup. Ct. 565, 56 L. Ed. 941; Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97; Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377; United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171; Western Union Tel. Co. v. Myatt, 98 Fed. 335. and other decisions less material. These authorities treat of the general nature and extent of the powers of the legislative, executive, and judicial departments of the United States, but in none of them was the constitutionality or validity of the Act of June 25, 1910, considered or determined.

On the other hand, the question of the validity and effect of that act, and of the jurisdiction of the Secretary of the Interior to hear, ascertain and decide who were the parties entitled by descent to the allotments of deceased Indians described therein, has been repeatedly considered and conclusively determined by the Supreme Court and by other federal courts, and they have uniformly sustained the act, the power of the Congress to enact it, the jurisdiction of the Secretary to decide the questions of heirship, and the finality of his decisions. Bond v. United States, 181 Fed. 613, 615, 616; Pel-Ata-Yakot v. United States, 188 Fed. 387, 388, 389; Parr v. Colfax, 197 Fed. 302, 305, 117 C. C. A. 48, 51; Hallowell v. Commons, 239 U. S. 506, 508, 509, 36 Sup. Ct. 202, 60 L. Ed. 409; Lane v. Mickadiet, 241 U. S. 201, 203, 206, 207, 209, 36 Sup. Ct. 599, 60 L. Ed. 956. If these decisions had not been rendered, it would not be a difficult task to draw the conclusion they announce from other decisions of the Supreme Court, and

from the facts that the decedent and his heirs were Indians, wards of the United States, that when the Secretary's decision was made the United States held this allotment in trust for the heirs of Joseph Cox, that the administration of the land and the execution of the trust were administrative rather than judicial duties, and that the determination of the question who were the heirs of this decedent was necessary to the execution of the trust and to the administration of the land during its continuance.

Analogous grants of quasi judicial power to the Secretary, such as his jurisdiction to determine what persons are entitled as purchasers, pre-emptors, and homesteaders to tracts of public lands, analogous grants to the Dawes Commission of the quasi judicial power to determine what Indians of certain tribes were entitled to allotments of lands. and many other questions and many other grants of like character which have been sustained by the Supreme Court might be cited. But a discussion of the constitutionality and effect of the Act of June 25, 1910, and of the power of the Secretary to determine thereunder who the heirs of Indian allottees therein mentioned are, would be futile, because the Supreme Court has twice decided these issues. The conclusion of this court, therefore, is that the Act of June 25, 1910, which grants to the Secretary of the Interior jurisdiction to ascertain and determine who were the legal heirs of the Indian allottees of the Omaha Tribe, who died intestate while the United States held the titles to those allotments in trust for such heirs, was constitutional and valid. the decisions of those questions in such cases by the Secretary are final and conclusive, and his determination in this case that the title to the allotment of Joseph Cox and to the proceeds, use, and profits thereof descended to Jesse H. Cox, is neither subject to collateral attack nor reviewable by the courts, in the absence of pleading and proof of fraud. error of law, or gross mistake of fact.

[2] Another objection to the decree of dismissal is that, before the hearing by the Secretary on which his decision in hand was based, he had decided that Jesse H. Cox was not the sole heir of Joseph Cox, that this earlier decision exhausted his power to determine who were the heirs, and that for that reason his later decision was coram non judice and void; but that position is also untenable, because the Supreme Court expressly so decided in Lane v. Mickadiet, 241 U. S. 201,

209, 36 Sup. Ct. 599, 60 L. Ed. 956.

[3] The second question is: Did the complaint or proof in this suit set forth a cause of action in equity to avoid the Secretary's decision for fraud, error of law, or absence of substantial evidence to sustain it? Whether or not the weight of evidence in substantial conflict sustains one or the other side of an issue of fact is a question upon which the final decision of the Secretary in a case of this character is generally final and conclusive; but his decision upon this issue of heirship, like the decision of the Land Department, of the Dawes Commission, and of other quasi judicial tribunals, may undoubtedly be avoided by a suit in a court of equity on account of fraud which induced it, on account of error of law upon facts found, conceded, or established beyond dispute at the hearing before him, or on the ground that at the close of

such hearing there was no evidence to support his finding on a material issue of fact which controlled the result. James v. Germania Iron Company, 107 Fed. 597, 600, 601, 46 C. C. A. 476, 479, 480; Howe v.

Parker, 190 Fed. 738, 746, 111 C. C. A. 466, 474.

There was no pleading or proof of fraud in the conduct of the hearing before the Secretary. On the facts found by him, on the facts conceded, or on those established beyond dispute, there was no error of law in his action. Whether or not he made a finding of a material fact or material facts conditioning his decision, which there was no substantial evidence to support, and whether or not he made a gross mistake in his finding of such facts, are questions which this court cannot consider or determine in this case, because there is no admission that there was no substantial evidence before him to sustain his findings; nor is there any pleading or proof in the record in hand of all the evidence that was before him, so that this court can for itself determine this matter by a comparison of all the evidence with the findings. If one would attack the finding of facts of a quasi judicial tribunal like the Secretary or the Land Department, upon the ground that there was no substantial evidence to support it, he must allege and prove, not only that there was a mistake in the finding or findings, but the evidence before that tribunal or Secretary from which the alleged mistake resulted, before any court can enter upon the consideration or decision of any issue of fact determined at the hearing by such tribunal or Secretary. United States v. Northern Pacific Ry., 95 Fed. 864, 870, 882, 37 C. C. A. 290, 296, 308; James v. Germania Iron Co., 107 Fed. 597, 600, 601, 46 C. C. A. 476, 479, 480; United States v. Atherton, 102 U. S. 372, 374, 26 L. Ed. 213; United States v. Budd, 144 U. S. 154, 167, 168, 12 Sup. Ct. 575, 36 L. Ed. 384.

The complaint contains no pleading sufficient to tender to the court below the issue of a gross mistake of fact by the Secretary, as neither the mistakes in his decision nor all the evidence before him upon the questions of fact conditioning his mistakes is either pleaded or proved.

The decree below must therefore be affirmed; and it is so ordered.

BRYSON et al. v. HINES, Director General of Railroads, et al.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1920.)

No. 1790.

1. Carriers \$\infty\$ 306(1)—Builder of unsafe railroad, accepted and operated by

government, liable for injuries to soldiers transported.

One who built a railroad on a military reservation, knowing that it would be used for the transportation of troops, and that it was so poorly constructed as to be dangerous, is liable for injuries to soldiers caused by such negligent construction, though the government had accepted the railroad and was operating the train on which the soldiers were riding.

 Carriers \$\infty\$ 306(1)—Exemption of government from suit does not affect liability of joint tort-feasor.

The exemption of the government from suit for injuries to a soldier transported over an unsafe railroad, built by a railroad company on a

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military reservation and accepted and operated by the government, does not affect a liability of the railroad company.

3. Railroads 55%. New. vol. 6A Key-No. Series—Director General's circular, requiring compensation under War Risk Insurance Act for injuries, did not divest accrued rights.

The circular of the United States Railroad Administration, providing compensation for soldiers injured or killed on the railroads under the War Risk Insurance Act (Comp. St. §§ 514a-514j), and not by claim against the administration, could not divest a right of action against a railroad company for the death of a soldier, which had accrued before the circular was published.

4. Carriers = 291—Haste, excusing negligent construction of railroad operated by government, cannot be assumed.

In an action against a railroad company for negligence in constructing an unsafe railroad, accepted and operated by the government for carrying troops on a military reservation, where there was no proof that the government required the construction in such haste as to excuse the negligence, the railroad cannot be relieved from liability on that ground, as it cannot be assumed as a matter of law that the government required the construction of a dangerous track.

5. Railroads 51/2, New, vol. 6A Key-No. Series-Director General's negli-

gence held question for jury.

In an action for the death of soldiers, caused by derailment of a train, evidence that the track was so bad that cars were derailed on it every day, and testimony by an experienced witness that on such a track the speed should not have been over half the speed at which the train was operated, is sufficient to take to the jury the question of the Director General's negligence.

6. Railroads 51/2, New, vol. 6A Key-No. Series-Director General's circular, requiring compensation under War Risk Insurance Act, instead of

action for injuries, not retroactive.

If the circular of the Director General of Railroads, providing for compensation under the War Risk Insurance Act (Comp. St. §§ 514a-514j), for injury to soldiers during transportation, was sufficient to withdraw the consent of Congress to suits against the Director General for such injuries, it does not prevent recovery against him for injuries caused before it was issued, since it does not express an intention that it should have a retroactive effect, and such effect will not be given by construction, especially where it would result in injustice.

7. Railroads 52. New, vol. 6A Key-No. Series—Director General not lia-

ble for negligence of military officers.

Where the arrangement of the cars in a troop train was entirely within the control of the military officers, the Director General cannot be held liable for negligence in putting light wooden cars between heavy steel cars.

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Separate actions by A. H. Bryson, as administrator of Walter C. Bryson, deceased, and by Emma C. Swann, as administratrix of Philetus C. Swann, deceased, against Walker D. Hines, Director General of Railroads, and the Atlantic Coast Line Railroad Company, tried together by consent. Judgment for defendants on directed verdict, and plaintiffs bring error. Reversed.

Zeb F. Curtis, of Asheville, N. C., D. W. Robinson, of Columbia, S. C., and James J. Britt, of Asheville, N. C. (Harkins & Van Winkle, of Asheville, N. C., on the brief), for plaintiffs in error.

P. A. Willcox, of McRae, Ga., A. L. Hardee, of Wilmington, N. C., and Thomas S. Rollins, of Asheville, N. C. (Charles F. Patterson, of Washington, D. C., and Martin, Rollins & Wright, of Asheville, N. C., on the brief), for defendants in error.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. On May 10, 1918, Walter C. Bryson and Philetus C. Swann, soldiers of Company A, 321st Regiment of Infantry, were killed in Camp Jackson Military Reservation by derailment of a train on which they were being transported under military orders. In separate actions for damages, tried together by consent, their administrators charge that the proximate cause of the derailment was negligence of the Atlantic Coast Line Railroad Company and the Director General of Railroads.

There was abundant evidence of acts of negligence alleged in the complaints, but the District Court directed a verdict for the defendants; one of the grounds being that the right of recovery against the railroad company and the Director General for the injury or death of a soldier had been supplanted and taken away by the following circular:

"United States Railroad Administration, Division of Law.

"Washington, October 25, 1918.

"Circular No. 4.

"Attention is directed to the act of Congress entitled 'An act to amend an act entitled "An act to authorize the establishment of a Bureau War Risk Insurance in the Treasury Department," approved September 2, 1914, and for other purposes, approved October 6, 1917, Public Document No. 90, Sixty-Fifth Congress (H. R. 5723).

"This act establishes a system for compensating officers and enlisted men and women nurses of the Army and Navy Nurse Corps, when employed in active service under the War or Navy Departments of the government.

"In case of railroad accidents, in order to avoid confusion and to effectuate a proper and uniform handling of the compensation claims of such injured and disabled persons who are entitled to receive compensation under the War Risk Act, upon the happening of any accident causing death, disablement or of injury to any officer, enlisted man, or member of the Army or Navy Nurse Corps (female) occurring on any line of railroad under federal control, the General Solicitor will immediately notify J. H. Howard, Manager, Claims and Property Protection Section, Division of Law, Southern Railroad Building, Washington, D. C., giving the name and emergency address of the dead or injured person, his or her number, rank, and routing, and in the case of injured persons, his or her present address.

"Such injured officers and enlisted men and members of the Army and Navy Nurse Corps (female) will be remitted to their claim for compensation through the War Risk Bureau and will not receive any payment through the Railroad Administration.

"No claim for damages for injuries occasioning death or disablement of such persons should be recognized or entertained. The circumstances surrounding accidents should be investigated as heretofore and report filed.

"The General Solicitor will notify general claim agents of this circular who will in turn notify all claim agents."

"John Barton Payne, General Counsel. "Approved: W. G. McAdoo, Director General of Railroads."

We first give attention to the effort of defendants' counsel to sustain the instruction that no negligence was proved which can be

imputed to either of the defendants.

Atlantic Coast Line Railroad Company constructed the road from Simm's Station on its line into Camp Jackson. The sole purpose of construction was the transportation of troops and supplies and munitions for the construction and maintenance of the camp. The Southern and Seaboard Railroads paid part of the cost, under bills rendered by the Coast Line. This construction was completed before the Director General took charge of railroads under the President's proclamation of December 26, 1917. The portion of road which was inside the limits of Camp Jackson, on which the accident occurred, was acquired by the government, either by purchase from the Atlantic Coast Line Railroad Company or under a contract with that railroad company for its construction as a part of the reservation. On demand for cars by the military authorities, they were carried into the reservation and brought out by an engine of the Coast Line in charge of one of its engineers. Within the reservation the arrangement of the cars on the track and the entrainment of troops were under exclusive control of the military officers in charge. The maintenance and repair of the track was in exclusive control of the War Depart-

The evidence tended strongly to show that the accident was due chiefly to the negligent construction by the Coast Line of a grossly and obviously unsafe track, and the negligence of the government in accepting the track and in failing to make it safe after acquiring it. Col. Frank, quartermaster, testifying to the cause of the accident, said:

"I attribute it to the light class of rail that was put in there and accepted by the quartermaster whom I relieved. I never would have accepted the track, if I had been the quartermaster when it was constructed. After the accident, I examined the track and found it badly torn up—a rail broken, a few angle bars broken, a few spikes cut off. From my examination as to the cause of the accident, I would say poor construction. I know a little bit about engineering, and I think it is about the poorest piece of railroad construction I ever saw in my life. The trestle was built on a grade with an acute curve. That is why I asked for heavier rails, trying to make it safe. I also needed tie plates, angle bars, and angle braces. About six weeks before the accident, I had removed practically all of the ties at that place, one at a time, by the railroad crew, and put them back in, putting as many as five or six spikes in each tie trying to hold it down until I could get heavier equipment, trying to prevent an accident, which I felt sure would happen some day. I had the railroad crew to go over the track after every three passenger trains went out. They were light angle bars used on 35-pound rail."

Other witnesses gave like testimony as to the unsafe construction and bad condition of the track, and the consequent frequent derailments. Col. Frank also testified that he wrote in vain several times to the Quatermaster Corps in Washington, stating the dangerous condition of the track, warning of impending accident, and asking that the road be made safe.

[1] For this negligence of the War Department, of course, there can be no recovery. The defendants maintain that although the road as constructed may have been an obvious menace to the life of every

person transported over it there is no liability on the builder for loss of life due to its negligence in that respect; for the reason that it was accepted and operated by the government and that from the time of acceptance the government alone was responsible. For this defendants rely on the general rule than one injured by a dangerous or defective instrumentality in the hands of another person cannot recover against a third person, who sold or furnished it, because of lack of privity of contract. Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621. Cases citing this case and applying the rule are collated in Rose's Notes, 25 L. Ed. 871.

But the opposite rule applies where the person selling or furnishing the article or instrumentality knows it to be dangerous, and also knows it will be used by other persons not aware of the danger; and this rule holds, even if the person to whom the article was sold knows the danger. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 179, 29 Sup. Ct. 270, 53 L. Ed. 453; O'Brien v. American Bridge Co., 110 Minn. 364, 125 N. W. 1012, 32 L. R. A. (N. S.) 980, 136 Am. St. Rep. 503, and numerous authorities cited; Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303. In such case the additional tort of the buyer in concealing the danger does not cancel that of the seller; the person injured has his remedy against two wrongdoers, instead of one.

According to the testimony the Atlantic Coast Line Railroad Company constructed and turned over to the government a track which it could not fail to know was exceedingly dangerous, and which it certainly knew was to be used to transport thousands of soldiers. There is not a particle of evidence that the soldiers killed knew of the dangerous nature of the track. But it would make no difference if they had known, because the builder of the road knew their knowledge would avail nothing; for it knew the controlling fact that the soldiers who were to be transported had no power to reject the track, or to have it repaired or reconstructed, or to refuse to travel over it. Does not the argument come clearly to this? The railroad company. in breach of its duty, constructed and delivered to the government an unsafe track, which it knew would endanger the lives of soldiers forced to travel upon it, yet this breach of duty was canceled by the breach of duty of officers of the government in using the track in an unsafe condition. This amounts to saying that an original wrongdoer is released when another takes up and continues the wrong. The statement of the argument carries its own refutation, and it is disposed of by the Supreme Court in Waters-Pierce Oil Co. v. Deselms, supra, and other authorities cited.

[2] The exemption of the government from suit does not affect

the liability of the railroad company.

[3] It follows that, if the negligent construction described in the testimony was a proximate cause of the accident, the plaintiffs had a vested right of action against the railroad when it occurred on May 10, 1918. It is admitted that if there was such a vested right of action it was not affected by Circular No. 4. This conclusion would result in a reversal of the judgment.

[4] It was earnestly pressed at the argument that the Atlantic Coast Line was not responsible for negligent construction because of the haste required of it by the government. This defense is without support either in the allegation of the answer or the testimony. We cannot assume as a matter of law that the government required of the Coast Line the construction of a track which imperiled the life

of every so'dier who passed over it.

[5] We think there was also evidence of actionable negligence in the operation of the train by the Director General. According to the evidence the train was running at a speed of from 8 to 10 miles an hour, and this was the usual speed. There was evidence to the effect that the track was in such bad condition that two or three cars were derailed on it every day. One witness of long experience on railroads testified that on such a track the speed should not have been over 4 to 6 miles an hour. It was therefore for the jury to say whether the

speed of the train was high enough to be negligent.

- [6] As already observed, Circular No. 4 could not take away any cause of action for the negligence of the Atlantic Coast Line Railroad Company, for it existed and was a vested right before that circular was issued. The right of action had also accrued against the Director General under the federal statutes and proclamations of the President, if the train was negligently run. As the Director General was an officer of the government, the right of action was in effect against the government, and was dependent upon the permission and grant of the government found in these statutes and proclamations. This permission and grant could, of course, be withdrawn at any time before the judgment. We do not discuss the question whether Circular No. 4, issued by the Director General, had the force of an act of Congress, withdrawing the grant or permission to sue him, for the reason that, if the Director General had such power and exercised it, we do not think he expressed in the circular the intention that it should have the retroactive effect of destroying rights of actions which had already Statutes are never construed to act retrospectively, unless the legislative effect is clearly expressed or necessarily implied. When retrospective operation of the statute would result in injustice, the presumption against such a legislative intent is still stronger. United States v. Burr, 159 U. S. 78, 15 Sup. Ct. 1002, 40 L. Ed. 82; Osborn v. Nickolson, 13 Wall. 654, 662, 20 L. Ed. 689; United States v. American Sugar Refining Co., 202 U. S. 563, 577, 26 Sup. Ct. 717, 50 L. Ed. 1149; 36 Cyc. 1205. There is nothing in the circular to indicate that it was intended to apply to injuries and deaths of soldiers which already had been inflicted, and it would have been a manifest hardship to take away the right of action from soldiers who at the time of boarding the train and incurring the risk had the statutory assurance of the protection of liability of the Director General for death or injuries due to the negligent operation of the train.
- [7] We think there can be no recovery for negligence in putting light wooden cars between heavy steel cars, in consequence of which the wooden cars were crushed by the derailment. The officers of the

army had entire control of the arrangement of the cars, and for their negligence in this respect there was no right of action against either of the defendants.

Reversed.

AYALA v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. October 27, 1920.)

No. 1372.

Criminal law = 1044—Court may consider whether there was any substantial evidence, though motion for directed verdict was not renewed.

Though a motion for directed verdict at the close of the evidence for the prosecution was not renewed after accused had introduced his evidence, the Circuit Court of Appeals may determine whether there was any substantial evidence to support the verdict, though the question was not properly raised, where a plain error was committed at the trial.

 Criminal law \$\insigma 1159(2)\$—Where there was no substantial evidence to support a conviction, judgment will be reversed.

In a prosecution under Penal Code, § 237 (Comp. St. § 10407), for bringing into Porto Rico from a foreign country lottery tickets and lists, evidence that accused had such tickets and lists in his possession when leaving a ship which had come from another country, but had previously touched at two other Porto Rican ports, and that he threw them into the water when they were demanded, held, that there was no substantial evidence to sustain a conviction, so that judgment will be reversed.

3. Criminal law = 1159(2)—Evidence sustaining inference consistent with innocence, equally with guilt, will not support a verdict of guilty.

While it is the province of the jury to draw inferences which may reasonably be drawn from the evidence, there is not substantial evidence to support a conviction, where inferences as consistent with innocence as with guilt may be drawn from the proven facts.

Criminal law \$\infty\$ 552(1)—Attempt to destroy evidence relevant, but not conclusive.

While the attempt of accused to destroy evidence against him is competent to go to the jury, it is not alone conclusive evidence of guilt.

In Error to the District Court of the United States for the District of Porto Rico; P. J. Hamilton, Judge.

Cornelio Ayala was convicted of bringing into the United States lottery lists and tickets, and he brings error. Reversed and remanded.

Hugh R. Francis, of San Juan, P. R. (Francis & De la Haba, of San Juan, P. R., on the brief), for plaintiff in error.

Thomas J. Boynton, U. S. Atty., of Boston, Mass., for the United States.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. The plaintiff in error, hereinafter called the defendant, was convicted at the April term, 1918, of the District Court of the United States for Porto Rico, upon an indictment in which he was charged, in two counts, with violation of section 237 of

the Penal Code of the United States (Comp. St. § 10407), the material part of which is as follows:

"Whoever shall bring or cause to be brought into the United States or any place subject to the jurisdiction thereof, from any foreign country, for the purpose of disposing of the same, any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme, * * * shall, for the first offense, be fined not more than one thousand dollars, or imprisoned not more than two years, or both."

In the first count in the indictment he was charged with having brought or caused to be brought into the United States from a foreign state, to wit, the republic of Santo Domingo, to the island of Porto Rico, of the United States, 24 lists, papers, certificates, or instruments purporting to be and to represent and contain the numbers of the winning tickets corresponding to a drawing held on March 25, 1917, in a lottery known as "Padre Billini" in the republic of Santo Domingo.

In the second count he was charged with having brought or caused "to be brought into the United States from a foreign country, to wit, from the republic of Santo Domingo, into the district of Porto Rico, of the United States, a large number of papers, certificates, or instruments * * * purporting to be and to represent tickets, shares, chances, and interests in and dependent upon the event of a certain lottery offering prizes dependent in whole or in part upon lot or chance, to wit, the lottery in favor of the 'Manicomio, Padre Billini,' republic of Santo Domingo, which said lottery as aforesaid was to take place and be holden on the 13th day of May, 1917," and that he brought said lottery tickets into the United States for the purpose of disposing of the same.

The errors assigned are: The admission of certain evidence; instructions of the court; and the denial of a motion to instruct the

jury to return a verdict for the defendant.

There was but little direct evidence, either upon the part of the government or of the defendant. That upon the part of the government. briefly stated, was that one Domingo Cummings, who was an inspector of customs at Ponce, on the island of Porto Rico, in the discharge of his official duties, had occasion to go aboard a Cuban steamship, the Santiago de Cuba, on the 9th day of April, 1917, which had arrived in the harbor of Ponce; that he saw the defendant on board the steamship with his wife and children, preparing to leave the ship to go aboard a launch which was to take them ashore, and thought the defendant was trying to avoid him and to conceal a package; that he followed the defendant down the gangplank of the steamer aboard the launch, and there demanded the package of him; that the defendant refused to give it to him, and when he made an effort to take it the defendant threw it overboard. The inspector recovered it from the water, and upon examination found that it contained what purported to be lottery tickets and lists of drawings in favor of the Insane Asylum Padre Billini, located at Santo Domingo, in the Dominican Republic.

There was evidence that the defendant was intending to sail upon the steamer to Santo Domingo. It does not appear whether he or his wife and children had come in on the steamer, or where they boarded it; but it did appear that they were leaving the steamer with him when the inspector attempted to obtain the package from him. The testimony of the inspector was corroborated by that of two boatmen who were in the launch. Evidence as to his character was the only evidence introduced by the defendant.

[1] At the close of the evidence on the part of the government the defendant requested the court to dismiss the case, "because of lack of any evidence or any showing by the government sustaining the indictment." This request was refused and exception taken. The defendant then introduced character testimony only, and at the close of all the testimony the defendant did not request the court to direct the jury to return a verdict of not guilty. The general rule is that, if the defendant, after denial of his motion to direct a verdict at the close of the government's testimony, introduces testimony in his own behalf, he thereby waives his motion, and it is his duty to again renew his motion after all the evidence is closed. But, notwithstanding this rule, the Supreme Court has held that, where a plain error has been committed in the trial of a criminal case, it will be considered by the court, although a motion for a directed verdict was never made.

In Wiborg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127,

1197, 41 L. Ed. 289, the court said:

"No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency; and although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

In discussing the right of the appellate court to consider in criminal cases the ground upon which a verdict rests, Judge Sanborn said in Fielder v. United States, 227 Fed. 832, 833, 142 C. C. A. 356, 357:

"There is, however, an exception to the rule to the effect that in a criminal case, where the life or liberty of the citizen is at stake, the appellate court may, in the interest of justice, examine the evidence to see whether there was any substantial evidence whatever against the accused, and if none is found may reverse the judgment, although no motion or request was made on that ground, and no exception was taken or assignment of error made."

And he cites Wiborg v. United States, supra, Clyatt v. United States, 197 U. S. 207, 221, 25 Sup. Ct. 429, 49 L. Ed. 726, Crawford v. United States, 212 U. S. 183, 194, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392, Weems v. United States, 217 U. S. 349, 362, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705, and several Circuit Court of Appeals cases.

Notwithstanding the failure of the defendant to move at the close of all the testimony for a directed verdict, we feel authorized to con-

sider the error which has been assigned, as if the motion had been made at the proper time, and to determine whether there was any substantial evidence upon which the verdict of the jury could rest.

The jury were correctly told by the court that it was necessary for the government to prove that the defendant had brought or caused the lists and lottery tickets in question to be brought from Santo Domingo into the district of Porto Rico, and upon this the court instructed the jury as follows:

"There is no evidence one way or the other upon that very interesting fact, and it is something that you would have to infer—get at by inference, as you think the facts may justify. If you think they were brought from Santo Domingo by anybody for disposition, and that this man then got hold of them to carry out that disposition, he would have, in the eye of the law, caused the lottery tickets to be brought to Porto Rico for disposition, and would be guilty."

He had already instructed the jury:

"Now, if he went on board, and just casually picked up or found this (sic) on board, and was taking them on shore, he would not be guilty of bringing them into Porto Rico from Santo Domingo, because he would have nothing to do with Santo Domingo. If he went on board, and bought them from somebody there, he would not be guilty of bringing them from Santo Domingo to Porto Rico, because that would be a purchase that was in American waters, and would have nothing to do with Santo Domingo. It would be something done here. But you would have to resort to guesswork to find either of those things. There is no evidence whatever in the case that he found them, or that he bought them. If, on the other hand, you think that the facts justify you in concluding beyond a reasonable doubt that he had some employés on this boat who delivered them to him to be taken on shore for disposition, then you would find him guilty, and it is not necessary that you should think that he had ordered them from Santo Domingo."

While the statute makes it an offense to receive or take lists of drawings or instruments purporting to be lottery tickets which have been brought from a foreign country into the United States, the defendant was not charged with this; and it was an essential part of the government's case that it prove to the satisfaction of the jury, beyond a reasonable doubt, that the defendant had brought or caused such lists and tickets to be brought from Santo Domingo into the island of Porto Rico.

[2-4] The only evidence upon which the defendant was convicted was that he was found with these lists and tickets, and that when they were demanded from him he threw them overboard. There was no direct evidence, as stated by the court, that he had any accomplices aboard the Santiago de Cuba, or that he had been in any way connected with bringing the lists or tickets from Santo Domingo. There was evidence that the steamer had touched at San Juan and Mayaguez, upon the island of Porto Rico, before it came to Ponce, and from the defendant's possession of the lists and the lottery tickets, and his conduct, the inference could as well have been drawn by the jury that the tickets and lists were obtained at San Juan, or Mayaguez, or that the defendant had obtained them in the harbor of Ponce from somebody aboard the steamer Santiago de Cuba, as that he had caused them to be brought from Santo Domingo. While it was the province of the jury

to weigh the evidence, and to draw all reasonable inferences that might be drawn therefrom, we do not think that, when inferences as consistent with innocence as with guilt may be drawn from the proven facts, it can be said that there was substantial evidence to support a verdict of guilty. The attempt of the plaintiff to destroy the evidence against himself evidently had great weight with the jury.

It is pointed out in Hickory v. United States, 160 U. S. 408, 416, 16 Sup. Ct. 327, 40 L. Ed. 474, that evidence of acts of concealment—

"are competent to go to the jury as tending to establish guilt, yet they are not to be considered as alone conclusive, or as creating a legal presumption of guilt; they are mere circumstances, to be considered and weighed in connection with other proof, with that caution and circumspection which their inconclusiveness when standing alone require."

In our view of the case, we do not deem it necessary to discuss the other errors assigned, because we feel that there was no substantial evidence that the defendant had brought or caused the lists and lottery tickets to be brought from Santo Domingo, which was an essential part of the government's case, and the entry must be:

The judgment of the District Court is reversed, the verdict set aside, and the case remanded to that court for further proceedings not inconsistent with this opinion.

CENTRAL IRON & COAL CO. v. MASSEY.

(Circuit Court of Appeals, Fifth Circuit. November 4, 1920.) No. 3456.

 Abatement and revival ≈ 12—Pendency of suit in state court no defense to suit in federal court.

The pendency of a suit for the same cause of action in a state court furnishes no ground for plea in abatement to a subsequent action brought by the same plaintiff against the same defendant in a court of the United States sitting in the same state.

2. Trial \$\infty\$60(1), 90—Admission of evidence later connected up not error; motion to exclude evidence admitted before connection shown necessary.

In coal miner's action for injuries resulting from defective tipple track, evidence that the track was bad two or three weeks before the accident was properly permitted to stay in subject to its being connected up, and where no motion was made at the conclusion of the testimony to exclude it and further testimony showed that the condition of the track had not been changed during the intervening time, there was no error.

 Appeal and error = 1052 (2)—Indefinite expression cured by later definite expression of witness.

In coal miner's action for injuries resulting from defective tipple track, the objection to the expression of a witness that the condition of the track "was, you might say, in pretty bad shape," was cured by his subsequent positive statement that the track was in bad shape at the time of the accident.

4. Evidence 481(1)—Master and servant 274(8)—Evidence as to proper method of dumping coal car held admissible.

In an action by a coal car dumper, injured by a derailed car while he was walking beside the car to raise the catch thereon, where defendant contended that the catch should not have been raised while the car was

in motion, and plaintiff had testified that, if not raised until the car stopped on the tipple track, the car would not dump, his negative answer to the question, "So that was not the proper way to dump the car?" was properly admitted, in connection with his entire testimony, in view of his experience.

5. Master and servant \$\infty\$286(5)\to Negligence as to coal car dumper question for jury.

In a coal car dumper's action for injuries from defects in ways, works, plant, and machinery, brought under Code Ala. 1907, § 3910, held, that the affirmative charge was properly refused defendant at the close of the testimony showing defect in the track and in the derailed car, causing the injury while he was walking beside the car and attempting to raise the catch.

6. Trial ≈ 252(11)—Charge as to duty to repair defects properly refused,

where not applicable.

In coal miner's action for injuries resulting from defective tipple track, where there was no evidence that it was plaintiff's duty to remedy defects in defendant's ways, works, plant, or machinery, a charge denying plaintiff's right to recover if he was under such a duty was properly refused.

7. Trial \$\infty\$260(1)—Charge already covered need not be given. Denial of requested charges was proper, where they were fully covered by the general charge.

In Error to the District Court of the United States for the Western Division of the Northern District of Alabama; William I. Grubb, Judge.

Action by W. J. Massey against the Central Iron & Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry A. Jones and De Vane K. Jones, both of Tuscaloosa, Ala., for plaintiff in error.

Earle Pettus, of Birmingham, Ala., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Defendant in error, W. J. Massey, brought an action in the United States District Court for the Western Division of the Northern District of Alabama against the plaintiff in error, Central Iron & Coal Company, to recover damages for the breaking of his leg; said injuries alleged to have been caused by a defect in condition of the ways, works, machinery, or plant connected with or used in the business of the said defendant.

The evidence showed that the defendant was engaged in mining coal; said coal was hauled from the mouth of the mine in small cars, which were then pushed on a descending track and ran upon a tipple, where they dumped, discharging their contents into railroad cars on a track below the tipple. In order to empty said coal, it was necessary that a door at the end of the small car, which was restrained by a latch, held in place by a catch called a "monkey," should be released; that to do this it was necessary to raise this monkey, which, if in good condition, would stay raised, but when loose would fall back, and had to be held up by wrapping around it a chain, which was attached to the forward part of the car; that the plaintiff was employed as a

There was evidence that, while the regular way was for the dumper to raise said monkey before the car was started down the decline towards the tipple, he had other duties to perform, which often prevented his being at the mouth of the mine when the car was thus started, and that where this was the case it was customary for the dumper to walk briskly alongside of the descending car, which moved at the speed of a fast walk, and to raise the monkey, and, if necessary, to wrap around it the chain to hold it in place; that the car by which plaintiff was injured had been started down the decline before he could reach it; that he crossed the track and safely reached the side of the car on which the monkey was placed; that he raised same and discovered that it was loose and would not stand up; that he reached forward to get the chain with which to hold up the monkey, walking briskly along by the side of the car; that in the track on which this car was running there was a bad joint, the end of two of the rails being from two to three inches apart, and not in line, so that the flange of the wheel of the car struck this open joint, was derailed, and the car was thrown against him, ran over him, breaking his leg in three places, and inflicting upon him serious and permanent injuries.

The evidence indicated that the condition of the track and of the cars was known to the superintendent of defendant, in charge of the works, ways, and machinery; that it was not the duty of plaintiff to repair

the same.

Defendant filed a plea in abatement, alleging the pendency of a former action brought by the plaintiff against the defendant in the circuit court of Tuscaloosa county, Ala., to recover for the same cause of action here set up. Said plea being overruled, defendant pleaded to the merits.

[1] 1. There was no error in sustaining the demurrer to the defendant's plea in abatement. It is well settled that the pendency of a suit for the same cause of action in a state court furnishes no ground for plea in abatement to a subsequent action brought by the same plaintiff against the same defendant in a court of the United States, sitting in the same state. Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983; Gordon v. Gilfoil, 99 U. S. 168, 25 L. Ed. 383; McClellan v.

Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762.

[2, 3] 2. Error is assigned upon the refusal of the court to exclude the testimony of the witness Pate to the effect that the condition of the track about the place of the accident was bad some two or three weeks before the accident. The court permitted the testimony to stay in, subject to its being connected up, and no motion was made at the conclusion of the testimony to exclude it. The further testimony showed that the condition of the track had not been changed during the intervening time. There was therefore no error in the ruling of the court. The objection to the expression of the witness that the condition of the track "was what you might say in pretty bad shape," even if originally meritorious was entirely explained and cured by the subsequent positive statement of the witness that the part of the track alluded to was in bad shape at the time indicated.

3. In view of the testimony in the case that the man bringing the

small cars out of the mine was not supposed to wait for the dumper to come up and set the monkey before he shoved the car off, that if the dumper got to the car before it started in motion it was his duty to fix it for dumping before it started, but that when the car was started before the monkey was raised the man walked alongside and raised the monkey while the car was in motion, there was no error in permitting the plaintiff to testify that he did not have time to reach the car while it was standing still so as to then raise the monkey.

[4] 4. It is urged that the court erred in not sustaining defendant's objection to the testimony of plaintiff that waiting to raise the monkey until the car stopped on the tipple was not a proper method of dumping. The defendant was insisting that where the monkey was not raised before the car started down the incline it should not be raised while the car was in motion, and that it could be raised and the car dumped after the car stopped at the end of the tipple. Plaintiff had testified that if the monkey was not raised until that time the car would not dump, for the coal would not then pour out. He was then asked the question, "So that was not a proper way to dump the car?" and answered, "No, sir." In view of the experience of the plaintiff it was proper to permit him to testify as above, in connection with his entire testimony. Alabama Rwy. Co. v. Jones, 114 Ala. 519, 21 South. 507, 62 Am. St. Rep. 121; Davis v. Korman, 141 Ala. 479, 37 South. 789; Southern Rwy. Co. v. McGowan, 149 Ala. 442, 43 South. 378.

[5] 5. The principal error assigned is that the court refused to give the affirmative charge in favor of the defendant on the conclusion of the entire testimony. The suit is brought under the statute of Alabama regulating the liability of an employer to an employé. The statute provides that where an injury is caused to an employe through a negligent defect in the plant or appliances of such employer, the plaintiff injured by such negligent defect may, if free from negligence himself,

recover. The statute further provides:

"Provided, that in no event shall it be contributory negligence, or an assumption of the risk on the part of a servant to remain in the employment of the master or employer after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect, or who committed the negligent act causing the injury complained of." Code of Alabama 1907, \$ 3010.

There was evidence in this case of the existence of the defect in the defendant's track and that the car was derailed by reason thereof. There was also evidence of a defect in the monkey; also that the master was aware of the defects and that the party injured was not a servant whose duty it was to remedy the same, or who was responsible for the condition of said track, or said cars. There was also evidence that the plaintiff was injured by reason of these defects and was engaged in one of the usual and recognized methods of conducting the business for which he was employed. The court therefore properly refused the affirmative charge. Coosa P. & F. Co. v. Poindexter, 182 Ala. 656, 62 South. 104.

6. Error is assigned because the court refused to charge the jury on requests of the defendant that if the plaintiff, because of negli-

gence, indifference, inattention, or forgetfulness helped to cause his injuries he was not entitled to recover damages of the defendant because of said injuries. The court fully charged the jury upon the subject of contributory negligence on the part of the plaintiff. He charged the jury that the plaintiff must be free from fault in the injury in order to entitle him to recover for the employer's negligence. In so far as the defendant's requests were legal they were fully covered by the charge given. There was no evidence in the record that the plaintiff was guilty of any inattention, indifference, or forgetfulness; therefore there was no error in the court refusing the requests of the defendant on the subject of contributory negligence.

[6] 7. There was no error in the court refusing the request of defendant to charge, that if it was a part of the plaintiff's duty to remove or remedy a defect in condition of the defendant's ways, works, plant, or machinery, by which his injuries were caused he could not recover. There was no evidence in the case that it was the duty of this plaintiff to remedy any defects in said ways, works, machinery, or plant. Wilmington Mining Co. v. Fulton, 205 U. S. 60, 76, 27 Sup. Ct. 412, 51 L. Ed. 708; Mitchell v. Potomac Insurance Co., 183 U. S. 42, 48, 22 Sup. Ct. 22, 46 L. Ed. 74; Hart v. Bowen, 86 Fed. 877, 882, 31 C. C. A. 31.

[7] 8. Error is also assigned in the refusal of the court to give in charge the request of the defendant that, where there were two ways of doing the task on which he was engaged, one safe and the other unsafe, it was the duty of the plaintiff to use the safe way. The court had fully covered in his oral charge to the jury the duty of the plaintiff in the event there were two ways of performing the duty practical and open to him, to adopt the safe way, and that a failure so to do would be negligence defeating his recovery. He had further charged that, if a reasonably prudent man would not have attempted to prepare the car for dumping while it was in motion, plaintiff could not recover; also that, even if it was reasonably safe for the plaintiff to so prepare the car for dumping while it was in motion, if he was guilty of negligence in the manner in which he did it, he could not recover.

Where the court has fully covered the matter in his general charge, it is not error to decline giving a request on the same subject. Texas & Pacific Ry. v. Watson, 190 U. S. 287, 293, 23 Sup. Ct. 681, 47 L. Ed. 1057; Beaver Hill Coal Co. v. Lassilla, 176 Fed. 725, 100 C. C. A. 283; Norfolk & Portsmouth Traction Co. v. Rephan, 188 Fed. 276, 110 C. C. A. 254. Further, the request made is subject to the criticism that it did not submit to the jury whether the acts of the plaintiff, hypothetically stated therein, were, or were not, negligently done.

We therefore find no error in the several rulings of the court, and the

judgment of the District Court is affirmed.

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BANK OF ELBERTON v. SWIFT (two cases).

(Circuit Court of Appeals, Fifth Circuit. October 29, 1920.)

Nos. 3495, 3498.

1. Bankruptey 51—That voluntary petition was filed to protect expectancy does not warrant setting aside adjudication.

Under Bankruptcy Act, § 59a (Comp. St. § 9643), permitting any qualified person to file a petition for voluntary bankruptcy, and section 14 (section 9598), entitling him to discharge, except for acts therein set forth, the fact that a voluntary bankrupt, who had practically no assets, filed his petition to protect from his creditors a legacy he expected to receive shortly from his mother, does not warrant setting aside his adjudication as a bankrupt, since the purpose of the Bank-

ruptcy Act was to protect after-acquired property from creditors, and

the fact that he had some special property in view does not change his rights.

2. Bankruptcy \$\iff 143(9)\$, 148—Expectancy does not pass to trustee.

Since only vested interests are considered property within the meaning of the Bankruptcy Act, and after-acquired property is not subject to the bankrupt's debts, the property which he expects or hopes to acquire thereafter by will or descent is not affected.

3. Bankruptcy 455—Dismissal of petition to set aside adjudication not

An order of the District Court dismissing a creditor's petition to set aside for fraud the adjudication of voluntary bankruptcy is not one that can be reviewed on appeal, under Bankruptcy Act, § 25a (Comp. St.

9609).

Appeal and Petition to Superintend and Revise from the District Court of the United States for the Northern District of Georgia; Wil-

liam T. Newman, Judge.

Voluntary proceeding in bankruptcy by John K. Swift. The petition of the Bank of Elberton to set aside the adjudication on the ground of fraud was denied (259 Fed. 612), and petitioner appeals and files petition to superintend and revise. Appeal dismissed, and petition to superintend and revise denied.

Stephen C. Upson and Horace M. Holden, both of Athens, Ga., for

appellant and petitioner.

Daniel MacDougald, of Atlanta, Ga., and Samuel L. Olive, of Augusta, Ga., for appellee and respondent.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. November 8, 1917, John K. Swift was adjudged a bankrupt on his voluntary petition. June 6, 1918, the Bank of Elberton filed a petition to set aside the adjudication, on the ground of fraud. The fraud charged was that the bankrupt was using the Bankruptcy Act to defeat the collection of his note for \$4,300, which the bank held against him. The bank's petition alleged that the note was

 $[\]clubsuit$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes $268~\mathrm{F.}{-}20$

dated April 16, 1917, and due December 1, 1917; that at the time the bankrupt filed his petition his mother was 98 years old and at the point of death, and that she actually died shortly thereafter; that the bankrupt knew at the time of filing his petition in bankruptcy that by his mother's will he would be left a legacy of about \$20,000; that he knew the will could never be changed, because, after his mother had made it, a guardian of her property had been appointed by the ordinary's court, on the ground of her imbecility from old age; that the bankrupt's debts, other than to the bank, were insignificant; and that according to his schedule of assets the only property he had was a watch and wearing apparel worth less than \$100.

The District Court dismissed the bank's petition, and it has appealed

and filed petition to superintend and revise.

[1] After the most careful consideration we concur in the conclusion reached by the venerable and lamented District Judge. Section 59a of the Bankruptcy Act provides that "any qualified person may file a petition to be adjudged a voluntary bankrupt." Comp. St. § 9643. Section 70a vests the trustee "with the title of the bankrupt to all * * * property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Comp. St. § 9654. The amendment of 1910 (Comp. St. § 9631) further vests the trustee "with all the rights, remedies and powers" of a creditor holding a legal or equitable lien upon property within the custody of the bankruptcy court, and of a judgment creditor holding an unsatisfied execution as to property not within such custody. The bankrupt is entitled to be discharged, except for acts specifically set forth in section 14 and not material to this case, and the discharge operates to release him from his debts as of the date of the filing of his petition.

The act necessarily contemplates: (1) That a voluntary petitioner will be discharged from the burden of his debts; and (2) that all the property owned by him at the time he filed his petition will be distributed among his creditors. The discharge of the bankrupt does not affect the rights of the creditors to property which passes into the hands of the trustee. To insure distribution of all the bankrupt's property the trustee is given the power to assert, not only any right which the debtor could have asserted, but also any right, remedy, or power of a creditor holding a lien or unsatisfied execution. The statute, as already pointed out, specifically sets forth the grounds of objection to a discharge. But nowhere is it declared to be a ground of objection that after-acquired property would be unaffected by the claims of creditors. On the contrary, one of the main purposes of the act is to relieve after-acquired property from such claims.

In Hanover National Bank v. Moyses, 186 U. S. 181, text 191, 22 Sup. Ct. 857, 861 (46 L. Ed. 1113) Chief Justice Fuller quoted with approval the following language from In re Fowler, 1 Lowell, 161, Fed. Cas. No. 4,997:

"He [the bankrupt] may be, in fact, fraudulent, and able and unwilling to pay his debts; but the law takes him at his word, and makes effectual

provision, not only by civil but even by criminal process to effectuate his alleged intent of giving up all his property".

-and then added:

"Adjudication follows as matter of course, and brings the bankrupt's property into the custody of the court for distribution among all his creditors."

[2] Only vested interests are considered property within the meaning of the act. In re Elite (D. C.) 109 Fed. 625; In re Gardner (D. C.) 106 Fed. 670. Clearly, if property which the bankrupt actually acquires after the filing of his petition is not subject to his debts, property which he only hopes or expects to acquire cannot be reached by creditors.

The only cases relied upon by appellant are Zeitinger et al. v. Hargadine-McKittrick Dry-Goods Co., 244 Fed. 719, 157 C. C. A. 167, and In re Weidenfeld (D. C.) 257 Fed. 872. In the first-named case it appears that the board of directors of the defendant company were being sued by the stockholders in the state court, and that, after that court had announced that it would grant an accounting and appoint a receiver, the directors suddenly filed a voluntary petition to have the corporation adjudged a bankrupt. This petition was finally denied in the Circuit Court of Appeals. The contest there was between the stockholders and the directors, and not between debtor and creditors. Moreover, the debts claimed by the petition in bankruptcy to exist had theretofore been held by the state court not to be valid claims against the company. The whole purpose of that bankruptcy proceeding was to oust the jurisdiction of the state court.

In the Weidenfeld Case an involuntary petition had been resisted by the bankrupt until his wife died leaving him some property. He asked leave to withdraw his objection and to consent to be adjudged a bankrupt, in which event, of course, the property acquired from his wife would be relieved of his debts. But the petitioning creditors had theretofore asked leave to dismiss their petition against Weidenfeld and had given the required notice to the other creditors. There was no objection by the other creditors, and of course the court allowed the petitioning creditors to withdraw their petition, which was sufficient to end the case, although it denied the petition of the bankrupt

suddenly to change his attitude.

It was practically admitted in the oral argument that there was no remedy within the letter of the act, but it was earnestly insisted that appellant's petition showed an attempt to violate its spirit and to use the process of the court to perpetrate a fraud. It was not denied that a party might take advantage of a voluntary proceeding in bankruptcy for the very purpose of having any property he might accumulate thereafter relieved from his debts, but it was said that there must be a line drawn between a general purpose of that kind and a specific intent, such as is alleged to exist here, where the acquisition of the property by appellee followed so closely in time upon the filing of his petition. To that argument it need only be replied that the law authorizes the petition to be filed and adjudication made, and a discharge granted. The act fixes the rights of the parties. It has carefully enumerated

the things that can be done and the things that cannot be done, and it is not for the courts to add to the one or to the other. Congress enacted the bankruptcy statute in the exercise of a public policy, for the benefit, not of debtors and creditors, but of society at large. It realized, of course, that unscrupulous and dishonest men would take advantage wherever they could of its provisions. Equally of course, it was not intended to enable a debtor to rush into bankruptcy just in time to prevent his creditors from satisfying their claims out of property he was about to come into possession of. But the difficulty in any law upon so complicated a subject as business relations is to make it cover every particular case that may possibly arise. It does not seem to us that the act takes into account the motives of creditors in involuntary proceedings, or of debtors in voluntary proceedings: but instead of that, in view of the fact that such a practical subject as business relations between debtor and creditor is being dealt with, it concerns itself rather with conditions as they exist, and undertakes to fix definitely the obligations of the debtor and the rights and remedies of the creditor. In our judgment, it was thought best by Congress to prescribe general rules, which would usually promote satisfactory results, notwithstanding the fact that in isolated instances it would be difficult, if not impossible, to attain to the high standards of exact iustice.

[3] The order of the District Court is not one that can be reviewed on appeal, under the provisions of section 25a of the Bankruptcy Act, and the appeal is therefore dismissed.

The petition to superintend and revise is denied.

ROGERS et al. v. DESPORTES, Richland County Jailer, et al.

(Circuit Court of Appeals, Fourth Circuit. September 10, 1920.)

No. 1850.

Habeas corpus \$\infty\$109—Remand of petitioner to sentencing court for resentence held proper practice.

There being no statute giving to the District Court originally imposing sentence jurisdiction in habeas corpus proceedings by persons confined in a penitentiary in another district alleging their sentence and confinement to be illegal, it was the proper practice for the judge of the district in which such a penitentiary was located, on determining, in such habeas corpus proceedings, that the petitioners' sentence was unlawful, to remand petitioners for resentence to the court of their original prosecution, so that, by appeal from the latter court's further action, if unfavorable to petitioners, the sentence might be reviewed by the proper Circuit Court of Appeals, rather than by the Circuit Court of Appeals of the penitentiary district.

 Criminal law = 1218—Hard labor not requisite of sentence of federal court to Atlanta.

The power of a federal court to direct imprisonment in the penitentiary at Atlanta of a defendant convicted of a felony held not limited, under the federal Prison Act of 1891 (Comp. St. §§ 10552-10560) and the act of 1901 (Comp. St. § 10563), as to the Atlanta penitentiary, to cases

where hard labor is a part of the sentence imposed, in view of Cr. Code, §§ 335, 338, 341 (Comp. St. §§ 10509, 10512, 10515).

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston,

Application for habeas corpus by S. M. Rogers and others against

H. W. Desportes, County Jailer for Richland County, and another. From an order (268 Fed. 83) refusing to discharge petitioners, they appeal. Affirmed.

C. T. Graydon, of Columbia, S. C. (Cole L. Blease, of Columbia, S. C., of counsel), for appellants.

Francis H. Weston, U. S. Atty., of Columbia, S. C., for appellees. Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

WATKINS, District Judge. This is an appeal from an order refusing to discharge the petitioners under a writ of habeas corpus. The facts present a very unusual situation. The petitioners were convicted on the 22d day of January, 1920, in the District Court of the United States for the Eastern District of South Carolina, of the violation of sections 3258, 3281, and 3279 of the United States Revised Statutes (Comp. St. §§ 5994, 6021, 6019). They were each sentenced to pay a fine of \$500 and the cost of the prosecution, and to be confined for one year in the United States penitentiary at Atlanta. Although represented by counsel at the trial, there was no exception to the sentence and no application for a writ of error. On the 2d day of February, 1920, the petitioners were committed to the Atlanta penitentiary to serve their sentences.

Thereafter, on the 9th day of June, 1920, under habeas corpus proceedings, Hon. Samuel H. Sibley, Judge of the District Court of the United States for the Northern District of Georgia, held that the sentence to the Atlanta penitentiary for one year, not at hard labor, was illegal and void, and that the detention of the petitioners in the penitentiary was unlawful. On the 2d of July, 1920, Judge Sibley made an order directing the United States marshal for the Northern district of Georgia to transport the petitioners to Columbia, S. C., and there deliver them to the United States marshal for the Eastern district of South Carolina "to the end that such correction as may be lawful may be made in the sentence imposed upon them." In the effort to carry out this order, the marshal for the Northern district of Georgia transported them to Columbia, and there delivered them to the jailer for the county of Richland to be safely kept by him in the county jail until delivered to the marshal for the Eastern district of South Carolina. The marshal for the Eastern district of South Carolina has, however, declined to receive them into his custody.

The petitioners then made application to the Hon, H. A. M. Smith, District Judge for the Eastern District of South Carolina, for their release under a writ of habeas corpus upon the ground that the original sentence was held by Judge Sibley to be void, and that their detention was unlawful. In a written opinion dated July 31, 1920, Judge Smith held that the original sentence was lawful; that if as to the place of confinement, and the length and terms of confinement, it was not in strict accordance with the statute, the sentence was not void, and could be corrected only by writ of error; and that Judge Sibley had no jurisdiction to review the sentence and direct a resentence. Accordingly an order was made that the marshal for the Eastern district of South Carolina return the petitioners to the custody of the warden of the United States penitentiary at Atlanta, Ga., to serve the sentences

imposed. From this order the petitioners appeal.

Ill Judge Sibley, District Judge for the Northern District of Georgia, in which the Atlanta penitentiary is situated, had jurisdiction to entertain the writ of habeas corpus and to order the release of the petitioners if he found the sentence was absolutely void. The correctness of his judgment was reviewable by the Circuit Court of Appeals for the Fifth Circuit, and by certiorari by the Supreme Court of the United States. His order remanding the petitioners to the Eastern district of South Carolina for resentence was not binding on the judge of the Eastern district of South Carolina, for Judge Smith of that district is of equal authority with Judge Sibley. Nevertheless, in the present unsatisfactory state of the law we incline to think that Judge Sibley adopted the most convenient practice. Upon the arrival of the petitioners in the Eastern district of South Carolina, Judge Smith was at perfect liberty to hold that his original sentence was correct, refuse to alter it, and order the petitioners remanded to the Atlanta penitentiary. This order gave them the opportunity to apply for a writ of habeas corpus before him, and, upon his refusal to discharge them, to bring the matter by appeal to this court. The result is that the sentence of Judge Smith, alleged to be erroneous, is reviewed by this court having jurisdiction to correct his errors, rather than by the Court of Appeals of the Fifth Circuit whose office is to correct errors in that circuit. This is unfortunate circuity, but it seems to be unavoidable until a mere expeditious method is prescribed by statute by which District Courts of this circuit will have jurisdiction in habeas corpus, as to persons confined in the Atlanta penitentiary from the District Courts in this circuit, alleging their confinement to be illegal. It seems hardly necessary to say that Judge Sibley's holding that the sentence was illegal is not binding on this court as res adjudicata. He did not undertake to make it so. The only judgment made by him was that the petitioners should be returned to the Eastern district of South Carolina for resentence. He expressly refused to make any judgment discharging them.

[2] A review of all the authorities on the subject leaves the mind in great confusion as to the distinction between an erroneous sentence to be corrected by writ of error alone and a void sentence from which the prisoner is entitled to be released either by a writ of error or under habeas corpus proceedings. It is unnecessary for this court in the present case to define the distinctions or to lay down a rule for proper procedure, since the disposition of the cause on the question of the lawfulness of the sentence will dispose of the entire case. In order to arrive at a clear understanding of the power of the trial court to order the execution of its sentences in state or federal penitentiaries, it will be necessary to review both the statutory provisions

and the decisions of the Supreme Court relating to the subject. It will also be necessary to emphasize the distinction between the statutes enacted prior to 1891, which relate exclusively to state penitentiaries, the federal prison act of 1891 (Comp. St. §§ 10552–10560), and that of 1901 relating to the Atlanta penitentiary (Comp. St. § 10563), which dealt exclusively with federal penitentiaries or prisons.

The statutes relative to state jails and penitentiaries which are still in existence had been passed long prior to the federal prison act of 1291. These provisions are embodied in the following sections of the Revised Statutes: Section 5537 (Comp. St. § 10521), permitting the marshal to provide for temporary jails in states where the use of state jails, penitentiaries, etc., is not allowed to the United States; section 5538 (section 10522), authorizing the marshal to make provision for the safe-keeping of United States prisoners until permanent provision is made by law; section 5539 (section 10523), which provides that criminals convicted of any offense against the United States imprisoned in a state jail or penitentiary shall be subject to the same discipline and treatment as convicts sentenced to such institutions by the courts of the state; section 5541 (section 10527), which provides that persons convicted of any offense against the United States and sentenced to imprisonment for "longer than one year" may be sentenced to a state jail or penitentiary within the district or state where the court is held; and section 5542,1 which provides that criminals convicted of any offense against the United States and sentenced to imprisonment and confinement at hard labor may be imprisoned in a state jail or penitentiary. It will be seen from a review of these statutes that unless a convict was sentenced to confinement at hard labor the sentence could not be executed in a state penitentiary, unless the sentence was for more than a year. This was the precise point decided in the case of In re Mills, 135 U.S. 263, 10 Sup. Ct. 762, 34 L. Ed. 108. There the prisoner was charged by two separate indictments and pleaded guilty (1) to carrying on the business of an illicit liquor dealer without having paid the special tax provided by law, as provided by section 3242 of the Revised Statutes (Comp. St. § 5965); and (2) to having sold liquor to an Indian in violation of section 2139 of the Revised Statutes (Comp. St. § 4136a). He was sentenced on the first charge to imprisonment in the Ohio state penitentiary for the period of one year, and to pay a fine of \$100 and costs; and on the second charge to be imprisoned in the same penitentiary for a period of six months and to pay a fine of \$50 and costs, this term to begin at the expiration of the year. The court held that the separate sentences could not be treated as one sentence, and that, since the imprisonment provided for in neither case exceeded one year, the court had exceeded its jurisdiction. In the case of In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149, the same question arose as to the right to sentence the prisoner to a state penitentiary for a period not exceeding a year under section 5546 of the Revised Statutes.2 The court held, as in the Mills Case, that it was without the jurisdiction of the court to sentence to a state penitentiary under this section unless the sentence exceeded a year. The issue in neither of these cases was based upon

the right of sentencing to imprisonment at hard labor under section 5541, and neither related to a federal penitentiary.

In the case of Bryant v. United States, 214 Fed. 51, 130 C. C. A. 491, the sentence was to imprisonment in a federal penitentiary for a period of one year. The case, however, is not authority for holding that such imprisonment, without in terms specifying hard labor, is illegal. It is true that the District Judge before whom the writ of habeas corpus was brought held that the sentence was illegal, and the other District Judge who passed the sentence acquiesced in that view. The question before the Circuit Court of Appeals did not involve that issue. It was decided that the proper course of procedure in cases of illegal sentence was not to discharge the prisoner, but to return him to the court which tried him for the correction of such sentence, and that the resentence of a prisoner under such circumstances was lawful, although the term of the court at which the sentence was passed had expired. On the question of the legality of the original sentence the court at least inferentially suggested that, although that question was not raised, there was doubt upon this point. The language used was:

"The defects in the * * * sentence, if any (italics ours), did not inhere in the trial or verdict, and therefore it appears Bryant is guilty and was properly convicted."

The court also emphasized the fact that the orderly proceeding for the correction of the first sentence, if illegal, would have been by writ of error; the court saying:

"He could have had the defects corrected by a direct proceeding for that purpose, which would have enabled the appellate court to regard also the rights of the government."

And quoting the following language from Ex parte Spencer, 228 U. S. 652, 33 Sup. Ct. 709, 57 L. Ed. 1010:

"When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts, and if the judgment be excessive or illegal it may be modified or changed and complete justice done, as we have said, to the prisoner, and the penalties of the law satisfied as well."

An important question relating to the right of courts to sentence to prisons where hard labor was required as a part of the discipline had previously been decided in the case of Ex parte Karstendick, 93 U.S. 396, 23 L. Ed. 889. Karstendick was convicted in the Circuit Court of the United States for the District of Louisiana on May 1, 1876, for conspiracy under section 5440 of the Revised Statutes.* The punishment prescribed by the statute for this offense was a penalty of not less than \$1,000, or more than \$10,000, and imprisonment for not more than two years. It being ascertained that there was no suitable penitentiary in the district of Louisiana, the sentence was ordered to be executed in the penitentiary at Moundsville, W. Va. Karstendick was taken to this penitentiary, and while serving his sentence sued out a writ of habeas corpus and sought to be discharged on the ground that his imprisonment in the penitentiary without the state of Louisiana was not authorized by law and consequently void. He further challenged the jurisdiction on the ground that the crime was not by statute punish-

^{*} Comp. St. \$ 10201.

able by confinement at hard labor and that since imprisonment in the penitentiary at Moundsville necessarily implied imprisonment at hard labor the sentence was in excess of the power conferred. The court said:

"We have not been able to arrive at this conclusion. In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its senterce at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them. If the offense is flagrant, the penitentiary, with its discipline, may be called into requisition; but if slight, a corresponding punishment

may be inflicted within the general range of the law.

"This view of the case is strengthened by a further examination of the legislation upon this subject. As early as 1825, in an 'Act more effectually to provide for the punishment of crimes against the United States, and for other purposes' (4 Stat. 118), it was enacted (section 15) that 'in every case where any criminal convicted of any offense against the United States shall be sentenced to imprisonment and confinement at hard labor, it shall be tawful for the court by which the sentence is passed, to order the same to be executed in any state prison or penitentiary within the district or state where such court is holden, the use of which prison or penitentiary may be allowed or granted by the Legislature of such state for such purposes.' With this statute in force, the act of 1865, which has already been referred to, was passed, giving the same power in nearly the same words, where the punishment was by imprisonment for a longer term than one year, without any special requirement as to hard labor.

"These two acts are separately re-enacted in the Revised Statutes. The act of 1825 is reproduced in section 5542, and that of 1865 in section 5541, the language of the two original acts being substantially retained in the revision. With this legislation in full force, it is impossible to believe that it was the intention of Congress to confine imprisonment in penitentiaries exclusively to cases in which hard labor is in express terms made by statute a part of the punishment."

In the Mills Case, supra, the same question incidentally arose, and the court cited with approval the Karstendick Case; and further held that all crimes which were punishable by imprisonment in a state penitentiary, or prison, are infamous and can be proceeded against only by presentment or indictment of a grand jury, citing Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89, in which it is held that, where the crime is infamous within the meaning of the Constitution, the question is whether it is one for which the statute authorizes the courts to award an infamous punishment and not whether the punishment awarded is an infamous one. It was said, inter alia:

"An offense which the statute imperatively requires to be punished by imprisonment 'at hard labor,' and one that must be punished by 'imprisonment,' but the sentence to which imprisonment the court may, in certain cases, and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are, each, 'punishable' by imprisonment at hard labor. The former offense certainly must be thus punished; and as the latter may, in the discretion of the court, be so punished, it may, also, and not unreasonably, be held to be 'punishable' by imprisonment at hard labor."

A later case was that of United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 632. Pridgeon was tried at the September term, 1890, of the district court of the First judicial circuit of Logan county, Oklahoma territory, and for the Indian country, and convicted of horse stealing. The penalty for the offense charged was "punishable by a fine of not more than \$1,000, or by imprisonment not more than fifteen years, or by both * * * at the discretion of the court." U. S. Statutes at Large, vol. 25, p. 33. The sentence was that—

"The said Sidney S. Pridgeon, for the said offense by him committed, be imprisoned in the Ohio state penitentiary at Columbus (and confined at hard labor) for the term of five years, etc."

The usual discipline of the Ohio penitentiary for prisoners confined therein included hard labor. After beginning the service of his sentence the prisoner applied for discharge under writ of habeas corpus, alleging that he was wrongfully restrained of his liberty: First, because the court which tried, convicted and sentenced him had no jurisdiction in the premises; and, second, because the sentence imposed was beyond the power and jurisdiction of the court, and therefore void. He was discharged by the Circuit Court upon the ground that the sentence should have been for imprisonment alone, since the statute did not provide for hard labor, and that the imposition of hard labor as a part of the punishment rendered the whole sentence void. From this decision the United States appealed. In passing upon the appeal the Supreme Court said:

"The question, therefore, narrows itself down to this: Was the sentence imposing that term of imprisonment rendered void by the addition of 'hard labor' during his confinement?"

The court then after quoting at length, and with approval, from the Karstendick and Mills Cases, said:

"Under the rule announced in these cases, while the Act of February 15, 1888 [under which he was indicted and convicted], does not specifically authorize the imposing of 'hard labor' as a part of the sentence of imprisonment, still it was competent for the court to sentence the party convicted to imprisonment in a penitentiary where 'hard labor' is a part of the usual discipline; so that the provision for 'hard labor' in the sentence is nothing more or less than a sentence to simple imprisonment in the Ohio penitentiary, subject to its rules, regulations, and discipline, and if the sentence had been imposed in this form it could not justify the release of the prisoner on habeas corpus under the rule above announced. It is doubtful whether upon a writ of error the prisoner would have been entitled to a modification of his sentence by striking out the 'hard labor' portion thereof. By section 5539, Rev. Stat., it is provided that 'Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state and territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such state or territory.

"Suppose the five-year sentence had embodied the provision of this section—which it could lawfully have done—would it have carried with it, in point of fact, hard labor as a part of the discipline of the Ohio penitentiary? This being so, it is difficult to see upon what principle it can be held that the sentence of imprisonment is vitiated and rendered void for expressly including

the element or feature of 'hard labor,' which would have been otherwise implied in the sentence of simple imprisonment."

It must be conceded that there is difficulty in reconciling the numerous decisions on this subject. The apparent conflicts may be harmonized, however, by limiting the doctrine announced in these cases to the precise points of law and fact considered in each one of them. After careful consideration of all the statutes and decisions, the decided preponderance of reason and authority seems to us to lead inevitably to these conclusions: (1) That a sentence to a penitentiary, or other prison where hard labor is required, is valid notwithstanding the omission of the words "hard labor" in the statute defining the crime and its punishment; (2) that where the right to sentence to a penitentiary exists the inclusion in the sentence of the words "hard labor" do not vitiate it, although the statute defining the crime and its punishment does not provide for hard labor.

This was the law at the time of the enactment of the federal prison act of 1891. That act embraced nine sections, and, although the fact may be immaterial, the word "penitentiary" was not used therein. The first section authorized the Attorney General and the Secretary of the Interior to purchase three sites and "cause to be erected thereon suitable buildings for the confinement of all persons convicted of any crime whose term of imprisonment is one year or more at hard labor." If it be assumed that this provision was intended as a limitation of the class of prisoners who can be sent to these prisons, there is no basis in law or fact for the contention that the limitation of the right to send prisoners to state penitentiaries only where sentences are for terms of more than one year should be made applicable to this act. The limitation here was to one year or more. In view of the decisions in the Karstendick, Mills, and Pridgeon Cases, it would appear that the power to confine at hard labor did not depend upon the statute which defined the crime and its punishment so providing, nor upon the sentence expressly providing for hard labor. In this view of the case, the sentence in the instant case being for one year would be held to be lawful. However, it is not necessary to limit this decision to that point for the reasons hereinafter stated.

The provisions governing the Atlanta penitentiary are set out in the act of 1901, and so much of the original federal prison act as relates to the Atlanta penitentiary, is limited and defined by the later act. It is therein expressly stated that the United States penitentiary at Atlanta, Ga., shall be carried on in accordance with sections 4, 5, 8, and 9 of the act approved March 3, 1891. If it had been intended that the other sections of the act should govern, it is inconceivable that it would not have been so stated. The expressed inclusion of only certain sections of the act would seem necessarily to exclude other sections not mentioned. This view is strengthened by the fact that the act of 1895 (Comp. St. § 10562) relating to the Ft. Leavenworth penitentiary provides that it should be carried on in accordance with sections 4, 5, 6, 7, 8, and 9, thus including certain sections not mentioned in the Atlanta penitentiary act. In the case of the Ft. Leavenworth penitentiary it has been held by the Circuit Court of Appeals for the Eighth Circuit

in O'Brien v. M'Claughry, 209 Fed. 816, 126 C. C. A. 540, that the provisions of section 1 of the act of 1891 were repealed by the subsequent act of 1895 relating to the establishment of this penitentiary.

It must be remembered that the crime for which the petitioners were convicted is a felony. "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. Other offenses shall be deemed misdemeanors." Criminal Code, § 335 (Comp. St. § 10509). This section was enacted March 4, 1909. At the same time section 338 (section 10512) was enacted, which provides:

"The omission of the words 'hard labor' from the provisions prescribing the punishment in the various sections of this act, shall not be construed as depriving the court of the power to impose hard labor as a part of the punishment, in any case where such power now exists."

When the Criminal Code was enacted the words "hard labor" were omitted from all statutes therein embraced which had previously provided therefor. This, we apprehend, was done in view of the law as determined at the time of the adoption of the Code by the decisions of the Supreme Court, and the statutes already existing. The question of punishment by hard labor had been left almost exclusively to the discretion of the courts. It is true that in some cases it was imperative, but nevertheless the courts had the right to impose hard labor as a part of the sentences in all cases where the discipline of the prison to which they might sentence required it, although not specifically provided for in the statute defining the crime. As a matter of fact, it was so imposed almost indiscriminately. The records show that of the several thousand prisoners now serving sentences for crimes committed against the United States, the vast majority of those confined in state and federal penitentiaries are serving sentences at hard labor for crimes which have never been imperatively so punished. The Criminal Code has abolished hard labor as a part of the necessary punishment for the crimes which it defines by the entire omission of the words "hard labor" from the statutes re-enacted therein. Section 338 of this Code is merely permissive, and was intended to preserve the rights of the courts to require hard labor in their discretion, in all proper cases. This view is strengthened by the fact that section 341 of the Criminal Code (Comp. St. § 10515) after specifically repealing numerous statutes further provided:

"Also all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress, in so far as they are embraced within and superseded by this act, are hereby repealed."

The framers of the Code recognized that, before its adoption, the use of the words "hard labor" in a penal statute had become, as it were, surplusage, and that it was not necessary to provide in separate acts for a punishment that could be imposed by the courts in their discretion. That this was the view of the lawmakers is further emphasized by the fact that in no statute passed subsequent to the adoption of the Code was any crime, however heinous, made in terms punishable by hard labor. Neither the treasonable crime of espionage, nor

the revolting crime of white slavery, was made so punishable by the statutes denouncing these offenses. Since the federal prison act in section 1 provided that the buildings to be erected should be suitable for the confinement of all persons convicted of any crime whose term of imprisonment is one year or more at hard labor, the narrow construction of the act as argued by counsel for petitioners would preclude the sentencing to United States penitentiaries of any person whose crime was not by statute authorized to be "punishable by hard labor." The result of such construction would be that, after all the expenses incurred by the government in providing for these prisons, the courts would be powerless to have their sentences executed in any of them. Neither treason, robbery, perjury, nor other of the most infamous crimes could be so punished.

It must be remembered that a crime for which the punishment is death or imprisonment for more than a year is a felony and not a misdemeanor. Originally felonies were punishable by death, and by forfeiture of one's goods. Later on a distinctive characteristic was that they should be punishable by death or imprisonment in a penitentiary.

Since the act creating the Atlanta penitentiary deals with the treatment of its own prisoners, the government's power to send convicts there is not to be limited by the special statutory enactments relating to state prisons. The humane treatment accorded to prisoners in this penitentiary, where it is provided that they shall have opportunities for recreation, are being taught useful trades, and otherwise cared for both as to health and moral training, furnishes a strong ground for giving liberal construction to the statutes and laws concerning its establishment and operation.

The interests of the government and the welfare of its prisoners both demand that the United States shall not be prevented by unnecessarily restricted construction of custom or statute from using its own instead of state jails and penitentiaries. The effect of such restriction would be to subject unfortunate convicts to the demoralizing conditions that so often exist because of the lack of opportunity to work and to learn useful trades, and because of the unsanitary conditions due to lack of proper buildings which surround so many of the latter institutions. It has come to be universally recognized that labor is ennobling and not degrading, and that to deny a prisoner the opportunity of exercise and labor is demoralizing in the extreme. Any idea that hard labor is cruel and unusual punishment has long since been disproved in fact and should be, and now is, denounced in theory.

The crime for which the petitioners were convicted is made infamous by statute and not by any sentence imposed within the limitations of the law. It is significant that in the act creating the Atlanta penitentiary, not only was no mention made of the length of the term required, but it was expressly provided that the Attorney General should be authorized to transfer in his discretion to this penitentiary such prisoners undergoing sentence of confinement imposed by the United States courts in other institutions at the time of the passage of the act as could be conveniently accommodated therein.

Since the crime for which the petitioners were convicted is a felony

and is liable to punishment at hard labor in the discretion of the court, and is one subject to imprisonment in a penitentiary, and since there is no limitation as to time in the Atlanta penitentiary act, we are constrained to hold that the sentence was in all respects lawful and the petition for discharge should be and is refused, and that the order appealed from should be affirmed.

The petitioners have been in custody pending the consideration of the writs of habeas corpus; therefore, the time of their absence from the Atlanta penitentiary must not be excluded from the computation of the time for serving their sentences, which should expire, notwithstanding

this fact, as provided in the original sentences.

So far as the views herein expressed are inconsistent with our decision in Hickson v. United States, 258 Fed. 867, 169 C. C. A. 587, the latter case must be deemed overruled.

Affirmed.

In re GARDEN CITY PARLOR FURNITURE CO. RUSNAK v. COMMERCE TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.) No. 2610.

 Corporations = 487(1)—Assignment of accounts to secure ultra vires loan by corporation invalid, and accounts not collectible by it.

Assignments of accounts, made in pursuance of a contract for the purchase of accounts which was in fact a loan with the accounts as collateral security, and which loan was void because beyond the powers of the loaning corporation, are themselves void, and do not entitle the corporation to collect amounts of such accounts, even to the extent of reimbursing itself for the money loaned.

2. Equity @=66—Equity does not protect possession wrongfully obtained

from receiver or trustee; who comes into equity must do equity.

Collection of money by the assignee of the accounts of a bankrupt under void assignments, after the receiver in bankruptcy and the trustee were appointed, was wrongfully taking possession of such collections from an officer of the court or from the trustee, and such wrongful possession does not authorize retention of the funds to the extent of the loans to the bankrupt, under the maxim that the trustee, coming into a court of equity, must do equity.

Alschuler, Circuit Judge, dissenting.

Petition to Review and Revise an Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Involuntary proceeding in bankruptcy against the Garden City Parlor Furniture Company, bankrupt. On the finding of the District Court that the Commerce Trust Company was entitled to retain, from amounts received by it on claims assigned by the bankrupt, sufficient sums to reimburse it for money advanced to the bankrupt, with interest, Samuel Rusnak, as trustee in bankruptcy, brings petition to review and revise. Finding reversed, and cause remanded, with directions.

Jacob G. Grossberg, of Chicago, Ill., for petitioner. L. A. Stebbins, of Chicago, Ill., for respondent.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This is a petition to review and revise the finding of the District Court of the Northern District of Illinois in

favor of the respondent upon the following facts:

The Garden City Parlor Furniture Company, an Illinois corporation, was adjudged a bankrupt on an involuntary petition filed April 4, 1916. On April 5th the Central Trust Company was appointed receiver of the estate and assets of the bankrupt. Respondent, a corporation under the general incorporation laws of Illinois, was chartered for the purposes shown in the agreed statement of facts filed in this case and set out hereinafter.

Bankrupt and respondent entered into the following agreement:

"Articles of agreement, entered into at Chicago, Illinois, this 2d day of January, A. D. 1915, between Garden City Parlor Furniture Company, an Illinois corporation, hereinafter designated as first party, and Commerce Trust Company, an Illinois corporation, hereinafter designated as second party, witnesseth, that whereas, the first party is desirous of selling to second party contracts, accounts receivable, and choses of action, hereinafter designated as accounts, evidencing shipments of personal property: Now, therefore, in consideration of the premises, the parties agree as follows:

"First. Second party agrees to buy the accounts belonging to first party which are acceptable to the second party and pay therefor in cash and services the following: Cash, 98 per cent. of the face value (less all deductions taken by the debtor) of all accounts or parts or installments thereof that are paid to the second party within 30 days. On accounts, parts of accounts, or installments not so paid within 30 days, the said 98 per cent, shall be reduced by 1 per cent. for each additional period of 30 days, or a fraction thereof, that such accounts, parts, or installments thereof shall remain unpaid to second party.

"Services.—Second party shall make or cause to be made such credit investigations and audits and take such other steps as it deems necessary for the protection of itself and the first party. First party agrees to and does hereby accept said cash and services as full consideration for the sale of said accounts. Said cash shall be paid at the time following: 76 per cent. of the face value of said accounts upon acceptance of the same by the second party, the balance upon the payment of said accounts, to the second party: Provided, however, that no portion of such balance need be paid so

long as any accounts purchased hereunder shall be in default.

"Second. First party agrees to buy from second party on demand all accounts purchased as aforesaid that are in default and to pay second party

the face value thereof.

"Third. The term default as used in this contract is construed to mean the nonpayment of an account to second party at maturity; insolvency of the debtor; failure or refusal of debtor to accept, receive and retain the property evidenced by such an account. First party agrees to pay to second party all expenses and attorney's fees incurred by second party in and about the

collection of any account in default.

"Fourth. It is agreed that, contemporaneously with the purchase of accounts, first party shall assign and set over to second party such accounts purchased by it, to the end that second party shall be and become subrogated to all of the rights possessed by first party in respect thereto. Second party shall have the right to indorse the name of first party on all evidences of shipment or payment pertaining to accounts purchased hereunder. First party shall make entries upon its books disclosing the sale to second party

of accounts purchased hereunder, and all records pertaining thereto shall

at all times be open to the inspection of the second party.

"Fifth. It is expressly understood that the purchase of accounts by the second party is made upon representations in writing concerning the financial responsibility of the first party, statements of which are to be furnished second party once every calendar year.

"Seventh. This agreement and all its provisions shall inure to and become binding upon the heirs, executors, administrators, successors, and assigns of

the parties hereto.

"In witness whereof, the parties hereto have caused these presents to be executed on the day and year first above written."

On the back of which was printed the following:

"The following guaranty and waiver is to be signed by individuals:

"In consideration of the sum of one (\$1.00) dollar and other valuable considerations paid by Commerce Trust Company to each of the undersigned, receipt of which is hereby acknowledged, they and each of them do hereby jointly and severally guarantee to Commerce Trust Company, its successors or assigns, the full, prompt, and faithful payment, performance and discharge by Garden City Parlor Furniture Company of each of the provisions and conditions of the agreement on reverse side hereof, or any other instrument given or executed in pursuance thereof.

"The undersigned hereby jointly and severally waive all notice or default by first party, and waive notice of acceptance of this guaranty by Commerce Trust Company, its successors or assigns.

"In witness whereof, we have hereunto set our hands and seals this 2d

day of January, A. D. 1915."

On May 22, 1916, the adjudication in bankruptcy was made, and petitioner Rusnak was elected trustee. He filed his petition in the bankruptcy proceeding, in which he alleged that prior to the filing of the petition bankrupt had executed a certain instrument purporting to be an assignment of accounts payable to the said bankrupt aggregating many thousands of dollars to the Commerce Trust Company; that such assignments were merely given as security for certain usurious loans; that respondent had no authority to loan money or receive security therefor; that the assignments were ultra vires and void; that respondent, since the filing of the petition in bankruptcy, had made collections on the void assignments of moneys that were the property of the trustee; that there were certain accounts unpaid, and respondent was proceeding to collect them. Petitioner prayed that respondent be required to make answer to the petition. and be ordered to account for moneys collected under the purported authority of such assignments since the filing of the petition in bankruptcy, and also be required to pay all moneys so collected to petitioner; that respondent be restrained from making further collections.

Respondent filed its answer to the petition, and also filed a cross-petition. The cross-petition prayed for an accounting by the trustee in bankruptcy and by the receiver, and that the trustee in bankruptcy should be enjoined from making further collections.

The following agreed statement of facts presents fully the facts

in this case:

"On January 2, 1916, the Garden City Parlor Furniture Company, an Illinois corporation, entered into a contract with the Commerce Trust Company,

a corporation organized under the general incorporation laws of the state of Illinois (a copy of which contract is hereto attached, marked Exhibit A, and made a part hereof), and pursuant to the terms of said contract the said Garden City Parlor Furniture Company executed various assignments of its accounts receivable to said Commerce Trust Company, as hereinafter set forth, and said Commerce Trust Company paid to said Garden City Parlor Furniture Company certain sums of money therefor, as hereinafter set forth.

"The purpose for which said Commerce Trust Company was formed, as set forth in its charter, was 'to buy and sell choses in action and other personal property of every kind, nature and description; to borrow money, assign, mortgage or otherwise pledge or charge any or all of its property or property rights owned and held by it; to issue corporate obligations and to secure the payment of moneys borrowed; to do a general brokerage and commission business, and to enter into and carry out contracts for all lawful purposes. This statement of purposes shall not include the business of real estate brokerage or banking.

"On the date of the filing herein of the involuntary petition to adjudge said Garden City Parlor Furniture Company a bankrupt, on April 4, 1916, the Commerce Trust Company had in its possession assignments of accounts receivable of said Garden City Parlor Furniture Company, made and delivered in pursuance to the terms of the aforesaid contract, amounting to \$8,602.78 (an itemized list of which is hereto appended, marked Exhibit B, and made

a part hereof).

"In consideration of the assignment of said \$8,602.78 of accounts receivable, the said Commerce Trust Company had paid in cash to said Garden City Parlor Furniture Company before the filing of the petition herein to adjudge said company a bankrupt, pursuant to the terms of the aforesaid contract, 76 per cent. of the said sum, of \$6,538.11. Five per cent. interest on the said sum of \$6,538.11 from April 4, 1916, to March 12, 1917, is \$306.93.

"Subsequent to the filing of said involuntary petition on April 4, 1916, the said Commerce Trust Company has proceeded to collect said accounts receivable and has collected on said accounts the sum of \$5,270.97. (An itemized list, showing the amounts and dates of such collections is hereto appended, marked Exhibit C, and made a part hereof.)

"Said Commerce Trust Company still holds assignments of uncollected accounts receivable amounting to \$3,331.81. (An itemized list of which is

hereto appended, marked Exhibit D, and made a part hereof.)

"The average due date of said collections is July 20, 1916, and interest at 5 per cent. on the aforesaid sum of \$5,270.97 from said date to March 12, 1917, is \$169.84.

"On April 5, 1916, the Central Trust Company of Illinois was appointed receiver for the said Garden City Parlor Furniture Company, and from time to time thereafter debtors whose accounts had been assigned as aforesaid to said Commerce Trust Company remitted moneys due on said accounts to said Garden City Parlor Furniture Company, and said receiver collected and held said moneys so remitted, and refused to turn over said moneys to the Commerce Trust Company.

"Of the aforesaid balance of \$3,331.81 of assignments of accounts receivable. held by said Commerce Trust Company, said receiver has collected \$1,453,86 (an itemized list of which is hereto appended, marked Exhibit E, and made a part hereof), and still holds said amount, less exchange thereon, amount-

ing to \$3.35.

Of the said balance of uncollected accounts receivable the assignments of which are held by the Commerce Trust Company, the trustee herein, Samuel Rusnak, has collected \$40.05, being an account for that amount of M. Kaplan, of Scranton, Pa.

"Subsequent to the filing of said involuntary petition on April 4, 1916, the said Commerce Trust Company has from time to time received remittances from debtors of the said Garden City Parlor Furniture Company, in payment of accounts receivable not owned by said Commerce Trust Company or assigned to it. Said Commerce Trust Company has applied said moneys so received towards the partial satisfaction of the moneys alleged by it to be due from said bankrupt, and as a set-off to the moneys collected as aforesaid by the receiver and trustee herein. The moneys so collected by said Commerce Trust Company amount to \$456.21 (an itemized list of which is hereto appended, marked Exhibit F, and made a part hereof). The average due date of said money so collected is August 4, 1916, and interest at 5 per cent. on said sum from said date to March 12, 1917, is \$13.81."

The referee found that the contract was not, as it purported to be, a contract of sale of accounts, but that it was in fact a loaning contract, and the transactions thereunder were a series of loans, with accounts receivable transferred as collateral security, and that, as loaning transactions, the contract was illegal and ultra vires the Commerce Trust Company. The referee found that the respondent had a right to collect and apply the accounts until the actual advances thereon, with interest at 5 per cent., were repaid to respondent, and that the trustee and receiver should be enjoined from making collections on the assigned accounts until respondent had collected its account in full, and directed the receiver, though not a party, to pay over the money collected by it, with interest thereon, to respondent. The prayer of the trustee was wholly denied, except as to any accounts remaining after respondent's advances, with 5 per cent. interest, were repaid, and relief granted on the cross-petition of the respondent. The District Judge affirmed the referee's findings.

Necessity for discussion of the facts is very much narrowed because of the concession and assertion of respondent that the alleged sale contract was and is void, and because respondent has staked its whole case upon two alleged facts, which it claims were reciprocal, co-ordinate, and contemporaneous: First, respondent paid bankrupt a sum of money; second, bankrupt made and delivered to respondent, and respondent had in its possession at the time of the bankruptcy, various assignments of the accounts receivable of the bankrupt. The conditions present two questions:

[1] (1) Were the so-called assignments valid? While it is probably true that the respondent, at the time it paid the money to the bankrupt, received the various assignments of accounts, yet it seems to have overlooked the fact that it is provided in the agreement that—

"First party agrees to and does hereby accept said cash and services as full consideration for the sale of said accounts."

and:

"Fourth. It is agreed that contemporaneously with the purchase of accounts, first party shall assign and set over to second party such accounts purchased by it."

This binds up the assignment with and makes it a part of the agreement as fully as though its words had been written into the body of the agreement. Consequently the assignments were just as void as the agreement. Although respondent held the assignments, they were as void and useless in its hands as though they had never been written.

[2] (2) Should the rule that he who seeks equity must do equity be applied to petitioner? The trustee's petition was limited solely

to the receivables covered by the purported assignments and uncollected at the time of the filing of petition in bankruptcy. Upon the filing of the petition and the appointment of the receiver, all property rights of the bankrupt passed under the jurisdiction of the court; and when the trustee was appointed the title and right to possession vested in him, and it was at all times after the appointment of the receiver in the possession of the court. This extended to book accounts and receivables. Of the accounts in question under the petition, respondent had no possession at the time of the filing of the petition in bankruptcy. The intention of the bankrupt that it should have them was not the equivalent of possession, and no possession taken after the filing of the petition in bankruptcy could avail respondent. In re Jules & Frederic Co. (D. C.) 193 Fed. 533; Edison Co. v. Tibbetts, 241 Fed. 468, 154 C. C. A. 300; State Bank of Chicago v. Cox, 143 Fed. 91, 93, 74 C. C. A. 285. It not only could not avail respondent anything, but was a wrongful invasion of the rights of the court's officers, which rights the court was bound to protect.

Even if the assignment had been valid, it is conceded that it was only as collateral security and was not a sale, and under such circumstances an attempt to take possession without the consent of the bankruptcy court would be wrongful. One may not take the law into his own hands, and acquire possession by force or by a wrongful act, and then invoke the aid of a court of equity to maintain him in that possession. It would lead to a strange anomaly in the law to hold, upon a petition by the trustee, brought to protect him against the violations of his rights as an officer of the court by the wrongful act of the respondent, that, because the trustee is seeking to protect his rights against such wrongful acts, the court must grant him no relief whatever, but is compelled, under the rule that he who seeks equity must do equity, not only to give the respondent the fruits of his wrongdoing, but as was done in this case, give him affirmative relief by way of injunction against the trustee, and by way of an order upon the receiver, not only to pay over money which the receiver had rightfully collected, but to pay interest thereon as well. In re Grand Union Co., 219 Fed. 353, 135 C. C. A. 237.

The prayer of the trustee in his petition should have been allowed, and it is ordered that the finding of the District Court should be reversed, and the cause remanded, with directions to proceed in harmony with this opinion.

ALSCHULER, Circuit Judge (dissenting). I find myself unable to concur in the conclusion of the majority of the court that the equitable rule that "he who seeks equity must do equity" does not here have controlling application.

It has been definitely determined that transactions such as these, while purporting on their face to be sales of accounts, are in fact loans upon the security of the accounts so purporting to be sold. Apart, therefore, from the question of the power of a corporation

organized under the general corporation act of Illinois to make loans, the transactions here, while purporting to be sales of accounts, are in law loans upon the security of the assigned accounts. But in Illinois any loan of money by such a corporation is ultra vires the corporation, and a void transaction, and cannot as a loan be enforced. Mercantile Turst Co. v. Kastor, 273 III. 332, 112 N. E. 988; Calumet Dock Co. v. Conkling, 273 Ill. 318, 112 N. E. 982, L. R. A. 1917B, 814; North Ave. Bldg. Ass'n v. Huber, 270 Ill. 75, 110 N. E. 312, Ann. Cas. 1917B, 587; Nat'l Home Bldg. & Loan Ass'n v. Home Savings Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245. While money advanced on such an attempted loan may be, with legal interest, recovered back as money had and received (Leigh v. American Brake Beam Co., 205 III. 147, 68 N. E. 713; Brennan v. Gallagher, 199 Ill. 207, 65 N. E. 227), it has been decided in Illinois that its courts will not assist such a loaner in his attempt to realize upon security he may have taken in such a transaction (Calumet Dock Co. v. Conkling, supra; North Ave. Bldg. Ass'n v. Huber, supra). But the Illinois courts have not in respect to such transactions decided against the very generally accepted principle that, where one invokes the aid of a court of equity respecting a given transaction, relief will be granted him only upon condition of his doing equity towards the other party.

The trustee here filed his petition setting forth that the transaction in question was in law a loan of moneys on the security of assigned accounts, but alleging that the transaction was void for lack of power in the loaner to engage therein. The transaction itself, treated as a loan, if carried out according to its terms, would have given the loaner compensation for the use of its money far greater than permitted by the Illinois usury laws. The trustee invoked the aid of the equity (bankruptcy) court to have this contract, purporting to be a sale, declared a loan, and as a loan void under the laws of Illinois, and asked the court to prevent the loaner from claiming or interfering with the assigned accounts, and to restrain the loaner from collecting same and from preventing the trustee's collection thereof, and for an accounting for whatever accounts the loaner

had collected since the bankruptcy.

To my mind this presents a typical case of a party going into equity for relief, and thereby placing himself in position where, in order to obtain it, he must do what is equitable, which, in my judgment, is here nothing less than to repay whatever was actually advanced on the faith of the assignment of these accounts, with 5 per cent. interest, or, what is the same thing, and as decreed by the District Court, to retain the accounts assigned on the faith of the money advanced until the loaner realized thereon the actual advances made, plus lawful interest only, reassigning any accounts then remaining.

It is not important that the Illinois courts would not assist such a corporate loaner at its own first instance to realize on the security taken. In the administration of this equity it frequently and properly happens that the conditions imposed upon the complaining par-

ty, as equitable terms on which only the relief will be granted, are such as neither in law nor in equity would in the first instance be accorded to the opposite party upon his own original complaint. Story on Equity Jurisprudence (13th Ed.) pp. 65-66; Pomeroy on Equitable Jurisprudence, § 386; Broatch v. Boysen, 236 Fed. 516, 149 C. C. A. 568 (8 C. C. A.); Shafer v. Spruks, 225 Fed. 480, 140 C. C. A. 504 (3 C. C. A.); Jenson v. Toltec Ranch Co., 174 Fed. 86, 98 C. C. A. 60 (8 C. C. A.); De Walsh v. Braman, 160 III. 415, 43 N. E. 597; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867; Chambers v. Jones, 72 Ill. 275. A court of bankruptcy is a court of equity in the broadest sense of the term, and, once within its jurisdiction, parties may be compelled to do equitable things, which even chancery courts with their usual powers might not have the right to require. v. Atchison, T. & S. F. Ry., 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729; Atchison, T. & S. F. Ry. v. Hurley, 153 Fed. 503, 82 C. C. A. 453 (8 C. C. A.); In re Chase, 124 Fed. 753, 59 C. C. A. 629 (1 C. C. A.); Conklin v. U. S. Shipbuilding Co. (C. C.) 123 Fed. 913. Under the laws of Illinois choses in action are assignable either absolutely or as security, just as much as are goods and chattels. Chicago Title & Trust Co. v. Smith, 158 Ill. 417, 41 N. E. 1076; Hurd's Rev. Stat. Ill. c. 110, § 18; Hiberian Banking Ass'n v. Chicago, 178 Ill. App. 138; Salt Fork Coal Co. v. Eldridge Coal Co., 170 Ill. App. 268. To my mind the denial here of the application of the rule of doing equity as a condition of granting relief would work as palpable an inequity as for some irresponsible person to go to some mercantile establishment and borrow money on the security of his watch or other chattel, and then, because the establishment happens to be an Illinois corporation, lawfully incapable of making a loan to another, recover back the security without being required as a precedent condition to repay the amount obtained on the faith

manifests the injustice it would entail.

But, beyond the to me clear applicability here of this equitable doctrine, the trustee takes the estate subject to all equities between the bankrupt and others, against which an execution creditor could not have prevailed. Section 47a, Bankruptcy Act; Collier on Bankruptcy (11th Ed.) p. 728; 2 Remington (2d Ed.) §§ 1138, 1270; In re Richheimer, 221 Fed. 16, 136 C. C. A. 542 (7 C. C. A.); In re Pittsburg Big-Muddy Coal Co., 215 Fed. 703, 132 C. C. A. 81 (7 C. C. A.).

of the security. The mere statement of such a case to my mind

Where accounts have been assigned as security for loans an execution creditor of the assignor cannot in Illinois reach the accounts. Hitt v. Ormsbee, 14 Ill. 233; Lay v. Myers, 181 Ill. App. 614. Where the estate comes into bankruptcy, the broad equitable powers of the bankrupt court should in my judgment recognize and protect the equity of one who, on the faith and strength of the supposed security, has enhanced the estate by the amount of the loan to the bankrupt, quite regardless of whether the proceedings in the bankruptcy court respecting the transaction were first instituted by

the one party or the other. Hurley v. Atchison, T. & S. F. Ry., supra; Atchison, T. & S. F. Ry. v. Hurley, supra; In re Chase, supra; Conklin v. U. S. Shipbuilding Co., supra.

I am of the belief that substantial equity was effected by the

District Court's decree, and that it should stand.

ERHARDT v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)

No. 2672.

1. Criminal law \$\insigm\$1169(1) 1172(1)—Sharp conflict as to uttering words charged requires particular freedom from error.

Where there was a sharp conflict in the evidence as to the utterance by defendant of words charged to be violation of Espionage Act, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), it is particularly essential that there be freedom from error in the admission and rejection of evidence, and in charging the jury, in order to sustain the conviction.

2. Criminal law 361(1)—Exclusion of explanation of damaging evidence

and attitude toward war held error.

In a prosecution for violation of Espionage Act, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), where evidence was admitted that a newspaper containing a picture of the Kaiser was kept in defendant's house, and the court charged the jury could consider it as tending to give character to the man and to the statements alleged to have been made by him, it was error to exclude evidence that the paper was given to defendant's wife to read with a request that she keep it for the donor and that defendant had supported the war by money contributions.

3. Criminal law 5-761(18)—Charge held erroneous as assuming proof of

government's case.

In a prosecution for violation of Espionage Act, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), where there was a sharp conflict in the evidence as to the statements uttered by accused, a charge referring to the purpose of the Espionage Act, and stating that the purpose of prosecuting accused was to punish film for having violated the act, was erroneous, as assuming that the government's case was proved.

4. Criminal law @==823(2)—General statement held not to cure assumption of guilt.

Where, at the conclusion of the court's charge, accused excepted to the portions of it assuming his guilt, a statement that the facts were for the jury, and that the court assumed nothing to be true from the evidence, was insufficient to neutralize the necessarily prejudicial effect of the main charge, which assumed defendant's guilt.

In Error to the District Court of the United States for the Eastern District of Illinois.

William Erhardt was convicted of violating the Espionage Act, and he brings error. Reversed and remanded.

T. M. Webb, of East St. Louis, Ill., for plaintiff in error. James G. Burnside, of Vandalia, Ill., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. Erhardt was indicted for violation of section 3 of the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c),¹ was convicted and sentenced to 3 years' imprisonment and \$500 fine. He was born in Germany, came here about 40 years ago at the age of 19, and was naturalized in 1886. For more than 25 years last past he lived in East St. Louis, married, raised his family, and apparently had acquired considerable property. Next to his own home he had a four-apartment building, one apartment of which he rented to one Barner. On the evening of January 1, 1918, Barner and wife and their niece, and one Aydt, a roomer of theirs, went over to Erhardt's to spend the evening. Other neighbors were present, 11 in all. All were in Erhardt's two front rooms, which were connected by double doors. It was on this occasion that the offense was alleged to have been committed.

For the prosecution, Barner and Aydt testified that during the evening, in course of conversation with them, Erhardt uttered the words for which he was indicted, substantially as follows:

"We will never win the war. The Kaiser is a better man than President Wilson ever was, and after the war the American people will do as the Kaiser wants them to."

Aydt also testified to a conversation with defendant in October or November, 1917, in which Erhardt made similar remarks; and Barner testified that in January or February, 1918, he saw a newspaper containing a picture of the Kaiser, folded so that the picture showed, sticking under a clock in defendant's kitchen; that he protested to the defendant against the picture being there, telling him that some one would take it down; and that defendant answered that it was his property and he would like to see any one take it down.

Police officers, who arrested defendant late in March, 1918, testified that the picture was there when they made the arrest. The paper containing the picture was admitted in evidence, and witness Ziegler testified that the paper—a copy of the Christian Science Monitor—was given by him to Mrs. Erhardt. Erhardt flatly denied making the remarks for which he was indicted, and 5 others who were of the party on the night of January 1, 1918, testified that they did not hear any such words spoken, and that there was no "war talk" during the evening, which was devoted largely to music.

Several witnesses for the defense testified that Barner and Aydt were friendly toward Erhardt until some time in February or March, 1918, when differences and hard feelings arose between them over the decoration of Barner's dining room.

1"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

[1, 2] While the entire record appears but meagerly to establish the offense of "willfully obstructing the recruiting or enlistment service of the United States to the injury of the service or of the United States," the sharply contradictory evidence made it particularly essential that in the admission and rejection of evidence, and in charging the jury, there be freedom from error. We are of the opinion that error was committed in the court below in excluding evidence concerning the newspaper containing the picture of the Kaiser. As to the newspaper the court charged that—

"The jury can only consider this exhibit as tending to give character to the man and as characterizing the statements alleged to have been made by him."

"Character," as here employed, obviously refers to Erhardt's character as a German sympathizer or well-wisher, as bearing in turn on his purpose or intent to bring about that which is forbidden by the Espionage Act (40 Stat. 217). But the newspaper and the circumstances of its finding, and conversations concerning it, having been shown by the government, defendant should have been given opportunity to show fully how it came into his possession, or into his home, and the reason for keeping it there, and to testify directly as to whether he was a German sympathizer or well-wisher. But this right was denied him. For instance, witness Ziegler, after testifying that he got the paper from the Swann Hotel in East St. Louis and gave it to Mrs. Erhardt, was asked:

"What was said about the paper when you delivered it to Mrs. Erhardt; that is, in the presence of Mr. Erhardt?

"Attorney for the Government: Object to it.

"The Judge: Objection sustained.

"Attorney for defendant: I offer to show your honor that he delivered it to Mrs. Erhardt, and requested that Mrs. Erhardt read it and keep it for him, and he would call for it.

Attorney for the Government: The government objects.

"The Judge: That would not be proper."

On direct examination defendant was asked:

"I will ask you if at any time you permitted or allowed that picture to remain in your house for the purpose of any interest or sentiment in favor of the German government or against the American government? (Objection was made and sustained.)

"Was that picture kept there in the house through any feeling of antagonism to the American government or any favor to the German government? (Objection and same ruling.)

Defendant was also asked:

"Did you have at any time, or since the war, or have you now, any feeling of kindness toward the German government or the Kaiser? (Objection sustained; exception.)

"I ask you if you have contributed your money to the care of the American army. (Objection sustained; exception.)"

Assuming the pictures and the conversations testified to were admissible for the purpose in the charge stated, it was error to exclude the offered evidence explanatory of his possession of the picture or its presence in his house, and of his attitude toward the subject, bearing

directly on the "character" of the defendant in respect to the matters then under inquiry.

[3] In referring to the Espionage Act, the charge states:

"It is passed for the purpose of stamping out disloyalty in this country;

* * and the purpose of prosecuting this man, who is charged with the violation of this law, is to punish him for having violated it, and to prevent others from engaging in similar utterances."

[4] Without expressing opinion as to the correctness of this definition of the purpose of the act, it is apparent that the words italicized constitute error, because they assume that the government's case was proved. At the conclusion of the charge defendant excepted to such "portions of the charge which assume that the statements alleged in the indictment to have been made by the defendant were in fact made by him." Whereupon the court added:

"No; the court has told the jury that they were the judges of the facts in the case, and the credibility to be given each witness, and that the court itself is not concerned with the facts, and that the court assumes nothing to be true from the evidence, but these matters are entirely for the consideration of the jury."

It is not believed that this further statement was sufficient, under the peculiar circumstances of this case, to neutralize the necessarily prejudicial effect of the other part of the charge.

The judgment is reversed, and the cause remanded.

CLARK v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 12, 1920.)

No. 3375.

[Ed. Note,—For other definitions, see Words and Phrases, First and Second Series, Record; Voucher.]

Larceny \$\infty\$8—Pay check held not to have passed from government's possession when taken; "delivery."

Where mail carrier's pay check, at the time of the taking thereof for which defendant was prosecuted under Criminal Code, § 47 (Comp. St. § 10214), had been delivered by the government to the post office superintendent, to be handed, with others, to various mail carriers on their signing the pay roll, it had not been delivered nor had it passed out of the possession of the government; "delivery" being transmitting the

possession of a thing from one person into the power or possession of another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Delivery.]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Tennessee; Edward T. Sanford, Judge.

Walter W. Clark was convicted of an offense, and brings error.

Affirmed.

T. D. Fletcher, of Chattanooga, Tenn., for plaintiff in error. W. T. Kennerly, U. S. Atty., of Knoxville, Tenn.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The plaintiff in error was convicted in the District Court of the United States for the Eastern District of Tennessee, upon the first count in an indictment charging him with unlawfully and feloniously stealing or purloining a certain voucher or pay check No. 9191, dated November 15, 1918, amounting to \$44.80, and drawn upon the Hamilton National Bank in favor of A. N. Fears, a mail carrier in the employ of the United States, and working in the city of Chattanooga, and out of the Chattanooga post office. Said check being signed by T. Charlton Howell, postmaster, and countersigned by John C. Shelton, assistant postmaster, at Chattanooga, Tenn., which voucher or check at that time had not been delivered to the payee named therein, but was then and there the property of the United States, and in its possession.

[1] The plaintiff in error relies for reversal upon two assignments of error: (1) There was no evidence to support the verdict. (2) The court erred in failing and refusing to direct the jury to return a verdict of not guilty.

This first count of the indictment charges an offense under section 47 of the Criminal Code of the United States (Comp. St. § 10214), which in part reads as follows:

"Whoever shall embezzle, steal or purloin any money, property, record, voucher or valuable thing whatever of the moneys, goods, chattels, records, or property of the United States shall be fined," etc.

It is contended on the part of the plaintiff in error that:

"An unindorsed and undelivered check has no other value to the drawer than a blank check would have, unless such special value is alleged and proved, and the obligation expressed on such check is not the subject of larceny."

This contention might obtain if it were necessary or proper to apply the common-law definition of larceny to the crime charged in this indictment. In the case of U. S. v. Davis, 5 Mason, 356, Fed. Cas. No. 14,930, the indictment charged a larceny under section 16 of chapter 9 of the Laws of 1790 (1 Stat. 112), which provided that:

"If any person * * * shall take and carry away, with an intent to steal or purloin, the personal goods of another."

In that case it was properly held that the common-law rule of interpretation should be applied; that:

"In the strict sense of the common law, personal goods are goods which are movable, belong to, or are the property of some person and which have an intrinsic value; that bonds, bills, and notes which are choses in action, are not esteemed by common law goods whereof larceny may be committed."

But, even under the common-law rule, conviction would be sustained if the paper itself had any intrinsic value, no matter how small that value might be. This question is fully discussed and authorities cited in the case of Jolley v. U. S., 170 U. S. 402, at page 407, 18 Sup. Ct. at page 626, 42 L. Ed. 1085. In the case of Keller v. U. S. (C. C. A. 7) 168 Fed. 697, 94 C. C. A. 368, it was held that six blank checks, with stubs attached, each of the value of one cent, constituted property, the subject of larceny, under Revised Statutes, § 5456.¹ Section 5456 of the Revised Statutes is now section 46 of the Criminal Code, which in part reads as follows:

"Whoever shall rob another * * * of, personal property belonging to the United States or shall feloniously take and carry away the same, shall be fined," etc.

Section 47 of the Criminal Code relates to the same subject-matter and defines a crime kindred in its nature to the crime defined in section 46, and is therefore subject to the same construction, as to the value of the thing taken, as the construction given section 46 in the case of Keller v. U. S., supra. The fact that time and labor had been expended upon this check by an officer of the United States, at the expense of the United States, in preparing it for the purposes for which it was intended, would certainly not make the check less valuable to the United States than a blank check, nor would the government be required to show that it was of the value of the amount written therein. If it was of any value whatever to the United States, then, in that respect, the verdict of guilty would be fully sustained by the evidence

However, counsel for plaintiff in error insists that, even if this check had an intrinsic value, that value was so trifling that the punishment inflicted is so severe as to be wholly out of proportion to such a trivial offense. The intrinsic value of the check before a delivery is of comparatively small importance in determining the criminal intent or the moral turpitude involved in the commission of the crime charged in the indictment. This defendant, if he stole the check, was not stealing it for the value of the paper upon which it was written. He was stealing it for the purpose of unlawfully securing the sum of \$44.80, that did not belong to him, and, even if it were necessary to have recourse to the intrinsic value of the paper upon which the check was written as a basis of this prosecution, its value is by no means the measure of his guilt. In many cases of a seemingly trivial nature, the evidence may disclose a criminal intent and purpose, demanding the severest penalty authorized by the law for such offenses. In other cases, appearing by the indictment to be of a much more serious nature, there may be such at-

¹ Comp. St. § 10213.

tending circumstances as would go far in extenuation of guilty purpose on the part of the offender. In all cases it is not only the right, but the duty, of the court to take into consideration all the facts and circumstances surrounding each criminal transaction, in order to determine the degree of the guilt of the accused, and the punishment that should be inflicted.

It is for this reason that the criminal statutes fix the minimum and maximum punishment for specific crimes and offenses, and leave to the discretion of the court, subject to these limitations, the sentence to be imposed. In this particular case the fixing of a penalty upon the sole consideration of the intrinsic value of the paper upon which this check was written would practically be a miscarriage of justice. But this conviction is not necessarily predicated upon the intrinsic value of the paper upon which the check is written. Section 47 of the Penal Code, under which the first count of the indictment is framed, is far wider in its scope than either section 46 of the Penal Code or the common-law crime of larceny. This section makes it unlawful to steal or purloin, not only the personal goods or property, but also includes within its terms records, vouchers, or valuable thing whatever.

This check is signed by the postmaster and countersigned by the assistant postmaster. It not only authorized the bank to pay, out of the funds of the United States on deposit in that bank, the amount named therein to the mail carrier in whose favor it was drawn, but in effect certified the amount due him from the United States for his services. It is not substantially different from a separate pay voucher, signed and attested by the postmaster and assistant postmaster, that might be presented by the mail carrier at the window of the post office cashier for payment. To all intents and purposes it is a "voucher," within the meaning and intent of section 47, of the Penal Code.

Not only is it a voucher, but it is in fact, and was no doubt intended to be, a record of payment by the United States to this mail carrier of the amount due him. In the ordinary course of business, it evidenced that payment as fully as any other record could evidence it. It was all-sufficient as a record of payment, without the receipted pay roll. That it had not yet been delivered to the payee, or canceled and returned to the bank, cannot change its character in that respect, if in fact it was intended, at the time it was written to serve the dual purpose of youcher and record of payment.

The charge of the court in reference to the nature of this paper, whether voucher or record, or both, is not before this court, and, if it were, no exceptions were taken to the charge. The indictment designates this paper as a "voucher or pay check," but without prejudice to the defendant this may be treated as mere surplusage, in view of the fact that the indictment fully describes the paper that he is charged with stealing or purloining from the United States, if the paper so described in detail comes within the meaning of any other term or designation used in the statute defining the offense.

[2] It is further contended on the part of the plaintiff in error that

the check, when taken by him, was not in the possession of the United States, but had already passed into the possession of the payee named therein. The facts in relation to this question are not in dispute. November 16, 1918, was the regular semimonthly pay day of the postal employés in the Chattanooga postoffice. These payments were all made by checks drawn against government funds in the Hamilton National Bank of Chattanooga. For many years it had been the custom of the postmaster and assistant postmaster to place these checks in a book containing the name and amount due to each employé in a room in the postoffice, and upon a table near to the desk of the superintendent in charge of these employés. These checks remained in the actual custody and possession of the superintendent, and completely under his control, until an employé entered the room, signed the payroll, and took possession of his own check.

On this particular day these checks were placed on the table in the superintendent's room, about 2 o'clock in the afternoon. The plaintiff in error, Clark, who was also an employé, came in, receipted for his own check, and received the same. When Fears applied for his check, about 5 o'clock in the evening, it could not be found among the other checks. There is evidence in this record that this was presented by Clark to the bank of D. B. Loveman & Co., and that he, in the presence of the paying teller, indorsed the name "A. N. Fears" upon it, and received from her full payment of the amount written therein. There is also further evidence tending to establish that this signature is a forgery, and that it is in the handwriting of

Clark.

It is claimed that the placing of these checks upon the table near the desk of the superintendent of employés, and under his immediate supervision and control, constituted a delivery to each employé of his own particular check. This contention overlooks the evidence of the assistant postmaster that:

"No employé was allowed to take his own check without signing the pay roll, receipting therefor."

It is apparent from this and other testimony that the postmaster had not parted with the possession of these checks, that they were still in his possession and under his control and that he had a right to remove any one or all of them from this table for any reason, or for no reason whatever. The fact that each employé was required to sign this pay roll before he could receive his check was a condition precedent to the delivery of the same to him. There could be no constructive delivery until this condition had been complied with.

Delivery is defined in Bouvier's Law Dictionary, as-

"Transmitting the possession of a thing from one person into the power or possession of another."

There is little chance to quarrel with this definition. Applying this definition to this case, it is clear that this check had not passed into the power or possession of A. N. Fears, in whose favor it was written, but still remained in the possession of the postmaster, who not only had the power, but the right, to take it from this table and destroy it

at will, or, if he chose, issue another one for an entirely different amount, if perchance any error had occurred in determining the correct amount due the carrier, or the check or voucher had inadvertently been written for the wrong amount.

Judgment affirmed.

KENMONT COAL CO. v. PATTON.

(Circuit Court of Appeals, Sixth Circuit. November 10, 1920.)
No. 3381.

In reviewing a denial of motion to peremptorily direct verdict for defendant, the case must be considered in its aspect most favorable to plaintiff.

2. Master and servant \$\infty\$=286(19)—Mine operator's negligence in providing working place question of fact.

In action for death of coal miner by falling slate, held, that it could not be said, as a matter of law, that the portion of the "breakthrough" between one entry and another, in which decedent was when the slate fell, was not part of the working place provided for decedent.

3. Master and servant € 107(2)—Duty to furnish safe place not confined to precise spot.

A coal-mining company's duty with respect to furnishing an employe a safe place to work *held* not necessarily confined to the precise spot in which he was to work.

- 4. Master and servant \$\iff 103(1)\$—Duty to furnish safe place nondelegable.

 A master owes a servant the nondelegable duty of reasonable care to furnish him a reasonably safe place to work.
- 5. Master and servant \$\iiin\$231(1)—Servant may presume performance of master's duty.

A coal company's employee, assisting in breaking up slate and removing it, could properly act on the presumption that the company's duty as to furnishing a safe place to work had been performed, unless he knew or by the exercise of care should have known of defect and danger.

6. Master and servant €=107(5)—Mine owner's duty to make working place safe stated.

The common-law rule, which relieves a mine owner from the obligation to provide his employee a safe place to work, and throws upon the latter the responsibility of looking out for his own safety, where he is engaged in "making his own place," and where the character of the work is such that the condition of the place as respects safety necessarily changes as the work progresses and by reason of such work, has no application where the work in which the employee is engaged does not necessarily change the character of the place as respects safety.

Master and servant \$\infty\$=243(12)—Nonobservance of mine owner's rules no defense in view of statute.

In view of Ky. St. § 2726, subd. 4, requiring the mine foreman to see that the working is safe, rules casting on employees the duty of examining tools, equipment, etc., cannot be invoked by the employer to support its contention that it was the duty of deceased, killed by falling slate, to examine carefully "for dangerous top," where it had notice that the place to which it had sent him not as trackman, or to carry on mining operations therein, but to remove fallen slate, was apparently dangerous.

In Error to the District Court of the United States for the Eastern

District of Kentucky; Andrew M. J. Cochran, Judge.

Action by Charles Patton, administrator of Kinney Patton, deceased, against the Kenmont Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

B. R. Jouett, of Winchester, Ky. (Miller & Craft, of Hazard, Ky.,

on the brief), for plaintiff in error.

Bailey P. Wootton, of Hazard, Ky. (R. C. Musick, of Jackson, Ky., and Wootton, Reeves & Wooton, of Hazard, Ky., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Defendant in error, as plaintiff, recovered verdict and judgment against plaintiff in error for damages on account of the death of decedent, caused by the falling of a large block of slate from the roof of defendant's Kentucky coal mine, in which decedent was employed. The substantial questions presented relate, first, to the trial court's refusal to direct verdict for defendant, and, second, to its failure to give a certain request to charge.

1. There was no error in overruling the motion to direct verdict for defendant. It appeared that on the afternoon before the injury a miner named Logan, who was working in the so-called Logan entry, called the attention of the assistant mine foreman to the condition of the slate in the roof of that entry and of the "breakthrough" between the Logan and another entry. Some slate had previously fallen, and a "horseback" of slate in the roof of the breakthrough and "feathering off" into the entry "looked wrong." Logan told the assistant foreman he would feel safer if the roof of both the breakthrough and the entry at the place in question were propped up. The assistant foreman, after inspecting the roof, promised to have it propped up right away. This was not done. Before work began the next morning a large block of slate fell from the roof in the lower part of the entry. The foreman directed Logan to break up the slate and remove it, and directed decedent, who was a trackman working in another part of the mine, to assist Logan in so doing. The rock, when broken up, was to be put in the breakthrough. While on this assignment, and when just outside the narrow entry, and inferably just within the "breakthrough," the "horseback" fell upon and killed decedent. Defendant denies that it was negligent in not making the roof safe, and asserts that it was decedent's duty, and not that of defendant, to see that the breakthrough was safe before entering; also that decedent was guilty of contributory negligence in failing so to do, and likewise assumed the risk of falling slate. These defenses are largely based upon the proposition that the breakthrough was not decedent's "place of work."

Considering, however, the case in its aspect most favorable to plaintiff, as we must in reviewing a denial of a motion to peremptorily direct verdict for defendant, it cannot be said, as matter of law, that the portion of the breakthrough in which decedent was when the slate fell

was not part of the working place provided for decedent. The entry was only a few feet wide. It extended longitudinally only about six feet below the lower limit of the breakthrough. The fallen rock lay on the entry floor, just below the lower line of the breakthrough and close upon its entrance. Decedent had attempted to break up the slate with a hammer, but said he could not break it. Logan said he believed he could, took the hammer out of decedent's hand, took the wedge, raised a "powerful heavy hammer" to drive it, when the horseback fell and crushed decedent. It was fairly open to inference by the jury from the evidence and existing situation that decedent had reasonably and naturally, in the exercise of due care, stepped within the confines of the breakthrough but a short distance, perhaps only a couple of feet or so, to avoid being hit by flying pieces of slate, or possibly by Logan's hammer, or perhaps otherwise in the course of his duty. Defendant's duty with respect to furnishing decedent a safe place to work was not necessarily confined to the precise spot in which decedent was to work. Fluehart Co. v. Elam, 151 Ky. 47, 52, 151 S. W. 34.

In view of these possible inferences, defendant was not entitled to a directed verdict. Under the common law, as administered by both federal and state courts, defendant owed decedent the nondelegable duty of reasonable care to furnish him a reasonably safe place to work. Dasher v. Hocking Mining Co. (C. C. A. 6) 212 Fed. 628, 631, 129 C. C. A, 164, and cases cited. The evidence amply supported a conclusion of defendant's negligence. Defendant being so bound, decedent could properly act on the presumption that the duty had been performed, unless he knew, or by the exercise of care should have known, of the defect and danger. Dasher v. Hocking Mining Co., supra, 212 Fed. at page 631, 129 C. C. A. at page 167, and cases cited; Hazard Coal Co. v. Wallace, 181 Ky. 636, 638, 205 S. W. 692; Mason, etc., Co. v. Kennison, 134 Ky. 844, 850, 121 S. W. 999. The testimony is not such as to show contributory negligence or an assumption by decedent of the risk, as matter of law. The common-law rule, which relieves a mine owner from the obligation to provide his employee a safe place to work, and throws upon the latter the responsibility of looking out for his own safety, where he is engaged in "making his own place," and where the character of the work is such that the condition of the place as respects safety necessarily changes as the work progresses and by reason of such work, has no application where the work in which the employee is engaged does not necessarily change the character of the place as respects safety. Dasher v. Hocking Mining Co., supra, 212 Fed. at page 632, 129 C. C. A. at page 168, and cases cited; Hazard Coal Co. v. Wallace, supra, 181 Ky, at page 638. 205 S. W. at page 693; Evans Co. v. Ball, 159 Ky. 399, 406, 407, 167 S. W. 390.

The Kentucky statutes have not relaxed these rules as applied to the instant case. Subdivision 4 of section 2726 of the Kentucky Statutes expressly makes it the duty of the mine foreman or his assistant to visit and examine every working place in the mine not less than twice each week while the mine is in operation, to direct and see that every working place is properly secured by props or timber, and that no per-

son is directed to work in an unsafe place unless for the purpose of making it safe. He is also required to see that the workmen are provided with sufficient props and timbers, suitably cut, and to deliver them to the working place when ordered or selected by the workmen, as specified in the mine rules and in another subdivision of the same statute.

The questions of defendant's negligence, as well as of decedent's contributory negligence and assumption of risk, were at least for the jury's consideration. That is to say, neither question can, as matter

of law, be answered in defendant's favor.

The fact that the jury was instructed that, as matter of law the place within the breakthrough where the accident occurred was part of decedent's place to work, cannot help defendant; for no exception was taken to the charge of the court in that respect, and the failure to

except was not the result of inadvertence.

[7] 2. The request to charge whose refusal is complained of would, if given, amount to a peremptory instruction that defendant would not be liable if its rules numbered 2, 7, 15, and 17 were in effect, and if decedent failed, upon entering the place where he was injured, to carefully examine it "for dangerous top," or if he failed from time to time during the progress of the work to examine his working place, or the top of it, to see that it was not becoming unsafe, and if, but for decedent's failure in either of these respects, he

would not have been injured. This instruction was properly refused. Rule 2 has no apparent pertinency to the situation presented. The same is true as to No. 15, which relates to the duties of trackmen. Decedent was not acting as a trackman in doing the work in question. He was called from his duties in another part of the mine to do labor of an entirely different character. Rule 7 also has no pertinency, for it relates to the duty of workmen to take down all loose or dangerous slate, or to otherwise make the roof safe by properly timbering it "before commencing to mine or load coal." Decedent was not engaged in that occupation. Rule 17 declares it the duty of all employees to use the utmost care to avoid injuries to themselves and others, and to see that all tools, machinery, appliances, and equipment with which they have to deal in the performance of their duties are kept in safe condition or repair, and in case they discover any of them to be out of repair or in unsafe repair, they should render them safe, and if unable to do so report the defect to the mine foreman or his assistant. Obviously, this rule has no pertinency to the instant case, except so far as it may relate to the propping up of the roof. It is plain that the instruction asked for, so far as it related to that subject, was properly rejected, in view of the requirements of subsection 4 of section 2726 of the Kentucky Statutes, to which we have already referred. Defendant being charged with the statutory duty referred to, having notice that the place to which decedent was sent was apparently dangerous, and having sent him there upon a special mission, not as a trackman or to carry on mining operations therein, but merely to perform that special mission, cannot, by means of the rule in question, evade its responsibility to exercise care for decedent's safety by throwing upon him the duty of protecting himself against its own negligence.

The judgment should be affirmed.

RAYDURE v. LINDLEY et al.

(Circuit Court of Appeals, Sixth Circuit. November 3, 1920.)

No. 3389.

1. Appeal and error \$\infty\$=1096(3), 1199—Injunction in decree cannot, after affirmance, be changed by trial court, nor its correctness reviewed on second appeal.

In suit by senior against junior oil lessee, the final decree, enjoining defendant, who had placed on the premises oil-drilling machinery, tanks, etc., after complaint had been filed, from doing any work on the land, except what was "necessary for the removal of machinery, equipment, and material placed by him thereon which has not been set up or placed upon said lease for use in operating it," was an injunction against the removal of any equipment or material placed by defendant thereon which had been set up or placed for use in operation, and, the effect of affirmance being to affirm the decree in all its parts, it was not thereafter within the power of the trial court to vacate or modify this injunction in further proceedings in the same cause and based upon substantially the same foundation, such as a so-called amended and supplemental answer and cross-bill; nor would the appellate court upon second appeal be justified in considering as still open on such appeal the correctness of such injunction, the point, although necessarily involved in the first appeal, having been waived by failure then to present it, and being necessarily covered by the first affirmance.

2. Mines and minerals \$\iiin\$ 80—Junior oil lessee held not entitled to compensation for drilling, etc.

Notwithstanding Ky. St. § 3728, allowing compensation for improvements made in good faith by defeated occupant, in action by senior against junior lessee of Kentucky oil lands, the defeated junior lessee would not be awarded compensation for drilling done after he forcibly took possession, where, because of evidence that, on account of the controversy and the junior lessee's possession, the senior lessee had lost a sale and thereby a then realizable profit many times the cost of drilling the wells. it was not clear that any net benefit to the senior lessee resulted from the junior lessee's entire course of conduct, of which the drilling formed only one part, and all of which was to be considered in determining the question of benefit.

Appeal from the District Court of the United States for the East-

ern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by John W. Lindley and others against Winfield S. Raydure. From a decree denying defendant relief on an amended and supplemental answer and cross-bill, filed after affirmance of final decree for plaintiffs, defendant appeals. Affirmed.

Ed. C. O'Rear, of Frankfort, Ky. (W. G. Dearing, of Frankfort, Ky., on the brief), for appellant.

A. R. Burnam, Jr., of Richmond, Ky., for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. This is the second time this case has been in this court. It involves the conflicting claims of two oil leases covering the same property. The lessee under the junior lease obtained possession. The other lessee, the one under the senior or bottom lease, brought this suit, which was essentially an action of ejectment, although brought upon the equity side of the court in analogy to the Kentucky practice. Upon the former appeal, reported in 249 Fed. 675, 161 C. C. A. 585, we held that the bottom lease was good, and affirmed the decree by which Raydure had been directed to turn the property over to Lindley. Raydure then filed in the court below a pleading which he called an amended and supplemental answer and cross-bill, in which he asked that he be permitted to remove those items of personalty which he had put upon the property and which were removable, and that he have compensation for his expenses put upon the property in drilling wells, which wells were said to increase the vendible value of the lease by at least as much as they cost. The District Court denied any of this relief to Raydure, and he appeals.

[1] His claim to relief has reference to three classes of items; The first consists of those appliances put upon the surface of the ground and only temporarily and perhaps indirectly attached. Of this class, the wooden tanks standing upon the surface of the ground and not connected thereto, except by piping, may be taken as typical. The second class consists of items more directly attached, but capable of removal without serious injury to the realty. The well casings and the well tubing are both of this class, although they differ in the degree of the facility in which they can be harmlessly removed. The third class consists of the items of expenditure which are represented only by the supposedly improved condition of the leasehold in permanent respects—as the cost of drilling

The first two classes, for the purpose of this opinion, may be considered together. Under the terms of both top and bottom leases, and by prevailing customs, he had the right as against the lessor to remove all these items; as to some, absolutely, and as to some, with conditions. The theory under which they were held to have passed from the ownership of the lessee who installed them to that of the lessee whose title prevailed is that they had become united to and merged in the leasehold or the operation, and so had lost the character of separable personalty. We do not have occasion to pass upon Raydure's challenge of this theory, because, for the support of this part of the decree below, there is another reason, ample in itself.

wells.

In the original case, Lindley's complaint prayed an injunction to prevent Raydure from going upon the premises for the purpose of drilling or removing oil or gas, and from obstructing Lindley in his production of oil and gas therefrom, and also prayed a decree that Lindley be adjudged the exclusive owner of the rights in controversy. This complaint was filed before Raydure had put upon the property any of the items now in dispute. Raydure, by his answer

and cross-bill, claimed to be the lawful owner of the rights in question, and that he had the exclusive right at all times to enter said premises for the purpose of drilling, and the exclusive right "to erect, maintain, operate and remove all buildings, * * * structures, pipe lines, machinery * * * erected upon or placed on said land by him," and he prayed that his title and possession be quieted. This litigation occupied about a year, during which period Raydure installed the items and incurred the expenses now involved. By the final decree in the case, it was adjudged that Raydure and his employees be perpetually enjoined from—

"extracting any oil or gas or doing any work upon the lands hereinafter described, other than such as may be necessary for the removal of the machinery, equipment and material placed by him thereon which has not been set up or placed upon said lease for use in operating it."

This was plainly an injunction against the removal of any equipment or material placed by Raydure on the land, which had been set up or placed for use in operation, and the injunction, therefore, reached and covered both the first two classes of items above specified. It was the apparent theory of the decree, as it is of the later order now appealed from, and by analogy to the rights of conflicting claimants in the realty, that any equipment which had been set up or placed for use in operation had become attached to, and merged in, the leasehold interest, and should go along with it to the successful contestant, because it had become a part of the same unit. Not only is this the certain meaning of the decree, but Raydure did not overlook or misunderstand the effect of the decree in this particular. One of his assignments of error upon the former appeal challenged the injunction restraining him from "removing or in any manner interfering with the machinery or appliances used in drilling for, extracting or storing oil or gas"—though this assignment was not specifically urged in this court. The effect of the decree in this court was to affirm the decree below in all its parts, and it was not thereafter within the power of the trial court to vacate or modify this injunction in further proceedings in the same cause and based upon substantially the same foundation. Bissell Co. v. Goshen Co. (C. C. A. 6) 72 Fed. 545, 19 C. C. A. 25; Eastern Cherokees v. U. S., 225 U. S. 572, 582, 32 Sup. Ct. 707, 56 L. Ed. 1212.

It is sought to avoid this situation because a later paragraph of the decree appointed a receiver to hold and operate the property pending the appeal, and provided that Raydure pending the appeal—"shall not remove any machinery, equipment, or material from the above described leases during the pendency of such appeal, which may be necessary to such receiver in carrying out the order of his appointment."

It is suggested, rather than urged, that this paragraph made the earlier and absolute injunction contingent upon the further order of the court eventually to be made in the receivership matter. If the two paragraphs were inconsistent, there might be room for this claim; but there is no inconsistency. The decree as a whole recognizes that the equipment and materials, brought upon the premises

by Raydure, were at that time of two classes: That which had been placed for use in operation, and that which had not been so placed. The earlier and general injunctional provision did not prevent Raydure from removing the latter class of items. The later paragraph provided that he must not remove even these, if the receiver should

need them for his temporary use.

We do not overlook that, as we have construed the decision of the Supreme Court in Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152 (see Chesapeake Co. v. McKell, 209 Fed. 514, 516, 126 C. C. A. 336), the appellate court upon a second appeal is not so absolutely bound by its first decision as the law of the case as the trial court would be; but this would not justify us in considering as open on the second appeal a point which, though necessarily involved upon the first appeal, had been waived by the failure to present it, and which had necessarily been covered by the former decree of affirmance.

[2] From these considerations, it follows that, in so far as the decree now under consideration confirms Lindley et al. in the undisturbed possession and use of the class of property of which the surface tanks are typical, it must be affirmed. The claim for the cost of drilling wells, as an improvement added to the value of the property, stands upon a different basis, since it is not necessarily concluded by the former decree, and is made by analogy to the claim of the defeated contestant as to a real estate title, which is often first formulated after the main controversy is decided. This claim may well include the second class of items above named, which are quasi permanent in their attachment. It might even reach to the first class of items specified, since upon the theory that these items had become merged in the leasehold interest their analogy to improvements upon the real estate becomes close; but, in view of the result we reach, it is not important to what items the claim and its theory reach.

There is a statute in Kentucky (section 3728, Carroll's Kentucky

Statutes) which provides that—

"If any person, believing himself to be the owner, by reason of any claim in law or equity, the foundation of which being a public record, hath or shall hereafter peacefully seat and improve any land, but which land shall, upon judicial investigation, be decided to belong to another, the value of the improvements shall be paid by the successful party to the occupant," etc.

Manifestly this statute does not literally apply to the lessee's operations under an oil lease and to a contest between the conflicting lessees; but the underlying principle is so far one of equity, independent of statute, and applied by equity courts generally, that a consideration of the equitable principles applied as between contesting land owners is not inappropriate. Under such language as that found in this statute, and under the general equitable principles involved, it has come to be understood that the good faith of the occupant in making his improvements is the criterion of his right to be reimbursed, and whether Raydure should be deemed

to have proceeded "in good faith" is the question which has been chiefly argued; indeed, the court below rested its conclusion largely

on the "high-handed" character of Raydure's action.

Leases for two parcels are here involved; in each case, Raydure had personal knowledge of the existence of the earlier lease when he took his; as to one parcel, Lindley was first to occupy by placing drilling machinery thereon, and Raydure forcibly took possession in that he moved this machinery off the property, in the absence of Lindley or any one representing him; as to the other parcel, Raydure took possession first, and maintained it with a show of force, when immediately thereafter Lindley undertook to enter. Lindley commenced this suit very promptly, and, at its commencement, Raydure had not, upon either parcel, done any part of the drilling or attached any of the property for which he now claims compensation. These items all developed after the suit was begun and before the original decree, and rested upon the possession thus taken or maintained. These matters militate against Raydure's good faith, as that term has been defined in this connection.

On the other hand, before he had incurred much, if any, of the expense now involved, Raydure consulted three reputable and competent counsel, by each of whom he was advised that, as matter of law, his title was good, because the Lindley leases were unilateral and void. It is not denied that the decisions of the Kentucky courts up to that time furnished at least plausible support for this theory and were not to the contrary, and the opinion of the court below and of this court on the former hearings demonstrate that the question was, or at least at the time of commencing suit had been, close and difficult. It also appears that an oil lease is perishable property, and for the preservation of its value may require immediate development-differing in this respect from ordinary real estateand also that Raydure tried, but failed, to get Lindley's consent to the appointment of a receiver at or near the beginning of the suit. Under these circumstances, Raydure forcibly protests that a court of equity ought not to treat him as a fraudulent or bad faith claimant.

The latest and most pertinent decision of the Kentucky Court of Appeals is found in Loeb v. Conley, 160 Ky. 91, 169 S. W. 575, Ann. Cas. 1916B, 49. This was a case between two oil leases. The junior lessee had been in possession and had drilled wells, but the senior had prevailed in the litigation. Compensation to the junior was denied. The Kentucky cases are reviewed, and the case is decided on its own facts. It would seem that the thing in controversy was whether, as matter of fact, the prior lease included the property covered by the other one, and it is held, in substance, that whatever the junior lessee expended on the property, after he had knowledge of the prior lease which was claimed to cover the property, he did subject to the chance that he would lose it if the fact was as claimed. Indeed, it does not appear by the reported opinion that the junior lessee had any fair reason for believing that the earlier lease did not cover the property. While announcing the general rule that whatever is done by the occupant after notice of

the adverse title is done at his peril, yet perhaps the gist of the opinion is found in the statement:

"Under these circumstances, we think that the Loebs (the junior lessees) did not make these improvements in good faith belief that they had the right to make them, and so are not entitled to compensation"

—and in the further statement that, when the improvements are made after actual notice "of a recorded instrument that shows on its face the superior ownership of the adverse claimant, there is no ground left on which to rest the belief of good faith."

It is not difficult to distinguish the Loeb Case from the present one. We are not prepared to say that Raydure did not believe that he had the right to drill the wells; and the earlier lease to Lindley, instead of "showing on its face the superior ownership of the adverse claimant," showed the contrary, providing the advice of Ray-

dure's counsel was good law.

In Guffey v. Smith, 237 U. S. 101, 118, 35 Sup. Ct. 526, 59 L. Ed. 856, we find facts in some respects very similar. There was a contest between two oil leases, and the junior had been in possession, and the senior was contested, because it was claimed to be invalid through the presence of a surrender clause. The Supreme Court says that after the junior lessee had actual notice of the existence of the earlier lease and the intention of the lessee therein to insist upon his rights, what was done thereafter "cannot be regarded as anything less than a willful taking and appropriation of the oil which was subject to complainant's superior right," It is not easy to avoid the controlling effect of this decision as applied to the present case; yet perhaps it can be distinguished. That opinion had already stated that the existence of an "honest though mistaken belief" that the defendants had a right to the oil was the controlling thing; and no such advice of counsel justifying that belief, as is found here, appears in the Guffey-Smith Case (though it might very probably have existed). Perhaps more important by way of distinction is the fact that the right of an occupying defendant to recover for permanent improvements was not directly involved and that the analogy thereto was not noticed or considered. fendants during their possession had taken out and sold a large amount of oil; they were being required to account for it, and they sought to set off against the price they had received their cost of production. The cases cited by the Supreme Court (237 U. S. 119, 35 Sup. Ct. 532, 59 L. Ed. 856)1 show that it had in mind the rule that one who has removed timber, minerals, etc., from the real estate without the consent of the true owner will be charged with the ultimate manufactured value in the form in which he sold them. if he was a willful trespasser, but only with the raw value, if he was ignorant of the true title. It did not appear that these im-

¹ Indeed, one of these cases, U. S. v. St. Anthony, 192 U. S. 524, 542, 24 Sup. Ct. 333, 48 L. Ed. 548, is the strongest case we have seen to the effect that one who relies upon mistaken counsel in matter of law, though he knows all the facts, may still have the status of "good faith."

provements added to the value of the property turned back to Guffey; indeed, it is obvious that they did not add to the original value, because they were only presented as being in mitigation of waste. The considerations affecting a case of permanent improvements adding to permanent value are not necessarily the same in all respects as where the matter is one of accounting for a trespass.

Whether or not the rule of Guffey v. Smith should be considered as applicable to the facts here existing, there is another reason for upholding the decree. An oil lease is perishable property; its entire value may be lost by neighboring operations unless it is worked; its management is a business enterprise calling for a high degree of skilled judgment, and even with such judgment it remains largely speculative from beginning to end. It may be best to drill this year or not to drill, to put down 5 wells or 50, to pump or not to do so, to operate or to sell. The true owner is entitled to exercise his own judgment in all these things. He ought not to be compelled to submit to somebody else's, even though it may turn out to be better than his. Where the owner is excluded from occupation and management for a year, during the early stages of development of the field, while the location of pipe lines and other matters are being settled, and values are fluctuating violently, it can rarely be said with certainty at the end of the period that the cost of drilling a few wells has been a net benefit to the true owner which equity should require him to repay to the one whose claim turns out to be unfounded.

This record contains evidence tending to show that Lindley, because of the existence of the controversy and Raydure's possession, lost a sale, and thereby lost a then realizable profit many times the cost of drilling these wells. There is evidence, also, claiming that many more wells ought to have been drilled. On the other hand, the price of oil was so constantly increasing that the delay did not hurt anybody; but, in the next case, the price of oil may have fallen. The whole subject is speculative. It is enough to say that upon this record we are not convinced that any net benefit to Lindley resulted from Raydure's entire course of conduct, of which the drilling of the wells forms only one part, but which must all be taken into account in determining any equitable question of benefit.

The decree is affirmed.

HAGEN et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 11, 1920. Rehearing Denied December 6, 1920.)

No. 3442.

Criminal law \$\infty\$ 528—Confession of one defendant admissible, on joint trial.

It is not error to admit in evidence a confession of one conspirator on the joint trial of himself and others, where the jury is instructed that it may be considered only as against him. 2. Conspiracy \$\iff 40\to Joinder of new party does not make new conspiracy.

One who joins a conspiracy after it has been formed by others becomes a party to it from that time, and his joinder does not create a new conspiracy.

3. Criminal law \$\infty 823(2)\$—Instruction as to effect of confession held not

error in view of cautionary instructions.

In a trial for conspiracy, where a confession voluntarily signed by one defendant was read to the jury, and was corroborated by other evidence, an instruction that the statement was binding on him *held* not error, as directing a verdict against him, where the jury were further told to disregard any opinion the judge may have expressed on the facts.

4. Criminal law \$\iiii 636(7)\$—Recalling jury in absence of defendants not error

The fact that defendants were not present in court when the judge recalled the jury and withdrew a written confession made by one defendant, which the jury had taken to their room, at the same time repeating a part of his charge relating to the effect of the confession, held not to render such action reversible error, where defendants were not in custody and their absence was voluntary.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Criminal prosecution by the United States against Ed Hagen, Ed Carey, Walter F. Patton, and Dick Russell. Judgment of conviction, and defendants bring error. Affirmed.

John F. Dore, George H. Rummens, John J. Sullivan, John F. Murphy, and Walter Schaffner, all of Seattle, Wash., for plaintiffs in error. Robert C. Saunders, U. S. Atty., of Seattle, Wash., and Ben L. Moore, Sp. Asst. Atty. Gen., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error were convicted of a conspiracy to violate section 35 of the Penal Code (Comp. St. § 10199), by stealing certain intoxicating liquors belonging to and in the possession of the United States. The indictment charged that the conspiracy was entered into by the plaintiffs in error and four others, to wit, Locknane, Morrison, Smart, and Tom Russell, on or about March 22, 1919, and that it was a continuing one. The indictment set forth two overt acts: First, the taking of a certain portion of the liquor on the night of March 29; and, second, the taking of the remainder on the night of March 30.

[1] Carey, one of the plaintiffs in error, made a written confession, which was read in evidence on the trial. Error is assigned to the admission of that confession on the ground that Carey had no part in the formation of the original conspiracy and did not join therein until March 30, that there were two conspiracies, and that Carey was not implicated in that which was charged in the indictment. In admitting the testimony the court below stated to the jury that the confession was to be considered as a statement from Carey only, and not as binding any of the other defendants, and in instructing the jury the court said

that "the statement may not be considered evidence against any one in the case except Carey himself." There was no error in thus admitting the evidence.

[2] There was but one conspiracy. Its purpose was accomplished in part on the 29th and in part on the 30th. The unlawful conspiracy had not been abandoned before the 30th. Carey made himself a party to the conspiracy, as was shown by his participation in the overt act of March 30, and thereby he became responsible as the others. United Mine Workers of America v. Coronado Coal Co., 258 Fed. 829, 838, 169 C. C. A. 459; Thomas v. United States, 156 Fed. 897, 910, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; United States v. Cassidy (D. C.) 67 Fed. 698; United States v. Babcock, 3 Dill. 581, 585, Fed. Cas. No. 14,-487. Said Judge Dillon in the case last cited:

"Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto, from that time, as if he had originally conspired."

[3] Error is assigned to an instruction in which the court charged the jury:

"The defendant Locknane has entered a plea of guilty to the charge in this case. * * * The defendant Carey has made a written statement, which has been admitted in evidence, and which has been read to you. Now this statement is binding upon the defendant Carey. words, you can find a verdict of guilty against one or all of the defendants. One man cannot conspire, but in this case Locknane has already pleaded guilty, and Carey has admitted in writing that he is guilty, and that makes two."

It was true that Carey had admitted in writing that he was guilty. His confession was a clear admission of his guilt, and it was corroborated by proof that the liquor which he stated that he took was found where he stated that he had placed it. The court, in giving the instruction which is criticized, did not charge the jury to find the defendant Carey guilty. The court took pains to tell the jury at the close of the charge that they were the sole judges of the facts, and said:

"If I have inadvertently intimated to you any opinion I may have of any fact, I desire you to disregard that and conclude solely upon the facts."

It is not disputed that Carey's confession was given freely and voluntarily, and without coercion of any kind. He did not take the stand to testify in his own behalf, and there was no evidence which tended in any way to discredit his confession. In charging upon the effect of that confession, the court did not go beyond the range of comment permissible in a federal court.

[4] The jury, on retiring to consider of their verdict, were allowed to take with them the written confession of Carey, over the objection of the latter's counsel. Shortly thereafter the jury, by direction of the

court, were recalled, and the court said:

"I simply recalled you for the purpose of withdrawing from your consideration the statement made by Carey. I stated that could only be considered as against Carey, and against no one else. This has been read to you, and I am not going to send that to the jury room. You will simply have to remember it as it was read. You will not consider that in relation to any of the defendants, except Carey."

On behalf of the plaintiffs in error Carey, Patton, and Russell, this action of the court is assigned as error, on the ground that they and their counsel were absent from the courtroom. As to the absence of the former, the contention is answered by the fact that the said plaintiffs in error were not in custody, and that they voluntarily absented themselves from the courtroom. The rule is stated in Diaz v. United States, 223 U. S. 442, 455, 32 Sup. Ct. 250, 254 (56 L. Ed. 500, Ann. Cas. 1913C, 1138):

"Where the offense is not capital, and the accused is not in custody, the prevailing rule has been that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."

But the plaintiffs in error cite authorities to the doctrine that, if any statements "material to the issue are made by the judge to the jury in the absence of defendant and his counsel, and to the defendant's prejudice," they will be ground for reversal, and that it is error for the judge "to alter his charge after the jury has retired, unless in open court in the presence of the parties." In the present case the judge made no alteration of the charge, nor did he make any statement material to the issue. He simply withdrew from the jury a paper that had been allowed to go to the juryroom, and repeated a statement, which he had made in his charge to the jury, that they were not to consider that instrument in relation to any of the defendants, except Carey. Carey could make no objection to such withdrawal of the instrument. for he had objected to its submission to the jury, nor could the other defendants in any way be prejudiced thereby. At most, what occurred was but an irregularity, which should not have the effect to require that a trial be set aside, which in other respects was fairly and properly conducted.

Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 39 Sup. Ct. 435, 63 L. Ed. 853, is not authority to the contrary. That case differs from the case at bar, in that there the trial court, in the absence of the parties, made statements to the jury material to the issue, by sending to the jury a supplemental instruction in writing on the question of contributory negligence. This was held error, for the reason that the parties had no opportunity to direct the mind of the trial judge to the point on which it was supposed he had erred in law, so that he might reconsider it and change his ruling, if convinced of error.

A case in point is Dodge v. United States, 258 Fed. 300, 169 C. C. A. 316, where the trial court, in the absence of the defendant and his counsel, had answered a question of the jury whether or not they might convict under a certain count of the indictment. Said the Circuit Court of Appeals:

"In the instant case it is evident that no possible harm resulted or could result from the communication which passed between court and jury. The communication gave the jury no information which was not contained in the

original charge. While the judge should not have done what he did, to reverse on that ground would under the circumstances be so extremely technical that it does not at all approve itself to our judgment." Certiorari denied, 250 U. S. 660, 40 Sup. Ct. 10, 63 L. Ed. 1194.

See, also, Whitney v. Commonwealth, 190 Mass. 531, 77 N. E. 516; Moseley v. Washburn, 165 Mass. 417, 43 N. E. 182.

The judgment is affirmed.

OLIN v. KITZMILLER et al.

(Circuit Court of Appeals, Ninth Circuit. October 11, 1920.)

No. 3438.

 Fish == 8—Effect of agreement between states for joint regulation of fishing.

The legislative agreement between the states of Oregon and Washington that all regulations for preserving and protecting fish in that part of Columbia river over which the states had concurrent jurisdiction should be approved by both states, ratified by Congress April 8, 1918, held not to affect the right of one of the states to prescribe qualifications of those to whom licenses to fish in the river would be granted by that state, as that a licensee must be a citizen of the United States.

Constitutional law \$\infty\$70(3)—Court cannot inquire into motives of Legislature.

It is not within the province of the judiciary to inquire into the motives of a Legislature in enacting a statute.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit in equity by Charles Olin against Perry Kitzmiller and others. Decree for defendants, and complainant appeals. Affirmed.

Wm. P. Lord and Arthur I. Moulton, both of Portland, Or., for appellant.

George M. Brown, Atty. Gen., I. H. Van Winkle, Asst. Atty. Gen., Millar E. McGilchrist, of Salem, Or., and W. W. Banks and L. A. Liljeqvist, both of Portland, Or., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. In the year 1915 the Legislatures of the states of Oregon and Washington entered into a compact and agreement expressed as follows:

"All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said states which would affect said concurrent jurisdiction, shall be made, changed, altered and amended, in whole or in part, only with the mutual consent and approbation of both states."

On April 8, 1918, the compact was ratified by Congress. 40 Stat. 515. At the time when the compact was entered into, the laws of both states authorized the issuance of licenses to take salmon in the

Columbia river to resident aliens who had declared their intention to become citizens of the United States. In the year 1919 the Legislature of Oregon amended its law, and provided that no license for taking or catching salmon or other food or shell fish, required by the laws of the state "shall be issued to any person who is not a citizen of the United States." The Legislature of the state of Washington has enacted no similar provision. The appellant, who is an alien, but who in 1892 declared his intention to become a citizen, contends that the Oregon law of 1919 is void, in that it violates the

provisions of the compact between the two states.

[1] We pass by the question whether by entering into the compact either state has divested itself of power to withdraw therefrom or to enact laws in derogation thereof without the assent of the other—a question which is not reached by the authorities cited by the appellant-and confine our inquiry to the question whether the amendment of 1919 is prohibited by the terms of the compact. From the language used it is clear that the contracting parties did not intend to divest either state of all power to enact without the other's consent legislation over the subject which was embraced therein. They left the Legislature of each state free to enact any law on the subject of the regulation and protection of fishing which would not affect the jurisdiction of the other state in the waters over which their jurisdiction was concurrent. A law which prescribes the qualification of a licensee by either state is clearly not a law which affects the concurrent jurisdiction. A law of Oregon which declares that such a license shall issue in that state only to residents and citizens thereof cannot come in conflict with a law or regulation of Washington, under which a license may there be issued to a resident alien who has declared his intention to become a citizen. nor can it, in any conceivable way, affect the rights of citizens or residents of the latter state.

Each state has the power to deal with the question of the right of its own subjects to take fish in the waters which are subject to the concurrent jurisdiction. It is only as to its common right with the adjoining state to take fish from those waters that its right is limited by the compact. Many conceivable regulations would be within the prohibition of the compact. Thus one state, without the consent of the other, may not change the open and closed seasons, may not prescribe the manner of taking fish, the number permitted to be taken, or the permissible fishing gear and appliances. All such matters affect the concurrent jurisdiction. It is not so with the designation of the qualifications of the licensees of either state to fish in the waters to which the concurrent jurisdiction extends.

[2] The appellant asserted in his bill a preferential right to the issuance of a license to fish with set nets for salmon in the Columbia river at certain designated places, which right had been accorded him for several years consecutively, and he alleged that the appellee Kitzmiller had entered into a conspiracy with the fish and game warden and others to deprive him of his fishing rights, in furtherance of which they induced and persuaded the Legislature of Oregon

to enact the amendment of 1919. No ground for equitable relief is stated in these facts. It is not within the province of the judiciary to inquire into the motives of a Legislature in enacting a statute. Stoppenback v. Multnomah County, 71 Or. 509, 142 Pac. 832; Calder v. Michigan, 218 U. S. 591, 31 Sup. Ct. 122, 54 L. Ed. 1163; McCray v. United States, 195 U. S. 27, 53–59, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; United States v. Des Moines, etc., Co., 142 U. S. 510, 545, 12 Sup. Ct. 308, 35 L. Ed. 1099.

The decree dismissing the bill for want of equity is affirmed.

STURTZ v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 6, 1920.)

No. 5553.

1. Criminal law \$\infty\$=1036(8)—Question of sufficiency of evidence must be raised below.

Where accused did not interpose any demurrer to the evidence of the government, or request a directed verdict in his favor, he did not preserve the right to secure a review of a question of the sufficiency of the evidence to support the verdict.

2. Criminal law \$\infty\$ 1036(8)—Court will not review for insufficiency of evidence not proposely presented upless convinced of injustice

dence not properly presented, unless convinced of injustice.

Where accused did not preserve his right to a review of the sufficiency of the evidence, the Circuit Court of Appeals will not exercise its right to review such evidence, unless convinced that the conviction works gross injustice, so that it will not review, where accused contended his admissions were uncorroborated, but there was evidence which the government contended corroborated the admissions, and which would have been sufficient in another circuit to support the verdict.

In Error to the District Court of the United States for the Eastern

District of Oklahoma; Robert L. Williams, Judge.

Reo Sturtz was convicted of introducing intoxicating liquor from without the state of Oklahoma into that portion of the state, which prior to its admission had been a part of Indian Territory, and he brings error. Affirmed.

D. M. Martindale, of Tulsa, Okl., for plaintiff in error.

Foster V. Phipps, Sp. Asst. U. S. Atty., of Muskogee, Okl. (Archibald Bonds, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge. Plaintiff in error was convicted in the court below of introducing from without the state of Oklahoma intoxicating liquor into that portion of the state which prior to its admission into the Union had been a part of Indian Territory, in violation of the Act of Congress of March 1, 1895 (28 Stat. 697).

The only ground requiring consideration urged in this court for

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the reversal of the judgment of the court below is the insufficiency

of the evidence to support the verdict.

There was evidence introduced by the government of an admission by the defendant that he had procured the liquor found in his possession at Joplin in the state of Missouri, and had brought it from said state into that portion of the state of Oklahoma which had formerly been Indian Territory, and it is urged by the defendant that there is no substantial evidence in the case corroborating such admission, and that therefore the case should be reversed under the authority of Goff v. U. S., 257 Fed. 294, 168 C. C. A. 378.

[1, 2] The defendant did not interpose any demurrer to the evidence of the government, or request the trial court to direct a verdict in his favor, as was done in the Goff Case. The defendant, therefore, did not preserve the right to secure a review in this court of the question of the sufficiency of the evidence to support the verdict. We are urged, however, notwithstanding the failure of the defendant in this regard, to consider the question, under the exception to the general rule, as was done by this court in Sykes v. U. S., 204 Fed. 909, 123 C. C. A. 205, Moore v. U. S., 224 Fed. 95, 139 C. C. A. 651, and Skuy v. U. S. (C. C. A.) 261 Fed. 316. The exception referred to is stated in the Sykes Case as follows:

"But there is an exception to this general rule, which has been made to prevent just such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or, as in this case, the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error."

We have carefully read and considered the evidence in the record. There is evidence in the case, not found in the Goff Case, which the government strenuously contends corroborates the confession or admission of the defendant. In this connection it may be noted that under the decisions of the Circuit Court of Appeals of the Sixth Circuit the sufficiency of the evidence in this case to sustain the verdict would be beyond question. Berryman v. U. S., 259 Fed. 208, 170 C. C. A. 276.

We are not convinced that a grave error was committed in the conviction of the defendant, or that his punishment would be gross injustice. It may well be that, after consideration of the case upon its merits, we would not reverse the judgment or grant a new trial. In any event, we do not think that this is a case where our discretion ought to be exercised in favor of the defendant. Robins v. U. S. (C. C. A.) 262 Fed. 126.

Judgment affirmed.

In re CROONBORG. CROONBORG v. RUBOVITS.

(Circuit Court of Appeals, Seventh Circuit. June 29, 1920.)

No. 2759.

Bankruptcy \$\iff 414(3)\$—Evidence held not to warrant refusal of discharge. On evidence that the property, for failure to schedule which bankrupt was denied discharge by the lower court, in fact belonged to the bankrupt's wife, held, that the bankrupt was entitled to discharge as recommended by the special master.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Frederick T. Croonborg, bankrupt. From an order denying the bankrupt his discharge, on opposition of Toby Rubovits, objecting creditor, the bankrupt appeals. Reversed, with directions.

Wharton Plummer, of Chicago, Ill., for appellant. James Rosenthal, of Chicago, Ill., for appellee.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Is the bankrupt, Croonborg, entitled to an order discharging him from his debts? This issue was referred to a special master, who, after a full hearing, recommended a discharge. A further reference resulted in a confirmation of this recommendation. The District Judge, however, sustained the exceptions and denied the application.

The issue, reduced to its last analysis, is one of credibility. Bankrupt, who failed to schedule the property belonging to "Croonborg Fashion Co., Ltd.," and the "Croonborg Academy," insists that he was but the manager of the business—his wife being the proprietor, she succeeding a partnership composed of herself and one Sauter. Much of the testimony is irreconcilable. Croonborg's and his wife's statements are disputed by one Sauter, a creditor and a former partner. Sauter's testimony is disputed in turn by the written agreement between himself and Mrs. Croonborg, creating the partnership between them, and by his later written assignment of his interest in the partnership to Mrs. Croonborg. These agreements, made some two years before any bankruptcy proceedings were instituted, are rather persuasive evidence of the truthfulness of bankrupt's story.

But more persuasive is the sworn statement appearing in the "Croonborg Gazette of Fashion," the publication of which represented the business of the Croonborg Fashion Company. This publication passed through the mails as second-class matter, and an affidavit of ownership was required by the postal authorities. Bankrupt, as manager, made the affidavits which covered a period of several years prior to the commencement of bankruptcy proceedings. Mrs. Croonborg and Sauter were named as owners in 1913 and 1914, and thereafter Mrs. Croon-

borg was designated therein as the sole owner. This statement corroborates the oral testimony of bankrupt and his wife, and is in turn corroborated by the written agreements heretofore referred to. Made under such circumstances, safeguarded by penalties which the maker of the affidavit would not readily invoke, we think these affidavits were entitled to great weight, and furnished the master with ample grounds for his conclusions.

It is hardly necessary to discuss the evidence further. Numerous facts appear that are not creditable to the bankrupt. But upon the issue before us we are not able to agree with the learned District Judge that the special master was wrong in his conclusions. Aided as he was by the presence of the parties and their witnesses, whose conduct and appearance on the witness stand must have influenced him in reaching his conclusion, we must recognize that he was in a better position than we to ascertain the truth. In re Matthews, Bankrupt, 257 Fed. 292, 168 C. C. A. 376.

The order is reversed, with directions to enter an order granting bankrupt a discharge.

McKINNON CHAIN CO. v. AMERICAN CHAIN CO.

(Circuit Court of Appeals, Third Circuit. September 27, 1920. Rehearing Denied November 27, 1920.)

No. 2522.

Patents =328-1,023,126, for chain-making machine, void.

The Coulter patent, No. 1,023,126, for a wire chain machine for automatically forming chain links for electric welding, held void on the ground that it was issued to Coulter as sole inventor, whereas the machine was the joint conception of Coulter and one Hoff, each of whom contributed elements of the combination embodied therein.

Appeal from the District Court of the United States for the Middle

District of Pennsylvania: Charles B. Witmer, Judge.

Suit in equity by the McKinnon Chain Company against the American Chain Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 259 Fed. 873.

Mitchell & Staples, of Buffalo, N. Y. (Frederick P. Fish, of Boston, Mass., and Louis Provost Whitaker, of New York City, of counsel), for appellant.

Frederick S. Duncan, Oscar W. Jeffery, and John H. Hilliard, all

of New York City, for appellee.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

WOOLLEY, Circuit Judge. The plaintiff, assignee of Letters Patent No. 1,023,126 granted to James Coulter, charged the defendant with infringement by the manufacture and use of machines embodying the invention of the patent. The claims in suit are 2, 3, 4, 5, 7, 9, 10, 11,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 268 F.-23

15, 20, 21, 26, 29, 30, 36, 37, 38, 39, 43, 45, 46, 47, 48 and 49. The District Court, finding an implied license in favor of the defendant, and,

therefore, no infringement, dismissed the bill. 259 Fed. 873.

By this appeal, the plaintiff has charged error in the court's finding of implied license, on which alone the court based its finding of noninfringement, and has assailed the decree broadly—lest it be held good on some other ground—by replying to all the defenses made at the trial and not passed on by the trial court. Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 848, 48 C. C. A. 72; Corning v. Troy Iron and Nail Factory, 15 How. 451, 14 L. Ed. 768; Patent Clothing Co. v. Glover, 141 U. S. 560, 12 Sup. Ct. 79, 35 L. Ed. 858; Woodward v. Boston Lasting Machine Co., 63 Fed. 609, 11 C. C. A. 353; Clark v. Deere & Mausur Co., 80 Fed. 534, 25 C. C. A. 619; Evans v. Suess Glass Co., 83 Fed. 706, 28 C. C. A. 24: Walker on Patents, § 655. These defenses, in addition to that of implied license, are the invalidity of the patent because of lack of patentable invention, or because invention, if any, was that of another, or was the joint invention of the patentee and another; laches and acquiescence in defendant's use of the invention for twelve years; and plaintiff's lack of title to the patent.

The position of these litigants in the industry to which the subject matter of the patent relates, and also the position of the patent, in that it substantially dominates the industry, have caused us to give this large record and the elaborate briefs careful and labored consideration and have induced us to decide the case on that one of the several issues which we regard as fundamental. While the evidence might perhaps sustain a finding of implied license, we hesitate to base our decision on such finding, for it is quite doubtful that the parties to the transaction out of which the invention arose came to an express agreement concerning its future use (though doubtless the defendant thought they had), and it is debatable whether the circumstances of the transaction, including the relation of the designer (later the patentee) of the machine to the corporation that contracted for its manufacture and sale to the defendant, were such as can validly raise a contract of license by implication. We shall therefore limit our discussion and confine our decision to that issue which we think is free from serious dispute.

Assuming without deciding that the subject-matter of the patent involves invention, the controlling issue, we think, is whether the invention was the sole invention of Coulter, the sole patentee, or was the joint invention of Coulter and Hoff, the latter being superintendent of

one of the defendant's mills.

This issue, invoking of course the law of joint invention, is mainly

one of fact, and turns primarily on the evidence.

Of this evidence we shall give only a summary (referring to the opinion of the trial court at 259 Fed. 873, for a more extended statement), and shall review the evidence in the order in which it was given at the trial.

Upon opening, the plaintiff offered in evidence a duly certified copy of the Letters Patent in suit. From this it appears that the patent is for a "wire chain machine," referred to throughout the record as an "automatic chain forming machine," made with especial reference to the manufacture of chains having links to be welded electrically.

In this country prior to the invention of the patent, chains were welded by the hand process of fire welding. At that time there was no art of electric welding of chains. In the development of this new art, it was found that to weld chains electrically two machines were required. One had to do with electric welding proper. But the limitations of a welding machine were such as to require the links of a chain to have certain indispensable yet well defined features, namely; the joint of the link must be at the center of the side, not at the top; the link must be true,—without kinks or nicks; and its ends must be brought together in perfect surface alignment one with the other, avoiding particularly a V-shaped opening, so that the electrodes of the welding machine might properly grip the link and successfully weld it. These requisites demanded by the welding mechanism brought into the new art the other machine. This machine had nothing to do with welding. It had only to do with forming and producing links capable of being electrically welded. Such was the chain forming machine of the patent.

While before the invention of the patent there was in this country, as we have just said, no art of electric welding of chains, there was an old and highly developed art of chain forming machines. To this art the inventor of the machine of the patent—whether Coulter, or Hoff, or both—very naturally and very freely resorted in designing a chain machine to produce links of the form required for electric welding. Indeed, it is admitted by all that the invention is but an addition to or a further movement of mechanism that already existed. As its name denotes, a chain forming machine forms a blank—a wire or rod into a link of a chain and on closing it threads it with another blank out of which in turn the next link is formed. The machine is composed of highly complicated groupings of slides, levers, arms, rolls, actuated by cams and driving shafts—covered at one time and another by numberless patents—having for their one object the pressure of a blank against a former and the bending of the blank around the former, or partly around it, until the blank takes its form or shape.

The point in an automatic chain forming machine of the prior art at which the inventor departed and began the invention of the patent was, we are inclined to believe, just after the arms or bending elements with grooved end rolls had moved forward simultaneously to bend or U-up a blank part way about a former. The really new thing, it seems to us, was the continued movement of the same arms or bending elements with their grooved end rolls acting successively upon the U'd-up blank (being held firmly with respect to the mandrel), whereby first one end of the blank is bent about the former, and then the other, so that the arms or bending elements by moving successively will not interfere with each other. The product is the true link required for

electric welding.

The patentee, however, claims for his invention both the simultaneous and successive arm movements. Though the art we think showed the first, it did not show both movements; at least it did not show both in the same operation. But this is not important, as we shall for the pur-

poses of this case adopt the patentee's contention and regard the invention as comprising both movements in combination. A typical claim of the patent is the following:

"2. In a machine for forming chain, the combination of a former, means for fitting a blank and positioning it so that the center of the blank shall be opposite the center of the former, and devices acting simultaneously to turn each end of the blank partly around the former, said devices thereafter acting successively on the opposite end portions of the blank to roll the ends of the blank toward each other into aligned relation."

The defendant maintains that the details of this construction were obvious and required only ordinary shop skill, and therefore did not amount to invention by whomsoever conceived. But as we are treating the patent as though it involved invention, the question is, that if the invention involved only the successive arm movement, or if, as we shall assume, it involved both the simultaneous and successive arm movements, whose conception was it?

The presumption arising from the patent is that it was the conception of Coulter, the patentee. The only aid to this presumption, aside from his affidavit filed with his application for a patent, in which, as required by statute, he swore that he was "the original, first and sole inventor," is Coulter's own testimony given at the trial that he was the inventor, and that he got none of his ideas from Hoff, with whom he did not talk and whom he did not meet until August, 1905, when the first machine, embodying his completed invention, was ready to be tested; and the testimony of Coulter's draftsman, that he did not see Hoff at Coulter's place of business; and also the testimony of Ryan, corroborating Coulter's testimony as to the date of his first meeting with Hoff, that Hoff came into the office of the Automatic Machine Company, the maker of the machine, in August 1905, and inquired for Coulter, though Coulter was then present and in plain view. There was testimony that neither then nor later did Hoff make claim to the invention. This is the plaintiff's case on its claim that Coulter was the sole inventor.

On this issue, the defendant introduced evidence to prove that another was at least a joint inventor with Coulter. This evidence,

greatly compressed, we shall give in narrative form:

Two or three years before the transaction of 1905, culminating in an application by Coulter in that year for the patent in suit, Carleton L. Hoff, superintendent of a chain making plant operated by Standard Chain Company, a corporate predecessor of the defendant, conceived the idea of welding chains electrically. The process of fire welding by manual labor, the only process then in use, was slow, costly and open to labor disturbances. Hoff directed the attention of the officers of his company to the feasibility of electric chain welding and to its desirability over the old method from manufacturing and commercial standpoints. His suggestions met with no favor. Hoff's idea persisted; and, undiscouraged, Hoff persisted through several years in urging his company to adopt his new method, until, early in 1904, its directors, more annoyed than impressed, gave him and Schmidt, its president, permission to develop electric welding of chains on their own

account. Late in 1904, however, the Standard Chain Company became interested and itself took up the matter of introducing in its plants electric welding along the line urged by Hoff. Acting through Schmidt, this company consulted the Thompson Electric Welding Company, then perhaps the foremost concern in the art of electric welding, and learned from it the requirements of a link capable of being welded by electricity, and arranged with it for a welding machine if the Standard Chain Company could succeed in getting a chain forming machine that would turn out links with the requisite features. Hoff set about to get such a machine. Being a practical chain maker, he apparently had well conceived ideas as to how a machine of this kind could be made. With these ideas he went to makers of special machinery and showed them what he wanted in the shape of a chain forming machine and how he thought it should be designed.

He first went to Martin O. Rehfuss, a manufacturer of special machinery, who had made for the Standard Chain Company a chain forming machine known in this litigation as the "Schmidt-Rehfuss machine." This machine, with bending arms moving only part way around the mandrel, Hoff thought, could be so modified by installing his ideas that it would produce the link he desired. He told Rehfuss, and by rough sketch (reproduced by Rehfuss) showed him his ideas, which contemplated arms with grooved rolls to bend a blank entirely around the mandrel by a further forward movement to the end of the blank. Later, in talking with Adolph Rietzel, superintendent of Thompson Electric Welding Company, who was advising him as to the character of the link a welding machine could handle, Hoff explained to him in detail the proposed movements of the Schmidt-Rehfuss chain forming machine when remodeled, namely; that now the "machine was automatic" and that "the blank was partially formed around the mandrel by rolls operated on a slide" and that "we could by a further movement throw these rolls around and close up the abutting ends."

Hoff also consulted Axel H. Nilson, another manufacturer of special machines, and by word, and rough sketch (reproduced by Nilson),

showed him his ideas of the proposed mechanism.

Hoff's testimony giving his conception of the mechanism of a machine to meet the requirements of electric chain welding is fully corroborated by the testimony of Rehfuss, Rietzel and Nilson, three disinterested witnesses.

All these transactions, including Hoff's several disclosures of his

ideas, occurred before Coulter came into the matter in any way.

Being now alive to the possibilities of electric chain welding, the Standard Chain Company became active. Knowing Coulter and having confidence in his mechanical ability, Garland, vice-president of the company, determined to consult Coulter about the proposed machine. He sent Coulter a letter introducing Hoff. Coulter was then vice-president and mechanical engineer of the Automatic Machine Company of Bridgeport, Connecticut, a concern engaged in the business of designing and building special machinery. Hoff testified that early in 1905, at the instance of Garland, and upon his introduction, he went to see Coulter at Bridgeport, and in an interview of two hours discussed

with him and by rough sketches showed him the requirements of the new chains and of the new chain forming mechanism, describing the suggested alterations in the Schmidt-Rehfuss machine. His testimony in part is as follows:

"I explained to him (Coulter) that in order that we could get proper contact with the electrodes on the ends of the link where he (Reitzel) wanted to apply the electricity immediately back of the joint, that there should be no abrasion in the wire; that in order to accomplish that, that we would use rolls in the machine to roll down the wire. These rolls—I explained to him what we had done with the machine we had in York by rolls to roll the wire around the former; if these rolls were carried further to the point or to the extreme end of the wire of the loop that it was necessary to roll down the wire to perfect the alignment; in order to do that it was necessary to have one roll to advance ahead of the other to—because they would conflict if they would meet at the point of the wire. * * *

"We touched on the cam movements and the location of the parts in relation to each other on the bed-plate, generally, the question of the, I think at that time I think we discussed the question of carrying the blank."

Hoff's testimony as to this early conference with Coulter was corroborated by Garland, then a disinterested witness, who testified that he brought Hoff and Coulter together and that Coulter told him that he had had such a conference with Hoff. Coulter did not contradict Garland; but his testimony previously given that his first interview with Hoff was in August, 1905, was in effect a contradiction of Hoff. Further bearing on the controverted question of a conference between Hoff and Coulter before the meeting between Garland, Schmidt and Coulter in New York (to which we shall refer presently), Rietzel of the Thompson Electric Welding Company testified that after the New York meeting Coulter sent him a blueprint of the proposed chain forming machine, almost, if not entirely, identical with the rough sketches Hoff had submitted to him before Coulter had been called into the matter.

In February, 1905, Garland and Schmidt had an interview with Coulter in New York, at which the problem of the new chain forming machine (without any suggestion of its mechanical solution so far as the record shows) was submitted to Coulter and a contract made through him with the Automatic Machine Company for the manufacture of a machine to do the work required.

Hoff testified to another interview with Coulter at Bridgeport concerning the machine sometime in April or May, 1905, which interview also was contradicted by Coulter's general denial of having met

Hoff before August, 1905.

The last meeting between the two men, according to Hoff, and the first meeting, according to Coulter, occurred in August, 1905, when the machine was completed and ready for trial. The machine then contained Hoff's proposed mechanism of simultaneous and successive arm movements, but these movements were around one mandrel. This is pertinent to the issues of sole invention by Coulter and joint invention by Hoff and Coulter, for while Hoff's testimony seems to point to two arm movements around one mandrel, yet it is possible to infer that in the alteration of the Schmidt-Rehfuss machine Hoff contemplated movements around two mandrels. To prove that the idea of a single

mandrel was Coulter's, the plaintiff produced in evidence Coulter's first layout showing two mandrels. (This, in one aspect, rather confirms Hoff's testimony that he had previously conferred with Coulter, and that he had, by reference to the Schmidt-Rehfuss machine, given, him his idea of double arm movements.) The plaintiff then introduced Coulter's second layout showing one mandrel. "The main changes" from the first to the second layout, as stated by Coulter himself, "were for making chains in one place rather than in two, two as the original intention, two places, making part and then carrying and finishing in another."

This is the defendant's case on the issue of joint invention, given in colorless outline.

Reference to the issue of infringement is made only to show the origin of the case. On October 4, 1905, following the delivery of the first machine, Coulter applied for a patent. Letters Patent, granted April 16, 1912, came to the plaintiff through sundry assignments. In the meantime the Standard Chain Company applied to the Automatic Machine Company for more machines. The latter company refused to build them because of the outstanding assigned application for a patent. Whereupon the Standard Chain Company, the defendant's predecessor, and later the defendant itself, manufactured and used more than one hundred machines of the design of the original. If the patent is valid, clearly it is infringed.

The evidence comprising the defendant's story of Hoff's part in the invention was not controverted by the plaintiff in rebuttal, nor in its case in chief, except in the limited measure shown in the evidence we

have reviewed.

From this evidence we make certain findings of fact. One is, that Hoff was the first to conceive the principle of simultaneous and successive arm movement mechanism. Another is, that later Coulter became possessed of the same idea, either from Hoff or from himself. These facts, on the evidence, are not open to serious dispute. That Coulter got the idea from Hoff is established, we think, by the clear preponderance of the direct testimony aided by all the probable inferences of the transaction, well within the rule requiring evidence impugning a patent to be clear, unequivocal and convincing. Schwarzwaelder Co. v. City of Detroit (C. C.) 77 Fed. 886; Manton-Gaulin Mfg. Co. v. Dairy Machinery & Construction Co. (D. C.) 238 Fed. 210, 215; affd. 247 Fed. 317, 159 C. C. A. 411; United States v. Bell Co., 167 U. S. 224, 251; Eastern Paper Bag Co. v. Continental Paper Bag Co. (C. C.) 142 Fed. 479, 500. If by chance this is not true, and if it happened that both Hoff and Coulter, on being presented at different times with the same problem of mechanics, conceived independently and at once the same solution, then we have something more than a singular coincidence; we have a situation which would induce us to believe that the solution must have been obvious to anyone skilled in the art of chain forming machines and did not involve invention at all.

Having been shown by Hoff the function of the double movement of arms "to roll the wire around the former"—evidently the capital idea of the machine, for without it the machine will not work—the remaining question is, whether Coulter in taking Hoff's conception and adapting it to a single mandrel—which, though it is not at all certain, we shall assume was solely Coulter's idea—made him the sole inventor of the machine.

Not having lost sight of the fact that the patent is for a combination, we can conceive that if Hoff's simultaneous and successive arm movements had been a part of the prior art, Coulter might have taken them, and, adapting them to a single mandrel, might have made in that combination a new invention. There invention would have resided solely in the combination, in no degree in its elements, and Hoff might not be heard to complain. But Hoff's conception, which he gave Coulter to develop mechanically, was not then a part of the art, either prior or present. It had never been reduced to practice; it had not been embodied in mechanical form; it had not emerged from its mental development. Hoff saw with his mind's eye a picture of arms with grooved rolls traveling simultaneously and then successively on a blank around a mandrel, moved and guided by the usual chain forming mechanism of arms, levers, and cams. This picture was in his mind; it was not in the art; and it did not get into the art until the machine embodying it came out of the shop. The machine then contained in combination Hoff's conception and what we have assumed was Coulter's conception, so combined and interrelated that the presence of each was indispensable to the functioning of the other, for without either the machine would not work.

As both Hoff and Coulter had at one time—the crucial time—worked together for a common end, which was finally accomplished by the contributions and united efforts of both, we are of opinion, after applying familiar law to the facts, that the invention was the invention of both, and was, therefore, joint invention. Walker on Patents, section 46; 1 Robinson on Patents, sections 398, 399, and cases in footnotes; Worden v. Fisher (C. C.) 11 Fed. 505, 506, 508; Barrett v. Hall, 1 Mason, 447, 472, Fed. Cas. No. 1,047; Thomas v. Weeks, 2 Paine, 92, Fed. Cas. No. 13,914; Consolidated Bunging Apparatus Co. v. Woerle (C. C.) 29 Fed. 449; Thropp & Sons Co. v. De Laski & Thropp Circular Woven Tire Co., 226 Fed. (C. C. A. 3rd) 941, 947, 949, 141 C. C. A. 545.

On this finding it follows that the award of the patent to Coulter as the sole inventor was unlawful, and that, in consequence, the patent, as to the claims in suit, is invalid. On this ground the decree below dismissing the bill is affirmed.

BETHLEHEM STEEL CO. v. CHURCHWARD INTERNATIONAL STEEL CO. (CARNEGIE STEEL CO., Intervener).

(Circuit Court of Appeals, Third Circuit. September 28, 1920. Rehearing Denied November 22, 1920.)

No. 2545.

1. Patents ←328—868,327, claims 1 and 3, for alloys of steel, void for want of invention.

The Churchward patents, No. 845,756, claim 1, and No. 868,327, claims 1 and 3, each for an alloy of steel, held, on the evidence, void for want of patentable invention.

2. Patents \$\iff 42\$—Novelty in proportions of alloy must produce new result.

Novelty, in the sense of the patent law, in the proportions of basic metals used in an alloy, involves not merely figuring out proportions differing from any known before, but new results from the new proportions, developing a new metal or an old metal with new characteristics of structure or performance.

Appeal from the District Court of the United States for the East-

ern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by the Churchward International Steel Company against the Bethlehem Steel Company, with the Carnegie Steel Company, intervening. Decree for complainant, and defendant Bethlehem Steel Company appeals. Reversed.

For opinions below, see 260 Fed. 962; 262 Fed. 438.

Charles Neave, of New York City, Joseph C. Fraley, of Philadelphia, Pa., and Clarence D. Kerr, of New York City, for appellant.

Duell, Warfield & Duell, of New York City (F. P. Warfield, H. S. Duell, and L. A. Watson, all of New York City, of counsel), for appellees.

Before WOOLLEY, Circuit Judge, and ORR and MORRIS, District Judges.

WOOLLEY, Circuit Judge. Vanadium was discovered in 1830 in a specimen of iron obtained from ores at Taberg, Sweden, and was subsequently produced in quantities from the slags of the Taberg blast furnaces. Later the metal was found in Scotland and Mexico.

Investigation of the metal began with its discovery and broadened with its widening production. Its value as an alloying material was of course not recognized until alloy steels, first conceived perhaps in about 1858, became established in 1890 to 1900. Since then the use of vanadium as an alloying metal has grown apace with the develop-

ment of its properties.

In the manufacture of steel from alloys in countless combinations and proportions it became known that small quantities of alloying metals and small differences in their proportions frequently make considerable difference in the properties of the resultant steel. It was discovered that vanadium lay between carbon and chromium in the properties it impresses upon steel and that small amounts ranging from .10 per cent. to .50 per cent. increase substantially the tenacity, elastic limit, tensile strength and the fatigue resistence of the metal,

and also its malleability and hardness after tempering. Hence its adaptability in alloy steels, where, as in armour plates, especially hard surfaces are required, and where, as in automobile and locomotive parts, shock and vibration are constant and metal fatigue inevitable.

As these properties were revealed, vanadium became very naturally the subject of wide discussion in metallurgical literature and its use increased in the metallurgical art as an alloying ingredient in alloy steel. Before vanadium thus came into use, the art contained a variety of alloy steels named and known by the essential ingredients composing them. Aside from carbon and manganese steels, whose controlling ingredients were present by nature, or, when desired, were increased by additions, the patent records and the literature of the art showed nickel steels, chrome steels, nickel-chrome and chrome-nickel steels, whose characteristics were those inherent in their dominant alloying materials. Later vanadium was added to these alloying ingredients. In consequence there came into the art vanadium-carbon steels, vanadium-nickel steels, chrome-vanadium steels, whose distinctive characteristics reflected the dominance of their alloying elements.

This was the state of the art, it is insisted, when James Churchward entered it with the inventions of two patents. These inventions, it is claimed, showed for the first time, in addition to the natural alloying elements of carbon and manganese, the three added elements of nickel, chromium and vanadium; thus establishing, as it is contended, the first vanadium-nickel-chrome alloy steel. The Letters Patent awarded Churchward for these alloy steels are No. 845,756, granted March 5, 1907, on an application filed November 1, 1906, and No. 868,327, granted October 15, 1907, on an application filed April 12, 1907. Churchward International Steel Company, the owner of the patents, charging their infringement by Bethlehem Steel Company, brought this action in the District Court. After hearing, the claims of the patents in issue were sustained and found infringed. 260 Fed. 962. Whereupon Bethlehem Steel Company took this appeal, bringing here for review several questions, only one of which we find necessary to consider.

We desire to make clear at the outset that in rendering a decision in this case we shall neither express nor intimate opinions on the metal-lurgy of vanadium, or of vanadium steel alloys, or on their place in the field of invention, present or prospective. We shall do no more than give such views as we find necessary to determine the issues of this case and then only as they arise from and are sustained by the evidence. Note is made of the unusual circumstance that this evidence, so far as it relates to the metallurgy of the subject, is not controverted. We shall therefore review the case as it was tried in the court below.

On the issue of validity the plaintiff offered in evidence copies of the Letters Patent in suit and rested. In other words, the plaintiff in opening relied solely on the presumption of validity of the patents arising from their grant.

Though differently described on their issue, both patents relate to alloy steels as distinguished from carbon steels or normal steels. Both claim an alloy containing, in different proportions, the same alloying metals of steel (with varying carbon content), nickel, chromium,

manganese and vanadium. In neither patent is it clear whether the invention disclosed is in the alloying metals or in their proportions or in both. So also in neither is it claimed that the resultant product contains or has in higher development the properties known to characterize the constituent alloying ingredients either separately or in combination, such, for instance, as we have shown with reference to vanadium.

[1] The first patent (No. 845,756) states that the "invention relates to alloys of iron and steel, and particularly to the latter, where nickel is employed as one of the alloying metals; and the object of the invention is to produce a self hardening metal (one cooled in the air from red heat and sufficiently hard to be used as a cutting tool) which will be suitable for many uses and purposes."

The only new property—indeed the only property—claimed for the alloy of the patent is found in the following language:

"It is believed that the alloying elements named react on each other to produce chemical and molecular changes of such a nature that the tungsten, chromium and manganese are permitted to harden the steel, while the vanadium removes or prevents brittleness and imparts toughness without softening the alloy. * * In cases where the product is to have extreme toughness and hardness the tungsten may be omitted"—as it is from the claim in suit.

The specification of the second patent (No. 868,327) differs little from that of the first. There it is stated that the invention

"relates to alloys of steel, and particularly where vanadium (as distinguished from nickel in the first) is employed as one of the alloying metals; and the object of this invention is to produce a metal * * which will be suitable for many uses and purposes."

Suitable proportions of the several alloying metals are illustratively given "for producing an extremely tough metal with great resistence to shock." The same theory of chemical reaction and molecular change described in the specification of the first patent is repeated in the second, differing from the first only in the addition of nickel to the element of vanadium in effecting removal or prevention of brittleness without softening the alloy.

Thus we come to the claims of the patents, of which three are in suit; claim 1 of the first patent, and claims 1 and 3 of the second patent. Laying aside claim 1 of the second patent for the moment, and reciting the remaining claims in a manner to show by comparison their similarity and difference, it appears that each claim is for

"An alloy containing the following metals in about the proportions given," namely:

Steel. Carbon Content. First Patent 90 to 95 parts Given Below Claim 1 Second Patent 91.50 to 98.30 parts Claim 3 Given Below Carbon. Nickel. Chromium, Manganese, Vanadium, First Patent Claim 1 .20 to .60 1 to 3.50 .50 to 2. .15 to .70 .05 to .25 Second Patent .50 to 2.50 .15 to 1. .05 to 1.50 Claim 3 .20 to 1.25 1 to 3.50

On comparison it is seen that the alloying metals are the same in both patents, the proportions of those in the second patent covering

the proportions of those in the first. To be more explicit, the proportion of each ingredient in each patent begins at the same minimum, and, in the second patent, the proportion of each ingredient comes up to that of the first patent and passes on to a higher maximum, producing, as the only difference we can discern, a range wider in the second than in the first, without any claimed difference in results, properties, or performance of the two alloys.

That the alloys of the two patents constitute inventions is evidenced prima facie by the patents and is implied in the presumption of the patents' validity arising from their grant. But this presumption is of course rebuttable and is open to attack on a showing that the claimed inventions for which the patents were granted were not inventions at all, because they lack new and advantageous properties over the prior art. In this manner the defendant attacked the plaintiff's prima facie case.

[2] Patentable novelty may reside either in the elements of alloys or in the proportions of the elements. If novelty of elements is claimed in the first patent, that patent falls on the plaintiff's failure to controvert the defendant's evidence abundantly showing that before Churchward vanadium was used with chromium, nickel, manganese and carbon in alloy steels. If novelty of elements is claimed in the second patent, that patent falls on the showing of the first patent. Novelty of the patented alloys, if any, must therefore be found in the proportions of the elements. On this issue the defendant showed that in endeavoring to determine experimentally the value of vanadium in nickel-chrome-manganese steel alloys it had used the elements of the patented alloys in substantially the proportions specified by the patents before Churchward's alleged inventions, which in this case are of the dates of the patent applications. This evidence however we do not accept as conclusive of anticipation, for it is possible that the defendant, in employing the same elements in the same proportions, may not, because of difference in heat treatment, have obtained the alloys of the patents. Pittsburgh Iron & Steel Co. v. Seaman-Sleeth Co., 248 Fed. 705, 708, 709, 160 C. C. A. 605. But novelty of proportions in the sense of the patent law involves something more than figuring out proportions differing from any that were known before. It involves new results from new proportions, developing a new metal, or, it may be, an old metal with new characteristics of structure or performance, embracing entirely new, or at least substantially enhanced, qualities of utility. Glue Co. v. Upton, 97 U. S. 3, 24 L. Ed. 985; Welling v. Crane (C. C.) 21 Fed. 707; Brady Brass Co. v. Ajax, 160 Fed. 84, 90, 87 C. C. A. 240; Pittsburgh Iron & Steel Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 C. C. A. 605; Miami Copper Co. v. Minerals Separation, Ltd., 244 Fed. 752, 157 C. C. A. 200. To prove that the alloys of the patents in the proportions specified lack patentable novelty the defendant produced evidence which, in the absence of contradiction, must be accepted as conclusive.

On the issue whether the alloys of the patents contain advantageous properties over alloys of the prior art made from the same elements in different proportions, or whether they contain properties different from those of the prior art, the defendant offered evidence to prove

that while vanadium has a beneficial effect in carbon steels, in nickel steels and particularly in chrome steels, it has no such effect in chrome-nickel steels; that instead of producing the only new and useful property in the resultant steel claimed for it in the two patents—the removal and prevention of brittleness—vanadium increases brittleness; that it (Bethlehem Steel Company), after using vanadium in nickel-chrome-manganese alloys within the range of the proportions of the patents, found that vanadium introduced a detrimental condition in the product, and, in consequence, abandoned its use; that Carnegie Steel Company (though under license of the patents and free to continue) found it troublesome to get out tonnage when adding vanadium to a nickel-chrome-manganese alloy and likewise abandoned its use; and that Midvale Steel Company, after experimenting with vanadium in similar alloys, was not sufficiently encouraged to begin its use.

The door was open to the plaintiff to meet this evidence in rebuttal. The plaintiff, however, controverted none of it. The defendant's evidence therefore stands with all its probative force undisturbed and must be accepted as the truth. Neither did the plaintiff avail itself in rebuttal to strengthen its case in chief-based on the presumption of validity from the patent grants—by producing evidence that the alloys of the patents were novel or that they contained new elements of utility, in that they were different from or better than prior nickelchrome-manganese-vanadium alloys either in metallurgical or physical characteristics or in performance. It rested first, on the presumption of utility arising from the fact that the defendant had made alloys of the elements of the patents within the range of their proportions. This of course is valid evidence of utility so far as it goes; but alone it does not prove in the light of the record that the utility of the patented alloys was greater than or different from that of kindred alloys made before the patents. Vanadium was an alloying metal of the prior art, known to be useful in producing certain properties and free to be used by anyone desiring them. To constitute invention in the continued use of vanadium, it must appear that some new property had thereby been attained or some newly useful result had been achieved.

The plaintiff relied, second, on proof that Carnegie Steel Company had paid it the substantial sum of \$275,000 in settlement of infringement litigation and for licenses under the patents in the manufacture of armour steel. While a transaction of this kind, involving the payment of a sum of this amount by a concern which had the metallurgical knowledge and expert patent assistance of Carnegie Steel Company, would doubtless cause anyone to pause in rendering an opposite opinion as to invention in the subject-matter; yet, unless we were to substitute the opinion of the experts of the Carnegie Steel Company for our judgment, without knowing what evidence was before them, but well knowing that the evidence before us was not before them, we must assume the responsibility and resolve the issues as the case has been made by the evidence. And this we do by finding that the evidence of this transaction, with all its implications, is outweighed by the evidence against invention.

The plaintiff relied, lastly, on proof of licenses under the patents granted United Alloys Steel Corporation, and on the claim that the alloys being produced under these licenses were supplanting other alloys in the art. While evidence of this character is always persuasive, and when aided by other evidence may become conclusive, it is not controlling in this instance. As the licenses were not introduced in evidence, and as no officer of the plaintiff or of the licensee corporation testified, the character of the licenses (and therefore their probative value) is not before us. As neither the licensee manufacturer nor any user of the licensed alloys testified, we are not informed of the properties or performance of the alloys or their place or doings in the practical art.

The remaining claim in issue is claim 1 of the second patent. It

is for—

"An alloy composed of steel combined with small proportions of nickel, chromium, vanadium, and manganese."

This claim contains the infirmities of the more specific one with which we have dealt.

Being of opinion that the claims in suit are, under the evidence, invalid for want of patentable invention, we direct that the decree below be reversed and that the trial court enter an order dismissing the bill.

MERRELL-SOULE CO. v. RICO MILK PRODUCTS CO.

(District Court, E. D. Wisconsin. May 27, 1920.)

1. Patents 328-860,929, for a process of condensing and pulverizing milk,

held infringed.

The Merrell-Soule patent, No. 860,929, for a process for condensing and pulverizing milk, one step in which is the admission of dry heated air through a slit into the drying chamber, is infringed by a process in which heated atmospheric air is admitted into the chamber through several openings, since it is manifest that such air must be dry to accomplish its purpose, and the difference in arrangement of the openings does not avoid infringement.

2. Patents 25-Use held to establish invention, not mere aggregation of

Where claims for a milk drying and pulverizing process were finally allowed by the Patent Office because the condensing of the liquid before the pulverizing produced substantially different and better product, the fact that other manufacturers, after the expiration of the patent covering the pulverizing process, deemed it necessary to use the condensation before pulverizing, shows that the claim of patentee that he produced an improved result, which was an invention, and not a mere aggregation of former processes, is well founded.

3. Patents 16-Possibility of achieving same result by old methods with greater skill does not disprove invention.

That it would be possible to achieve the results obtained by patentee by the use of old processes with greater care and skill than had been formerly used does not disprove invention, since the elimination of the necessity of great skill may itself show an improvement, evidencing invention. 4. Patents 328-860,929, for process for pulverizing milk, held sufficiently

to disclose invention to warrant preliminary injunction.

The Merrell-Soule patent, No. 860,929, for an improved process for pulverizing milk and other liquids, held, in view of its general use, sufficiently to disclose invention to warrant a preliminary injunction against infringement.

In Equity. Suit by the Merrell-Soule Company against the Rico Milk Products Company for injunction to restrain infringement of a patent. Preliminary injunction awarded.

Howard P. Denison, of Syracuse, N. Y., and Edward Rector, of Chicago, Ill., for complainant.

Clarence E. Mehlhope, of Chicago, Ill., for defendant.

GEIGER, District Judge. This is an application for a preliminary injunction to restrain alleged infringement of letters patent numbered 860,929, issued July 23, 1907, covering a process of separating the moisture from liquids. The defendant is engaged in the business of condensing and pulverizing milk. The application is resisted on the ground that the patent is invalid and that the defendant is not shown to infringe. In a general way the process consists—dealing with the particular subject of drying or pulverizing milk-in introducing it to a concentrating chamber wherein it may be heated, and wherein also a vacuum or minus pressure is maintained for condensing purposes. When the product has been condensed to a requisite degree, it is withdrawn through a pipe and introduced into a desiccating chamber under pressure through a spraying device, and immediately carried through such chamber under the influence of air or gas as a desiccating agent, whereby evaporation takes place to such degree that the particles of solids are precipitated and removed, after passing through a screen, from a collecting chamber.

The claims are two in number:

"1. The process of obtaining the solid constituents of liquids and semiliquids in the form of powder, which process consists in concentrating the substance by removing a large percentage of the water therefrom, converting the concentrated mass into a fine spray, bringing such spray into a current of dry air or gas having an avidity for moisture, so that substantially all the remaining liquid constituents are separated, thereby conveying the dry powder into a suitable collecting space away from the air or gas current and discharging the air or gas separately from the dry powder."

2. The process of obtaining the solid constituents of liquids and semiliquids in the form of powder, which process consists in concentrating the substance by removing a large percentage of water therefrom, converting the concentrated mass into a spray, bringing such spray into a current of dry heated air or gas, having an avidity for the moisture of the substance treated. retaining the atoms momentarily in said current so that substantially all the remaining moisture is converted into vapor and the product is prevented by the cooling effect of such evaporation from undergoing chemical change, conveying the dry powder into suitable collecting spaces away from the evaporizing current and discharging the air or gas separately from the dry powder."

In respect of the claimed invalidity of the patent, it is broadly asserted that, in so far as the method or process involves additional

Em For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

steps to those disclosed in one or more patents of the prior art, the process of the patent in suit discloses mere aggregation, and in no event additional steps, or a combination of steps, patentably novel. The defense of want of infringement is rested wholly upon the claimed absence, in the method in fact pursued by the defendant, of the use of "dry" air or "dry heated air."

The patent in suit was issued 13 years ago, and, while it has re-

The patent in suit was issued 13 years ago, and, while it has received no adjudication of validity, that circumstance is not controlling upon an application for preliminary injunction, if it can be said upon the proofs that the novelty and distinctiveness of the process is clear, and that by reason thereof it has received recognition and has

been adopted. This phase of the case will be referred to later.

[1] Upon the case as made by the parties, the question of infringement is not open, if the plaintiff can maintain its position respecting the fair interpretation of the claims of the patent. The only distinction claimed by the defendant is that it eliminates from its process the use of either "dry air" or "dry heated air," as taught by the respective claims of the patent; and the defendant insists that those terms import, not only indispensable elements but elements of such clear definitive scope as must exclude the step taken by the defendant. In lieu of using what the defendant claims must be rigidly defined as "dry air," or "dry heated air," its process is thus differentiated in this respect by its expert Hunziker:

"At East Troy [defendant's factory] heated atmospheric air was used, while patent 860,929 directs the use of dry air or dry heated air."

In differentiating the mechanism used by the respective parties in the use of either heated atmospheric air or dry heated air, in the respective processes, the expert says:

"The atomizing spray and the heated air at East Troy enter at one side of the drying chamber at an elevation about two-thirds from the bottom, while in patent 860,929 the atomizing spray and the dry heated air enter at or near the bottom of the drying chamber."

"At East Troy the heated air enters the dry chamber through a slot extending along the entire side of the dry chamber, while in patent 860,929 the dry heated air enters at the bottom through a series of openings."

A consideration not only of the art but also the defendant's interpretation of it, as well as the objective of any process for drying and powdering milk, certainly discloses the fundamental idea that, howsoever the spraying and drying process may be practiced, it must exclude a step which would hinder the removal of moisture. In other words, no one would suggest, in carrying out the spraying process, the concurrent use of moisture-laden air. When, therefore, we have the three terms "dry air," "dry heated air," and "heated atmospheric air," the query is naturally presented respecting any essential distinction between the steps involving the use of one rather than the use of the other. True, it may be conceded that dry air may be cold, and that atmospheric heated air may be moist; but, with respect to the latter, can that be indulged when the claim is pressed that identity of product in fact resulted in the use of it by the defendant? In other words, is it possible that the use of

moisture-laden, but heated, atmospheric air was, or in fact could be, used by the defendant, or any one, in making a dry powder said to be identical in consistency and quality with that resulting from the use of what the art has called "dry air," or "dry heated air"? The argument, if identity of result is admitted, necessarily leads to the exclusion of the particular quality of "heated," or "dry heated," or "heated atmospheric air," as immaterial. "Air," or "heated air," will suffice.

The other slight differences in the mechanism or arrangement practiced by the defendant in its process, noted by its expert, are not, and have not, been insisted upon as sufficient to escape the charge of infringement, if plaintiff's patent is valid. The case is therefore advanced directly to a consideration of the validity of the patent, and the proposition over which the contention arises is directly suggested, in view of the art and the file history of the patent in suit, by the steps indicated in the respective claims through this language:

"Concentrating the substance by removing a large percentage of water therefrom." (See claims 1 and 2.)

This phase of the alleged invention was sharply in issue in the Patent Office; the applicant appreciating the force of patent references which deal with the conversion of liquids into powders by the spraying method. The applicant discussed this step, saying:

"It will be observed from the foregoing description that by reason of the preliminary removal of a considerable percentage of the moisture of the milk or other substance treated, as by concentration, atoms of the material while in the form of spray contain so small a percentage of moisture that such moisture can be and is instantly taken up by the air or gas in the dry state in which the latter enters the chamber 21. From this it follows that the atoms need be subjected to the action of the heated air or gas only for an exceedingly brief period of time. Owing to the exceedingly short time of such action and to the fact that the heat of the air or gas is in a great measure offset or neutralized by the cooling effect of the rapid evaporation of the moisture, produced by the heated air or gas, it is entirely practicable to use such air or gas at a temperature much higher than could be employed, were the substance, when first deprived of much of its moisture, treated while in a highly divided state and promptly removed from the heated air or gas. In other words, the preliminary concentration so far reduces the percentage of liquid constituents that very brief treatment by heated air or gas will remove substantially all the moisture that remains; the cooling effect of the rapid evaporation will prevent excess hearing of the solid constituents during such treatment, though the temperature be such as would effect the chemical change were the treatment of any given atom prolonged; and, finally, the solid constituents are removed from the influence of the heat immediately after separation is effected. As a consequence, the resulting product retains all the solid constituents in a normal and natural state, so that the addition of a proper amount of moisture at any subsequent time will restore the substance to precisely its original condition. The dry powder is produced without pasteurizing or sterilization, results which would be produced, were the solid constituents subjected for any considerable time to a temperature such as is employed in this process."

Again:

"The percentage of moisture to be removed by the preliminary concentration cannot be stated in precise terms for all substances, nor, in fact, for any $268 \, \mathrm{F.}{-24}$

given substance, for the reason that the percentage of liquid or vaporable and solid constituent varies more or, less in different lots of a given substance. Speaking generally, however, it is found expedient to bring the substance, by preliminary treatment, to a substantially viscid condition, so that the moisture remaining in any given atom or globule of the spray shall be only such as can be removed during the rapid passage of such atom or particle through the desiccating chamber. As an example, with whole milk of good average quality, it has been found that the best results are attained when it is concentrated to a density of from 14 degrees to 15 degrees Baume. Fair results are obtainable with a preliminary concentration to a density as low as 10 degrees Baume."

The file history discloses the repeated rejection of all claims, and a refusal to recognize the contention of the applicant that the series of steps taken consecutively, but involving of necessity a preliminary reduction to a viscid condition, resulted in a product having qualities so improved, either in degree or in kind, as to credit invention to the applicant. The examiner pointed out that the specifications originally filed did not uphold such contention, and that, in view of the large variety of substances susceptible of treatment resulting in a great variety of products, "every possible degree of concentration" might be involved. (See office action May 31, 1907.) He pointed out further that by changing to a "definite degree of viscosity" before beginning to spray "is certainly not a part of the invention as claimed."

Thereupon the specifications and claims were amended, by incorporating the excerpt and the element or step above noted. In connection with the claim thus made, and after the examiner's observations, which, of course, contained his estimate of the applicant's process:

"There is no invention in first partially drying a material in one way and then completing the drying in another way."

The applicant responded:

"If that were all that was contemplated by the invention herein set forth, applicants would most respectfully bow to the decision of the examiner. * * *"

And after a reference to the Campbell patent, No. 762,277, applicant proceeded:

"Applicants are not asking for a claim which contemplates the mere partial drying of a liquid substance in one way and then completing the drying in another way per se; but they have discovered that by the series of steps herein set forth they have produced a new object never before contemplated by the prior art as expressed in the references set up, and that this new product has only been produced by the discovery, and that the series of steps have not been contemplated before."

Again:

"It is admitted that various substances have been dried by spraying processes, but it is not admitted that any one has heretofore discovered that there is a distinction between the effect produced by spraying the same substances at different densities, and it is submitted that there is nothing shown in the prior art which contemplates the production of a new product by first reducing the densities of the liquid as low as possible without denaturalization before spraying it for the purpose of producing a cooling effect upon the solids."

Upon the issue thus narrowed, the question was finally resolved by the Patent Office in favor of the applicant; and there is really presented upon this motion the single question whether the determination, in the light of the proofs, is now cast into doubt or into the field of debate, so that an otherwise clear infringement should not be preliminarily restrained. Upon this hearing the matters for consideration naturally fall into two classes:

First. The prior art, as it was open to consideration and in fact

recognized by the Patent Office.

Secondly. The proofs, which deal with the art and its develop-

ment since the advent of plaintiff's patent.

[2] Upon the first of these it is clear that the Patent Office was at first insistent upon dealing with the applicant's method as disclosing what might be called mere aggregation of prior art steps, or as introducing into the Stauf process, when applied, then recognized processes of condensation as a sort of preliminary, through purposeless, halting or interceptive step, and it is now urged that plaintiff's process consists of nothing more than first making condensed milk and then spraying and powdering it. It is apparent, however, that the art as practiced since the advent of plaintiff's patent has not considered, and does not now consider, the process as presenting a mere fortuitous and purposeless aggregation of rearrangement of steps.

Nothing better illustrates this than the adoption of the plaintiff's process by the defendant in this case. Nothing so clearly casts into doubt, if not utterly destroys, the probative force given to the affidavit presented by its expert, than the latter's own tribute to the merit of the patent in suit, in a somewhat comprehensive publication dealing with the general subject of condensed milk and milk powders. In such work, while not discussing many of the particular patents, notably the Stauf patent, dealing with spraying of milk, but rather comparing it with methods used in first solidifying and then grinding the product, the expert, writing in 1914, 7 years after the issuance of plaintiff's patent and 13 years after the Stauf patent, says, in particular reference to the process covered by plaintiff's patent:

"The milk is condensed in the vacuum pan to about one-third to one-quarter its volume. The condensed, but still fluid, milk is forced under pressure through a fine jet, casing to it be atomized and sprayed into a current of hot air in a vaporating chamber. This atomized fluid, forming a mist, offers the maximum surface for evaporation of its water. The hot air absorbs the moisture of the milk almost instantly, and the milk drops to the bottom of the chamber in the form of a snowlike powder. No grinding is necessary."

It may be observed that the commentator here appreciated the preliminary condensation as a fundamental element or step in the process, and, after quoting the claims dealing with the specifications, reaches this conclusion:

"The product of the Merrell & Gere process is without question superior to any milk powder manufactured by the various processes herein mentioned. It embodies the three all-important characteristics of a desirable and successful milk powder, namely: It contains less than the minimum amount of mois-

ture which permits a bacterial action; its butter fat is retained in the globular form, and it is therefore mixed with water readily, forming a complete emulsion; and its albumin is present in its natural noncoagulated and soluble form, insuring complete solubility of its dried milk in water."

The excerpts above, which disclose very clearly the considerations entering in the grant of the patent, when viewed in the light of the Stauf patent, No. 666,711, of January 29, 1901, and particularly in view of the force given to that patent in litigation (see Merrell-Soule Co. v. Powdered Milk Co. of America [D. C.] 215 Fed. 922; Id., 222 Fed. 911, 138 C. C. A. 391; Merrell-Soule Co. v. Natural Dry Milk Co., 222 Fed. 913, 138 C. C. A. 393), would seem to dispose of all reference to the prior art which was considered as bearing upon the validity of the Stauf patent. This is true, especially as that patent was held, and is here insisted by one and conceded by the other party, to mark a notable advance in the art or business of making powdered milk. It is rather late, the Stauf patent having expired, to urge processes such as were disclosed in the Just, Ekenberg, Campbell, Percy, La Mont, or Walker patents (see 215 Fed. [D. C.] 929) as having any bearing upon the validity of the patent in suit, in so far as this patent must plainly recognize the scope and distinctiveness of Stauf; and the consideration is therefore narrowed to the questions already stated, whether the patent in suit discloses a clear improvement on Stauf, in that it introduces the step of preliminarily condensing and then spraying and powdering.

Respecting the certain validity of a patent requisite to warrant the issuance of a preliminary injunction, the parties have discussed the recognition claimed by the plaintiff to have been accorded the patent in suit by licenses. The defendant has laid much stress upon the circumstance that the plaintiff, as owner of a number of patents, including Stauf, has embodied them all in its license agreements: and it is urged that the recognition ordinarily to be inferred from the acceptance of licenses is here destroyed by the circumstance that the licensees were of necessity obliged to bow to the Stauf patent; hence, dealing with the plaintiff as owner of both, unless they also accepted a license covering the patent in suit, it lay within the plaintiff's power to drive them entirely out of the powdered milk But as the patent in suit embodies as a fundamental business. and distinguishing element the introduction of the preliminary condensing step, the insistence by the defendants and all others—now that the Stauf patent has expired—upon introduction of that step into the process used by them, naturally raises the query: Why not use the Stauf method alone? It would seem to me that the answer to this question, upon the proofs in this case, is found in what the parties upon substantial agreement concede to be the highest essentials of a commercial milk powder and a process for making it. The Stauf process was so clearly distinguished in the litigation referred to as a method through which the raw product was serially passed through steps constituting a single process leading to drying through spraying in heated air, and the proofs in the present case, as well as the

adjudications upon the Stauf patent, disclose the intimacy of the relation between the air current, the pressure, and the volume of moisture at the time and point of spraying, as effecting both re-

covery and quality of the product.

Herein, and herein alone, does the patent in suit profess to advance beyond and improve upon Stauf; and it is hard to believe that the apparently universal desire of powdered milk manufacturers, including the defendant, to do the very thing which Merrell-Soule suggest, is a mere fortuity, which, if they saw fit, they might abandon or supersede by their present free choice of the Stauf method. Concededly, the preliminary condensation must directly affect the volume of moisture which, in pursuing the original Stauf method, is found when the milk reaches the spraying point, and therefore it directly affects the matter of pressure, the volume and temperature of the air currents, one or the other of which may in turn affect the volume of recovery, likewise the constituent elements of the product. The proofs, which rather clearly support the contention of the plaintiff in this respect, and therefore sustain its contention that the product is new in the sense that there is a larger volume of recovery, a greater solubility, and a greater freedom from moisture, do not seem to me to be met, except, first, by the flat assertion that such result cannot follow, or, secondly, that such conceded differences are in degree only, and could be overcome by the use of one or more of the other processes, if, as a matter of judgment or skill, it was desired to accomplish such result. But here, again, the query arises: Why, then, resort to the additional step suggested by plaintiff's patent? And it is my judgment that the real answer is found in the fact that, whether it be said to be a difference of degree, it is none the less so marked a difference as to give to the improved process a distinctiveness forbidding recognition of the Stauf process alone as a real rival.

We are now dealing with the probative force to be accorded to the evidence showing the recognition of the step of preliminary condensation. There is ample proof, as noted, of not only a general desire but an insistence upon taking such step—for some reason. When, therefore, the plaintiff argues that therein is found the strongest sort of proof of the indispensability of such step in achieving higher excellence and greater superiority of product, the mere suggestion that those who thus use the process may aim to make both condensed and powdered milk, the one by a partial, and the other by a complete, carrying out of the process, is not responsive to the plaintiff's contention that, in so far as powdered milk is thus made, the resulting product involves an appropriation and recognition of the merits of the patent. The latter does not profess to cover a process for making ordinary condensed milk with the alternative of merely continuing, if desired, to the spraying and powdering step, and thereby making merely such powdered milk as concededly may be made by the Stauf, or perhaps other, process.

[3] The novelty of the patent inheres in the continuity of steps taken in succession, but including the step of preliminary withdraw-

al of a large percentage of moisture, regardless of whether the amount so withdrawn brings the product to the proper character or consistency of ordinary commercial condensed milk. Therefore, when the proofs here show, as it seems to me they do, that the product resulting from pursuing the processes outlined in the plaintiff's position has the advantages pointed out in the proofs, the answer that the same results might be achieved with the exercise of greater or better judgment or skill in connection with other processes does not respond at all to the claim of patentable novelty. The latter may reside in the very circumstance that by pursuit of the new process dependence upon variable judgment or skill is eliminated, or at least minimized, and, if the result is greater certainty and an appreciably higher excellence in the particulars pointed out in the proofs, how can it be said not to evidence inventive endeavor?

[4] The record before us seems to answer this question, and thereby support the presumptive validity of the patent to a degree adequate to sustain a preliminary injunction; and the proofs adduced by the defendant to substantiate its claim of anticipation through prior use are not only inadequate to substantiate such claim, but do not east doubt upon the plaintiff's showing.

The conclusion is that a preliminary injunction may be awarded, upon giving such undertaking as may be fixed, after hearing the respective parties.

BRUCKMAN et al. v. STEPHENS et al.

(District Court, W. D. Missouri, W. D. October 13, 1920.)
No. 214.

Patents \$\iiint_{328}\$-1,071,027, for machine for making ice cream cones, infringed.

The Bruckman patent, No. 1,071,027, for a machine for making ice cream cones which works automatically throughout the process, held for a broad pioneer invention, and infringed.

In Equity. Suit by F. A. Bruckman and others against J. Q. Stephens and others. Decree for complainants.

This is a suit for infringement of letters patent No. 1,071,027, dated August 26, 1913, covering a machine for the manufacture of ice cream cones. The purpose of the machine is to manufacture these articles in a clean, wholesome way, entirely automatically. The batter is introduced into a tank and flows down, and is automatically fed to the baking molds. The cones are baked, the molds are automatically opened, and the cones are automatically stripped loose from the molding surfaces, to which they have a decided tendency to adhere, especially when sugar is used in the cone mixture. They are then delivered out of the machine without handling. The delivered cones are brought out, nested one into the other, and placed in shipping boxes for sale.

The machine consists generally of a rotatable wheel or carrier on a vertical shaft placed at the center. On that wheel are mounted a plurality of units or baking molds, each of which units consists of a pair of half-mold sections. They also include a core element, the half-mold sections, fitting together, forming a mold, into which the core is inserted, with just enough space left between it and the mold to form the thickness of the cone. The batter is in-

troduced into a batter tank, and goes down into a reservoir, into which the cores are dipped to acquire a quantity of batter. The cores are then brought back and placed in the female mold parts, and, after an interval of time, the core is locked down and the wheel passes around. When the wheel gets to a certain place in its travel, the cores are unlocked and start to ride upwards. The core bar is lifted up on a cam track, which causes the core to be slightly lifted in the cone, which is retained in the sections of the mold by the adhesion of the batter to the mold surface, which adhesion is augmented by the filigree design, which helps to hold the cone in. While the core is still projecting into the cone, that is, lifted only slightly, the sections of the mold are separated, and the core acts as a stripping finger that causes the cone, which has adhered to one side or the other of the half-molds, to be stripped free. The core is made of iron, and the molds are made of iron, and they are heated to a uniform temperature, which causes the cones to bake very rapidly. When the cone is raised slightly, the female mold parts are opened up, and, as they open, the core acts as a finger to detach the cones from the side to which they adhere; that frees the cone, which then drops down, goes through a trimming mechanism to remove the excess batter, and passes out on a con-

Before the advent of the Bruckman machine there were no automatic machines in use in this or any other country for manufacturing ice cream cones of any sort. The old practice was to bake the cones in a little hand instrument or oven similar to waffle irons. Various other methods were successively employed, but none involved a complete, comprehensive, and co-ordinating automatic system.

The defendants' machine is in appearance almost a Chinese copy of the Bruckman machine. The batter is placed in a tank, is thence introduced into the molds, the molds are locked, the core is locked, and the cone goes through its cycle and is discharged in substantially the same way as by the Bruckman machine. There are some differences in detail, but the various elements employed are obvious mechanical equivalents of the Bruckman device.

Albert E. Dieterich, of Washington, D. C., and M. J. Ostergard, of Kansas City, Mo., for complainants.

G. Y. Thorpe, of Kansas City, Mo., for defendants.

VAN VALKENBURGH, District Judge (after stating the facts as above). I do not think there is any necessity of taking up more time in this case. We have here presented a patented invention, which has developed a very considerable and practical commercial value in the art, and necessarily there is a great deal of desire on the part of others similarly engaged, or who desire to become similarly engaged, to avail themselves substantially of the general disclosures made by the patent in suit. The defendant in this case has taken the stand, and has displayed a very candid spirit, and I believe has acted in good faith in this matter, due to the fact that there is in his mind, as in the minds of others, a misapprehension of the inherent nature of this particular device and invention. Like many others, he thinks that a technical mechanical departure from the patented structure relieves him of any charge of infringement. Many of the suggestions he makes would be quite applicable to a very restricted invention, where the patentability of the device depended upon some incidental feature in the way of improvement that has been added to something theretofore well and generally known. In such cases, if a little difference in means is devised, something that operates a little more advantageously in some of the features of the process of operation of the machine, that is conceived by many to take the changed device out of the scope of the patented invention.

But I am compelled to look upon this as, in the true sense, a broad and pioneer invention. It is true that practically everything disclosed in complainants' device was previously known in some form or other, or in some art, standing by itself and separately used. Of course, it would be impossible to have had an apparatus for making ice cream cones that would not have displayed some of the characteristics of this invention: but it seems to me we have here the case of a man who has conceived a practical and commercial machine, capable of taking a substance like the batter of which ice cream cones are made—a brainless machine, purely mechanical, beginning with this batter and carrying it through to a point where this fragile cone is produced ready for the packing, a product that is easily broken, that requires the very greatest delicacy of touch and handling, and computation of the amount of the material, of the degree of heat, and of the period of contact, requiring almost mechanical precision; in fact, actual mechanical precision and exactness.

As I say, this machine carries this process to the point where this delicate and fragile product comes out, without the intervention of a man's hand, from the time it is batter until these fragile cones are ready to be picked up and put in the packing cases. The process must be taken as a whole. It must be viewed as an entirety, as it presents itself to my mind. I have had, of course, no experience in these matters; but I do know that, by hand, such processes are difficult, and it is to me almost inconceivable that any man could have invented a complex machine of this character (and it is a very complex machine) that could carry the material with which it deals to a successful issue with such mechanical precision. I do not think that man ought to be deprived of the benefit of what to me amounts clearly to inventive genius.

The Glass patent (Brookfield & Stivers, No. 835,235, November 6, 1906) is distinctly in another art, and, if it were not, I do not think it makes the disclosures presented by the patent in suit, nor any appreciable number of those disclosures that would be particularly helpful, or particularly suggestive, to anyone entering upon the study of this

subject. Therefore the defense of anticipation fails.

There is much more that could be said, but I think this sufficiently indicates the view of the court upon the whole matter as presented. An injunction will be granted as prayed. From the disclosures here only nominal damages should be awarded.

A decree may be entered accordingly.

DE LASKI & THROPP CIRCULAR WOVEN TIRE CO. v. IREDELL, Internal Revenue Collector.

(District Court, D. New Jersey. November 9, 1920.)

1. Statutes 219—Treasury rulings that word was omitted by oversight cannot change statute.

In construing a revenue statute, the fact that rulings by the Treasury Department indicate that a word was omitted from the statute by oversight is immaterial, since treasury rulings cannot modify or add to the clearly expressed language of Congress.

Internal revenue \$\iiii 7\$—Corporation licensing use of patents has only "nominal capital," term "capital" not embracing patent rights.

Within Revenue Act Oct. 3, 1917, §§ 201, 209 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 6336%b, 6336%j), "capital," which is defined as wealth employed in or available for production, including whatever is intended to furnish shelter, tools, and materials and maintenance for the laborers during production, does not include patent rights, so that a corporation which had an authorized capital only sufficient to maintain its organization between the royalty payments, and derived its income, which largely exceeded its total capital, from royalties on its patents, had only nominal capital, under section 209.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capital.]

3. Internal revenue 7—Corporation licensing use of patents is in a sense furnishing skill and service.

A corporation, which merely licenses others to use patents owned by it, is in a sense furnishing skill and service represented by the patents to others, so as to come within the spirit of Internal Revenue Act Oct. 3, 1917, § 209 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 63363%j), imposing a smaller excess profits tax on trades or businesses having only a nominal capital, which was intended for the protection of those whose income arose chiefly from personal services.

In Equity. Suit by the De Laski & Thropp Circular Woven Tire Company against Samuel Iredell, Collector of Internal Revenue of the First District of New Jersey. On motion by defendant to strike out the complaint. Motion dismissed.

E. Clarkson Seward, of New York City, Hutchinson & Hutchinson, of Trenton, N. J., and Roberts, Montgomery & McKeehan, of Philadelphia, Pa., for plaintiff.

Elmer H. Geran, U. S. Atty., of Trenton, N. J., for defendant.

BODINE, District Judge. The plaintiff, a New Jersey corporation, has brought suit against the collector of internal revenue for the First district of New Jersey to recover an excess profits tax for the year 1917, alleged to have been improperly levied, assessed, and collected, and the defendant has moved to strike out the complaint, for the reason that—

"A corporation whose sole income is received from licensed patents is a corporation having more than a nominal capital, within the meaning of sec-

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tion 209 of the Revenue Act of October 3, 1917" (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336%).

The complaint discloses that the plaintiff was incorporated in 1903, with an authorized capital stock of \$100,000. At the time of its incorporation its officers contemplated engaging in the business of manufacturing pneumatic vehicle tires of a peculiar and unusual construction. The Company experimented at great expense over a period of years, until it was determined that the manufacture of its tires was not commercially possible. One of the officers of the company during the period of experimentation developed a new form of mold for vulcanizing pneumatic tires, which mold was of general utility, and a patent was secured, which was assigned to the company for \$1, together with other patents relating to tire-manufacturing apparatus.

In 1911 the Company ceased conducting any other business than that of granting licenses under its patents. Its capital was reduced to \$10,000. During the year 1917 the capital and surplus were \$10,000 and \$2,000, respectively, or a total invested capital of \$12,000, which capital was used as a fund from which to advance salaries, wages, etc., and to provide office furniture, accommodations, and equipment. The company was in much the same position as an individual who, having invented a machine desired by others, received royalties for the use of his invention and kept sufficient money on hand to provide for his needs during periods when royalties would not be received. The company's net income during the year 1917 was \$105,650.29. It is clear, therefore, that the patents had real yalue.

The plaintiff concluded that it was entitled to be assessed under section 209 of the Revenue Act of 1917, on the theory that it was a corporation "having no invested capital or not more than a nominal capital." The Treasury Department, however, acting under section 210 of the act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 63363/sk), on the theory that it was unable to satisfactorily determine the invested capital of the plaintiff, assessed an additional tax, which was paid by the plaintiff under protest, and for the recovery of which this action is brought.

Section 201 of the Revenue Act of 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 63363/8b) provides that, in addition to an income tax, every corporation, except those specifically exempted, of which the plaintiff is not one, shall pay the additional tax upon its net income. The tax was graduated, and was a certain percentage of the net income, not in excess of certain fixed percentages of the invested capital. Under section 207 of the act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 63363/8h) the term "invested capital" is defined. It appears from this section that the plaintiff's patents would not be included in the term "invested capital," for the reason that no stock of the plaintiff company was issued therefor, nor were these patents specifically paid for in cash or tanglble property. The only invested capital of the plaintiff was the \$12,000 of capital and surplus, which was not used in the production of the net income of the plaintiff, but

merely for the purpose of advancing salaries, wages, and providing office accommodations and equipment, and which in itself, under treasury ruling, would not bring the company under section 201 of the act.

In determining the question whether such a corporation, deriving its income solely from royalties or licenses from patents, can be said to be a corporation "having no invested capital or not more than a nominal capital," within the meaning of section 209, reference is made in behalf of the collector to the Congressional Record of October 6, 1917, containing a statement by Hon. Claude Kitchin, who was at that time chairman of the Ways and Means Committee. It appears from this statement that the Excess Profits Tax Law, as contained in the House Bill, applied only to corporations and partnerships, and not to individuals. The Senate brought within the scope of the law individuals in trade or business, but excluded lawyers, doctors, professional men, and officers of corporations, as well as governmental officers. The House conferees, it would seem from Mr. Kitchin's statement, opposed the inclusion of individuals, unless they were all brought in. The Senate insisted upon the exemptions, and section 209 of the act resulted, which, it is the claim of the collector, was intended to apply to a definite class of persons; i. e., lawyers, doctors, professional men, and high-salaried officers of corporations and the government.

If this idea of providing especially for those rendering a personal service was all that was in the minds of the conferees, there seems to be no reason why they should not have used more exact language to convey their meaning, and further there is no reason at all why Congress should have specifically provided that, in a case of a trade or business "having no invested capital or not more than a nominal capital," there should be assessed a tax other than the tax to which such trade or business would otherwise be liable under section 201, unless there was to be a distinction between those employing "invested capital" and these employing "nominal capital." These terms admit of exact definitions.

[1, 2] The determination of this case must, as already indicated, depend upon the meaning of the words "not more than a nominal capital." It is clear from section 207 that the patents from which the plaintiff derived its revenue cannot be regarded as "invested capital." Counsel for the plaintiff, in a most exhaustive and painstaking brief, has shown that the treasury rulings indicate that the word "invested" was omitted in the act by oversight in the phrase "not more than a nominal (invested) capital." This suggestion, however, is not well taken, for the reason that, whatever the treasury rulings may have been, they can be given no force to modify or add to the clearly expressed language of Congress. It does not follow, however, that the word "capital" embraces patents. The following definitions of "capital" are in point:

"Wealth employed in or available for production." Funk & Wagnalls New Standard Dictionary.

"That part of the production of industry which, in the form either of national or of individual wealth, is available for further production." The Century Dictionary and Cyclopedia.

The late J. S. Mill, the eminent economist, defines "capital" as follows:

"What capital does for production is to afford shelter, protection, tools, and materials which the work requires, and to feed and otherwise maintain the laborers during the process. Whatever things are destined for this use, destined to supply productive labor with these various prerequisites, are capital." Political Economy, i, iv, § I. (The italics are mine.)

Taking this last definition, which embodies the thought of all the others, it seems clear that patents do not fall within the term "capital"; and it also seems to be clear that this is what was in mind when Congress made the distinction between "invested capital," which is defined under section 207 to include the actual cash value of patents paid for in stock or shares, and also such other intangible property, which had been paid for in money or stock, and also what was in mind when the word "capital" is used alone in section 209, preceded by the word "nominal"; that is, in the sense of something in name only employed in or available for production. The distinction is between those employing those stored-up concrete things, essential to productive labor, and those employing these things existing in name only. Patents were never capital in an economic sense. Congress included them within the term "invested capital" to the extent only of the investment in them; if no investment in them, then they remain in the same class as that intangible something which makes for the wealth of the professional man, the broker, or others engaged in a personal service, which could never be "capital," except in name only.

131 The decision of this case, however, need not depend solely upon the meaning of the word "capital," to be found in the distinction between "invested capital" and "nominal capital," as used in the act. The patents which the plaintiff owned were the concrete embodiment of the skill which the plaintiff possessed in its field of activity. This skill or service it bartered for a consideration. Such skill or service is like the service a lawyer in large practice renders for an annual retainer, and is very nearly akin to the service which a commission house renders to those who buy and sell through it, or the service of a concern engaged in selling or leasing real estate, and in writing insurance. The plaintiff's source of income was that which certain persons were willing to pay it for the use of its skill and knowledge. It is true that skill and knowledge had been reduced to concrete form; but the payment was for the use of the skill and knowledge, and not for any part or parcel of the form to which the skill and knowledge had been reduced. Hence it would seem that in a very real sense the plaintiff was engaged in rendering a personal service, and was not employing "capital," and certainly no more than a "nominal capital."

The motion to strike is dismissed.

In re ROSENBLUM.

(District Court, W. D. Missouri, S. W. D. June, 1919.)

Bankruptcy = 241(2)—Evasive testimony and apparent concealment of assets held to warrant bankrupt's commitment for contempt.

A bankrupt's evasive testimony before the referee and the court, his failure to account for considerable quantities of goods or their proceeds, etc., held to warrant his commitment for contempt for a period of six months, with an opportunity for the bankrupt to make disclosure of his affairs after five days of imprisonment.

In Bankruptcy. In the matter of Sol Rosenblum, bankrupt. On order to show cause why the bankrupt should not be punished for contempt. Judgment of commitment.

John C. Ammerman, of Joplin, Mo., for referee in bankruptcy. William L. Butts, of Joplin, Mo., for receiver and trustee. Mercer Arnold, of Joplin, Mo., for petitioning creditors. Tadlock & Tadlock, of Joplin, Mo., for bankrupt.

VAN VALKENBURGH, District Judge. The referee has filed with the court his certificate informing the court that the bankrupt has refused to submit to an examination according to law, in that he has persistently testified evasively and falsely, and has evinced a deliberate determination to conceal from his creditors and from the trustee all the material facts within his knowledge relating to the affairs of his bankruptcy. Upon the petition of the trustee, an order upon the bankrupt to show cause why he should not be punished for contempt was duly issued. The bankrupt was brought before the court, and the court directed that the bankrupt be further questioned upon the matters and things involved in his examination before the referee, for the double purpose of enabling the bankrupt to purge himself of his alleged contempt, if he so desired, and of enabling the court, from personal observation, to gain some insight into his mental and moral attitude. Accordingly the bankrupt was examined at considerable length. His answers were totally unsatisfactory and ineffective. The court has further carefully read the transcript of the testimony before the referee; it fully bears out the interpretation put upon it by that officer and by the trustee, and the examination before the court is confirmatory thereof.

While it is true that the bankrupt is an ignorant man, and still speaks English imperfectly, nevertheless he is able to command the language for all sufficient purposes and with a full understanding of questions and answers. He was able to amass the sum of \$2,000 as a pedler before entering into business in Joplin, and for some considerable period, at least, has been conducting a business amounting in volume to something like \$30,000 or \$40,000 a year. During the last four or five months preceding his bankruptcy, he bought goods in excess of \$23,000. He had \$3,500 on hand at the time of his failure. Taking into account his payments to creditors upon these bills, as well as his personal and other business expenses, as disclosed by his bank and check

books, he fails to account for something like \$10,000 or \$12,000 of the value of the merchandise he purchased. From his own admissions it appears that he has delivered, or, as he says, sold, considerable quantities of such goods to other dealers, including his brothers-in-law. He claims to have been paid for such sales. It is obvious that he should have either the goods, or the money, or satisfactorily account for

the disposition of all or both.

Making all allowances for ignorance and imperfect and unsystematic business methods, the court cannot shut its eyes to the fact that the bankrupt belongs to a shrewd business class, which is not given to dissipating its property or giving it away to others, without compensation, and without heed to its destination. It is also noteworthy that those who can neither read nor write, and who do not, therefore, depend upon written records, more accurately develop the faculty of accurate memory. Some of our shrewdest and most successful business men, with reasonable limitations, have labored under this handicap. Aside from general ignorance, the bankrupt gives no evidence of stupidity, except that of a studied nature amounting to affectation. The court cannot permit a pretext so superficial to thwart the mandate of the law in the administration of bankrupt estates.

Apart from this, the court was able to detect certain evidences of deceit which have an important bearing upon its estimate of the entire conduct of the bankrupt. He stated to the court that his former attorney, Mr. Coon, then out of the city, had the original notes he gave his brother, whom he claimed to owe \$5,000. He said his brother made him give notes for such loans, and that the full amount had been paid some time during the past year. Upon Mr. Coon's return, it developed that he had but one note, and that for the sum of \$2,000. The bankrupt, at the hearing before the court, produced what purported to be copies made of the originals, said to be in Mr. Coon's These copies were purely self-serving, and found no counterpart in what has been produced before the court. The court gave opportunity for such production, and no explanation is made for the failure. The fact appears to be that no such notes existed. The check books of the bankrupt do not show the payments he claims to have made. Even so, a wholly unexplained discrepancy further exists.

Furthermore, he admits making a statement to Dun & Co. which is, in fact, notoriously false. He claims, however, that this was made up by a representative of one of his creditors; that it was guessed at; that the bankrupt permitted it to be done, knowing what use was to be made of it, without taking the pains to make inquiry of his bookkeeper as to certain items, the exact amount of which could have been ascertained. His defense of ignorance in this respect is discredited. His action has been disingenuous and indirect. The conviction is forced that he has disposed of large quantities of his goods to relatives and others for his own benefit without payment, or that, if payment has been received, the same is concealed. He refuses to divulge the facts upon statutory examination, presumably for the purpose of protecting and concealing these illegitimate transactions.

In my opinion, the practice adopted in other circuits is appropriate

here. The judgment of the court will be that the bankrupt is guilty of contempt, and shall be committed to the Jasper county jail for a period of six months from this date. If, after five days of such imprisonment, he wishes to have an opportunity to be again examined, the marshal will be directed to take him before the referee for re-examination, and if, upon such examination, he shall make a full and satisfactory disclosure of all the material facts in the case within his knowledge, an application may be made to the court for a discharge from imprisonment; but if he declines to submit to such examination, or if, having applied for it, he is guilty of the same evasions and duplicity which characterized the ones already had, such imprisonment shall continue for the term already stated.

It is so ordered.

UNITED STATES v. MOSSEW.

(District Court, N. D. New York. October 12, 1920.)

1. Fines =18-Under Lever Act not remitted summarily.

Comp. St. § 10130, as to remission of fines on summary investigation before District Judge, does not authorize him to recommend remission of a fine by the Secretary of the Treasury for violation of National Defense Act Aug. 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115%e-3115%kk, 3115%-3115%r).

2. Fines \$\iiin\$ 18—Not remitted summarily by District Court, sitting as Court of Claims.

The concurrent jurisdiction with the Court of Claims given by Comp. St. § 991(20), does not authorize the District Court to sit as a Court of Claims to remit a fine imposed under National Defense Act Aug. 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½se-3115½sk, 13115½sr), where the claimant has not complied with the formal statutory provisions as to suing in the Court of Claims, but has merely presented a petition asking the court to act summarily.

Criminal prosecution by the United States against Joseph Mossew. On application for refunding of a fine. Order denied. See, also, 261 Fed. 999; 266 Fed. 18.

Mangan & Mangan, of Binghamton, N. Y., for petitioner. Dennis B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

COOPER, District Judge. This is an application by Joseph Mossew for the refunding of a fine of \$500, paid by Mossew upon pleading guilty in August, 1919, to an indictment containing three counts, charging him with a violation of the National Defense Act (40 Stat. 273, c. 53, approved August 10, 1917 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½e-3115½kk, 3115½[-3115½r]). On the 28th day of June, 1920, the indictment was quashed, and he now seeks to recover the amount of the fine.

The petitioner, Joseph Mossew, asks that this court, in a summary manner, certify and transmit the petition and facts to the Secretary of the Treasury, and have him remit the fine, under authority of section

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9636 of the Barnes Code (Comp. St. § 10130), or that the court sit as a Court of Claims under the jurisdiction conferred by section 785, subd. 20, Barnes Code (Comp. St. § 991 [20]), giving the District Court concurrent jurisdiction in all cases where such claim does not exceed \$1,000.

[1] Section 9636 of the Barnes Code was not meant to cover this class of cases. That section sets out:

"Whenever any person who shall have incurred any fine, penalty, or forfeiture, or disability, or may be interested in any vessel or merchandise which has become subject to any seizure, forfeiture, or disability by authority of any provisions of law for imposing or collecting any dues or taxes, or relating to the registering, recording, enrolling, or licensing vessels * * * shall prefer his petition to the judge of the district in which such fine * * * the judge shall inquire, in a summary manner, into the circumstances of the case, first causing reasonable notice to be given to the person claiming such fine * * * and to the attorney of the United States, * * * that each may have an opportunity of showing cause against the mitigation or remission thereof, and shall cause the facts appearing upon said inquiry to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury."

This section is liable to erroneous construction by reason of defection punctuation. It may be understood to mean "any person who shall have incurred any fine, penalty, or forfeiture, or disability," or (who) "may be interested in any vessel or merchandise which has become subject to any seizure, forfeiture, or disability," thus providing for two distinct classes of cases. By reference to the original act (1 Stat. 506 [Comp. St. § 10130]), it will be seen by the title that "any person" and "any fine, penalty," etc., is limited to the certain cases therein numerated. 20 Op. Atty. Gen. 705.

The power intrusted by the acts to the Secretary of the Treasury to remit penalties is one for the exercise of his discretion, and admits of no appeal to the Court of Claims or to any other court. Dorsheimer v. United States, 7 Wall. 166, 19 L. Ed. 187. In an analogous situation it was held that the Secretary is not authorized under this title to remit a fine or penalty incurred for violation of the alien immigra-

tion laws. 20 Op. Atty. Gen. 705.

This section is not applicable to proceedings to recover all fines. The Margaretta, Fed. Cas. No. 9,027. As this section is not applicable to the remissions of a fine in the case at bar, the court has no authority to order the Secretary of the Treasury to make remission of the

penalty incurred.

[2] Petitioner then asks that the court sit as a Court of Claims and remit the fine imposed. While it is true that the District Court has jurisdiction with the Court of Claims in amounts up to \$1,000, it is equally true that the United States government in its sovereign capacity cannot be sued, unless by consent of the sovereign. In order for the claimant to bring his cause properly before the court, he must comply with the formal statutory provisions relative to bringing suits in the Court of Claims. In this case the petitioner has merely presented a petition, and has asked the court to act in a summary manner. This

it has no authority to do, and until such time as he complies with the requirements essential to enable him to sue the sovereign government he is without redress.

The order is therefore denied, but without costs.

UNITED STATES v. GEER et al.

(District Court, W. D. Pennsylvania. September 8, 1920.) No. 2288.

1. Railroads 55/2, New, vol. 6 A Key-No. Series—Federal control did not suspend Hours of Service Act.

The taking over by the government of control of the railroads for war purposes, under Act Aug. 29, 1916, § 1 (Comp. St. § 1974a), did not suspend the operation of Hours of Service Act March 4, 1907 (Comp. St. § 8677-8680), and officers and agents of a railroad company retained in their positions, by the Director General of Railroads, remained subject to its provisions.

Master and servant ☐17—Unavoidable accident, within Hours of Service Act, affirmative defense.

In an action against officers or agents of a railroad company to enforce the penalty for permitting employees to remain on duty for a longer period than 16 consecutive hours, in violation of Hours of Service Act March 4, 1907, § 2 (Comp. St. § 8678), that the case was one of unavoidable accident, within the proviso of section 3 (section 8679), is an affirmative defense, which must be specially pleaded and proved.

 Master and servant —13—Unavoidable delay of train no excuse for extension of hours of service.

Delay of a train by unavoidable accident is not a license to a carrier for any officer or agent to keep the crew of such train on continuous duty over 16 hours, under the proviso in Hours of Service Act March 4, 1907, 3 (Comp. St. § 8679); but to excuse such service it must be shown that the officer or agent made at least some effort to avoid excess service.

At Law. Action by the United States against I. W. Geer and others, officers and agents of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for the United States.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa., and Monroe C. List, Sp. Asst. U. S. Atty., of Washington, D. C.

W. S. Dalzell, of Pittsburgh, Pa., for defendants.

THOMSON, District Judge. In this action, brought by the United States attorney on behalf of the United States, to recover for alleged violations of the Hours of Service Act, the parties have agreed that the cause may be heard and determined by the court; a jury being waived. The parties have also, by stipulation filed, agreed upon the following facts, which are accordingly found by the court as facts in the case:

(1) The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company is a corporation organized and doing business under the laws of the states of Pennsylvania, Indiana, and Illinois, and prior to 12 o'clock noon, December 28, 1917, said corporation was, and since 12:01 a. m., March 1, 1920, has been, a common carrier engaged in interstate commerce by railroad in the state of Pennsylvania and other states of

the United States, with an office and place of business at Pittsburgh, Pa. The main line of said railroad extends from Pittsburgh, through Dennison and Columbus, Ohio, to St. Louis, Mo., and Chicago, Ill.

(2) For some time prior to 12 o'clock noon, December 28, 1917, defendants were officers and agents of said railroad corporation as follows: R. E. McCarty, a vice president; I. W. Geer, general superintendent; J. C. McCullough, superintendent; J. H. Adrian, assistant trainmaster; J. C. Altland, train dispatcher; and H. E. Joseph, train dispatcher. All of said officers and agents, excepting I. W. Geer, were located at Pittsburgh; Geer was located at Columbus.

(3) By wirtue of that certain proclamation of the President of the United States issued on December 26, 1917, said Pittsburgh, Cincinnati, Chicago & St. Louis Railway, at 12 o'clock noon, December 28, 1917, was taken over by the United States, and was thereafter, until 12:01 a. m., March 1, 1920, in the possession and under the control of the United States, to the extent and in the manner set forth in said proclamation.

(4) In section 3 of the federal Hours of Service Act (Comp. St. §

8679) there is this proviso:

"Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen"

—which necessarily has a very important bearing upon the efficient operation of said railroad, especially in the performance of its duties to the public. In the operation thereof it was considered practically impossible for any of the operating officers, except those directly in charge of train operations at the time, to pass upon the question whether, under the circumstances, men employed in the actual operation of a train are or are not within the terms of this proviso. Therefore, in an earnest endeavor faithfully to comply with the provisions of the Hours of Service Act, the defendant R. E. McCarty, on April 27, 1915, then general superintendent of said railway company, and located at Columbus, Ohio, issued a certain order, which was in effect until some time in 1919, directing that all employees in train service should be relieved within the 16-hour period, as required by the act, unless such employees had been delayed in the completion of their run by an unavoidable accident or casualty, over which the officers had no control, and that, when so delayed, the time lost by reason of such unavoidable detention might be added to the 16-hour period. This order was transmitted to various division superintendents, including the defendant J. C. McCullough, then superintendent in charge of the division between Pittsburgh and Columbus. panying this order was a list of delays that the company's various division superintendents considered to be either excusable or nonexcusable.

(5) On January 3, 1917, the board of directors of the Pennsylvania Lines West of Pittsburgh appointed said I. W. Geer general superintendent of their Southwest System, which included said Pittsburgh, Cincinnati, Chicago & St. Louis Railway; and on July 2, 1918, said R. E. McCarty was appointed general manager thereof by G. L.

Peck, federal manager having jurisdiction over said railroad.

(6) On October 22, 1918, said I. W. Geer, then general superintendent at Columbus, reissued the instructions contained in said order of April 27, 1915, transmitting a copy thereof to said J. C. McCullough, then division superintendent at Pittsburgh, who in turn transmitted the same to trainmasters, assistant trainmasters, and train dispatchers in charge of train movements between Pittsburgh and Columbus.

(7) On December 29 and 30, 1918, there were operated over the line of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway the trains mentioned in plaintiff's statement of claim, known and designated as extra east and extra west, drawn by Pittsburgh, Cincinnati, Chicago & St. Louis Railway engine No. 8043. Both of said trains were engaged in the movement of interstate freight. The following named persons composed the engine and train crews of said trains: W. W. Chaney, conductor; C. F. Kull, engineer; J. A. Bridgeman, fireman; F. F. Heath, trainman; and A. C. Combe, trainman—being the persons named in the first, second, third, fourth, and fifth counts,

respectively, of said statement of claim.

(8) The members of said engine and train crews went on duty at Dennison, Ohio, at 8:45 p. m., December 29, 1918, with orders to operate their train to Pitcairn, a distance of 105 miles. After being delayed in the Dennison yards by trains ahead, they left there at 11:30 p. m. with 34 loaded freight cars, and proceeded with only the ordinary delays encountered by freight trains until they reached a point near Wheeling Junction, W. Va., about 4 miles west of a telegraph office known as "MN" Tower, which is about 1 mile from Collier, W. Va., at which point they were delayed 4 hours and 50 minutes by an unavoidable accident, the happening of which was unknown to any of said defendants until after said engine and train crews had left Denni-This unavoidable delay necessitated a decision by the defendant J. C. Altland, who was then on duty as a train dispatcher at Pittsburgh from 6:30 a. m. until 2:30 p. m., whether he should order said engine and train crews to turn their train over to other engine and train crews at Collier, where there is located a large freight yard, but which is not a terminal, and have the delayed engine and train crews take a train back to Dennison, or whether he should continue said crews in service eastwardly, with the view of relieving them between Collier and Pitcairn at what he believed to be the proper time. Said Altland, from his own experience, and also because of the instructions heretofore referred to, believed that he had the legal right to keep the delayed engine and train crews on duty 16 hours in addition to the 4 hours and 50 minutes unavoidable delay. Therefore said Altland, after consultation with the defendant J. H. Adrian, assistant trainmaster at Pittsburgh, caused the following message to be sent Conductor Chaney, over the signature of said J. C. McCullough, at "MN" Tower.

"Pittsburgh, Dec. 30th.

[&]quot;You had 4 hours and 50 minutes legal delay account of wreck at "MN."
Use this time.

J. C. McC."

Said Altland went off duty at 2:30 p. m., December 30, at which time he acquainted the defendant H. E. Joseph, who worked as train dispatcher from 2:30 p. m. until 10:30 p. m. with the citation

dispatcher from 2:30 p. m. until 10:30 p. m., with the situation.

(9) At the time Joseph went on duty the engine and train crews in question were on their way back to Dennison with a train of 19 loaded cars and 16 empty cars, having been so ordered by said Altland, over the signature of said McCullough. Shortly after going on duty said Joseph conferred with said Adrian, and upon the latter's instructions sent the following message, over the signature of said McCullough, to Conductor Chaney, of extra west, engine 8043:

"Pittsburgh, December 30th.

"Extra 8043:

"Do not outlaw yourselves at 5.35 p. m. If you cannot make Dennison with train, leave it at 'MB' Tower or 'OB' Tower and go in light.

"J. C. McC."

(10) The following table shows the movement of extra east and extra west, engine 8043, in detail, the distance of the several stations from Dennison, the time of arrival at and departure from these stations, and the time the engine and train crews in question had been on duty upon such arrival and departure:

Miles.	Stations.	Time.	On Duty.
	: 10.2	Dec. 29.	Hrs. Min.
	Lv. Dennison, Ohio	11.30 p. m.	2 - 45
9.6	Lv. OB Tower, Ohio	11.59 p. m.	3 14
47.3	Lv. Steubenville, Ohio	3.03 a. m.	6 18
48.7	Ar. Wheeling Junction, W. Va	3.34 a, m.	6 49
52.9	Ar. MN Tower, Collier, W. Va	8.53 a. m.	12 08
-52.9°		12.03 p. m.	15 18
47.3	Lv. Steubenville	12.31 p. m.	15 - 46
-9.6	Lv. OB Tower	4.36 p. m.	19 51
.1	Ar. D. A. Tower, Dennison	5.08 p. m.	20 23
Train crew relieved		5.30 p. m.	20 45
Engine crew relieved		5.34 p. m.	20 49

The court finds from the evidence the following additional facts:

(11) Train movements over the Pittsburgh, Cincinnati, Chicago & St. Louis Railway between Pittsburg, Pa., and Columbus, Ohio, were, in the following relative order of superiority, under the control of the general manager, the general superintendent, the division superintendent, the trainmaster or assistant, the train dispatchers.

(12) In December, 1918, the following named defendants were the operating officials of said railroad: R. E. McCarty, general manager; I. W. Geer, general superintendent; J. C. McCullough, division superintendent; J. H. Adrian, assistant trainmaster; J. C. Altland, train dis-

patcher; H. E. Joseph, train dispatcher.

(13) Train operations on this railroad were carried on in practically the same manner during the federal control as before. No trains of any other railroad company were ever operated over the line of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway between Collier, W. Va., and Dennison, Ohio.

(14) The persons named in plaintiff's statement of claim and engaged in the operation of the two trains in question were, on December 29 and 30, 1918, employees of the Pittsburgh, Cincinnati, Chicago &

St. Louis Railway Company.

The act of March 4, 1907 (Comp. St. §§ 8677-8680), under which this action was brought, is a highly remedial statute, in the enforcement of which the employees, but more particularly the public, are vitally concerned. In this case the burden is upon the government to show that the defendants were officers and agents of the common carrier, and that they required or permitted its employees, the defendants here, to remain on duty longer than 16 hours. If such proof is offered a prima facie case is made out, and upon the defendants, who claim a defense under the proviso to section 3, is the duty to properly plead and the burden of establishing such defense. The facts agreed upon show, and the affidavit of defense concedes, that the employees named in the several causes of action set forth in the statement of claim were kept on duty continuously for 20 hours and 50 minutes on December 29 and 30, 1918. But they plead by way of defense, first, that they were not officers and agents of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company at that time; that said railroad was then under federal control; that defendants were not the employees of the railroad company, but of the federal government; and that this action therefore cannot be maintained under the act of Congress in question. Second, it is denied that the defendants required and permitted the employees named to be and remain on duty for a period in excess of the time allowed by law; that none of said defendants had any knowledge of the existence of the circumstances complained of except I. C. Altland, who was at the time complained of train dispatcher, having charge of train movements, as it was impossible for any of the operating officers, except those directly in charge of the operation of the trains, to pass upon the question whether in any given circumstances the men employed in the actual operation of the train are or are not within the terms of the proviso to section 3 of the act of Congress; that in an endeavor to faithfully comply with the act the general manager had issued an order, which was in effect at the time of the matters complained of, directing that all employees should be relieved within the 16-hour period, unless said employees had been delayed in the completion of a given duty by reason of some casualty over which the officers had no control, and that in all such cases the time during which such employees were delayed by such casualty might be deducted in computing the 16-hour period; that such order was transmitted by the general manager to the general superintendent, who in turn transmitted it to the several superintendents, and from them to the several dispatchers and trainmasters. And it is denied that the facts of the case show any breach of the Hours of Service Law.

[1] As to the first question: By the act of August 29, 1916 (Comp.

St. § 1974a), the President was given power by Congress—

"in time of war * * * to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment,

or for such other purposes connected with the emergency as may be needful or desirable."

In December of that year, war being then in progress, exercising the power thus vested in him, the President, by proclamation, took possession and assumed control of the several systems of transportation in the United States. By the proclamation a Director General of Railroads was appointed, with authority to take possession and control of the systems, to operate and administer the same for war purposes only, such control to cease upon the cessation of war. The act gave to the Director General the authority to use the services of the existing railroad officers, boards of directors, and employees to perform their duties as theretofore—

"until and except so far as said director shall from time to time, by general or special orders, otherwise provide."

In this legislation we have a conspicuous illustration of the right of the nation in time of war to exercise under the Constitution those extraordinary powers which may be deemed necessary for national protection and defense. In the presence of a great national exigency and in the interest of the whole people the powers of the nation rise superior, not only to the rights of persons, natural and artificial, but superior also to the rights of states. From the provisions of the act of Congress conferring the power, the proclamation of the President exercising that power, and the act providing for the operation of the transportation systems the legal status of the railroad companies and their officers and employees must be determined. It is clear that the corporate entity of the transportation systems is preserved; that the possession, use, and operation of the carrier, called federal control, is temporary and ceases on the cessation of the war.

Under the above legislation and the powers conferred on the President, and through him upon the Director General, the government in no sense became a common carrier, but exercised control over the carriers to the end that said systems of transportation be utilized for the transportation of troops, war material, and equipment to the exclusion, so far as may be necessary, of all other traffic thereon.

Keeping in view the purpose, and only purpose, of the legislation, it would be very anomalous if the existing acts of Congress, such as the safety appliance acts, the hours of service acts, and others passed solely for the purpose of protecting the public, should be held to be suspended or repealed, and that the nation could not thus exercise the extraordinary powers of government for national preservation without temporarily invalidating the existing legislation passed for the protection of the traveling public. To prevent any such harmful construction of the act, it is provided in section 10 of the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j):

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

This seems to me conclusive of the question. The legal status of the carrier while under federal control is fixed by the act of Congress, and that act expressly makes the carrier while under federal control subject to all laws and liabilities as common carriers.

I do not understand this position to be in conflict with the case of the Northern Pac. R. Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897. That case involved only a question of the right of the state of North Dakota to control intrastate rates during the federal control of railroads. Nothing in the opinion warrants the inference which defendants' counsel seek to draw therefrom that the defendants here are exonerated from liability because of the federal control of the carrier. It follows, therefore, that the first position

taken by defendants' counsel cannot be sustained.

[2, 3] Turning to the second question, the liability of the defendants under the facts, the act makes it unlawful to require or permit service of trainmen over 16 hours, unless such service is necessitated by an unavoidable accident. The prohibition is against the carrier or any officer or agent permitting such excess service. It has been held that the penalty applies, not to the crew as a unit, but to each individual member who is kept in the service overtime. Excess service may be justified under the facts, but the excuses embodied in the proviso are separate and affirmative defenses which must be specially pleaded and established. United States v. K. C. S., 202 Fed. 828, 121 C. C. A. 136; and cases cited. The authorities also establish that a delay to a train by an unavoidable accident is not a license to a carrier for any officer or agent to keep the crew of such train on duty over 16 hours. To excuse such service it must be shown that the officer or agent made at least some effort to avoid excess service. A., T. & S. F. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175, Ann. Cas. 1918C, 794; United States v. A., T. & S. F. (D. C.) 236 Fed. 154; G., C. & S. F. v. United States, 255 Fed. 753, 167 C. C. A. 99. It is also true that an officer or agent requires and permits excess service whenever he fails to prohibit it. O.-W. R. & N. v. United States, 223 Fed. 596, 139 C. C. A. 142.

In 1915 the defendant McCarty was general superintendent at Columbus, and in April of that year he issued the instructions to his subordinates, the compliance with which was the cause of the excess service of the employees in question. Later McCarty became vice president, and in July, 1918, general manager. During all this time he allowed these instructions to remain in effect. In 1917 the defendant Geer was appointed general superintendent at Columbus, and in October of 1918, he reissued said instructions. The excess service complained of was performed in the state of Ohio in December, 1918; the order requiring the service being issued at Pittsburgh. Yet, in May, 1917, the Circuit Court of Appeals for the Sixth Circuit had declared unlawful the very thing embodied in these instructions. This was followed in June by the decision of the Supreme Court of the United States, which made a similar ruling. Notwithstanding this conclusive interpretation of the law, the instructions in question

were allowed to remain in full force until some time in 1919, and as a result excessive service of train and engine crews was required and permitted.

The defendants do not plead a necessity for the excess service in question, nor that the same could not have been avoided, nor was evidence introduced to show any causal connection between the unavoidable accident and the excess service. The defendants Altland and Adrian caused the message requiring excess service to be sent to Conductor Chaney. Joseph did not attempt to avoid service over 16 hours; he and Adrian, in sending the second message, were concerned only in avoiding service over 20 hours and 50 minutes.

The defendants may have been mistaken as to the law of the case and the legal duty resting upon them under the circumstances toward the employees under their control. But this does not answer the case. It does not relieve the carrier, its officers and agents, from a very diligent effort to avoid exceeding the limits of service specified by the act of Congress, and which should be so construed as to effectuate the humane purpose of its enactment. Under the law applicable to the facts of the case, I find the defendants jointly and severally liable to the plaintiff on the five several causes of action set forth in the statement of claim.

UNITED STATES v. PUHAC.

(District Court, W. D. Pennsylvania. May Term, 1920.)

No. 1.

1. Statutes ≈165—Provision imposing penalties repealed by later statute prescribing different penalties.

National Prohibition Act, which imposes penalties for various violations, held to repeal provisions of the internal revenue laws, which prescribe different penalties for the same acts.

though drawn under different statute.

Where an indictment properly charges an offense under the laws of the United States that is sufficient to sustain it, although it may have been drawn on the supposition that the offense charged was covered by a different statute.

3. Intoxicating liquors =137-"Property designed for the manufacture of liquor" defined.

The words "property designed for the manufacture of liquor," as used in National Prohibition Act, tit. 2, § 25, are broad enough to include a still and distilling apparatus whether set up or not, and mash, wort, and

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, Property.]

Criminal prosecution by the United States against Andy Puhac. On motion to revise sentence. Denied.

E. Lowry Humes, of Pittsburgh, Pa., for the United States.

ORR, District Judge. In this case the indictment was drawn in the same form as the indictments hereinafter referred to; a true bill was found, and the defendant pleaded guilty. The amount of whisky manufactured by the defendant was five gallons. The court imposed a sentence of \$100. Thereupon the United States attorney moved the court to reconsider its judgment in imposing such sentence, upon the ground that said sentence was improvidently and illegally imposed, because the acts of Congress under which the indictment was drawn fixed a minimum penalty of both fine and imprisonment.

Since the passage of the National Prohibition Act (41 Stat. 305), many indictments have been drawn under certain sections of the Revised Statutes, which were passed by Congress for the purpose of securing to the United States internal revenue. True bills have been found upon such indictments, and defendants have been before the court for sentence. A grave doubt arose in the minds of the judges as to whether or not, since the passage of the National Prohibition Act, the revenue laws should be invoked for the punishment of such offenders. In other words, the court has been extremely doubtful as to the propriety of imposing the punishment provided for the violation of such revenue laws, where the indictments disclose, not only violations of the revenue law, but also violations of the National Prohibition Law. This involves the question whether the revenue laws, under which the indictments were drawn, have been repealed by the National Prohibition Law, either in whole or in part. Usually the counts in such indictments are four in number—the first charging an attempt to defraud the United States of the internal revenue tax upon spirits distilled by the defendant; the second charging the possession of a still, set up without registering said still with the collector of internal revenue; the third charging the making and fermenting of mash, wort, and wash fit for distillation on premises other than an authorized distillery; and the fourth charging the separation of distilled spirits from the fermented mash, wort, and wash.

The first count is usually drawn under section 3257 of the Revised Statutes (Comp. St. § 5993), which imposes a penalty of forfeiture of the distillery and distilling apparatus, distilled spirits, and all raw materials for the production thereof, found on the premises, and for a fine of not less than \$500 nor more than \$5,000, and an imprisonment of not less than 6 months nor more than 3 years. The second count is usually drawn under section 3258 of the Revised Statutes (Comp. St. § 5994), which provides for a penalty of \$500 and that the offender be fined not less than \$100 nor more than \$1,000 and imprisoned for not less than 1 month nor more than 2 years. The third and fourth counts are usually drawn under section 3282 of the Revised Statutes (Comp. St. § 6022), which imposes a fine of not less than \$500 nor more than \$5,000 and imprisonment for not less than 6 months nor more than 2 years.

In association with the sections of the Revised Statutes heretofore referred to are many others, which provide many details with respect to manufacturing, and especially with respect to government supervision, all for the purpose of securing to the government its lawful revenue from what in many states was the lawful manufacture of a lawful product. For example, section 3252 of the Revised Statutes (Comp. St. § 5987), which imposes a penalty upon one who adds any substance to distilled spirits before the tax is paid thereon, for the purpose of creating a fictitious proof; section 3260 (Comp. St. § 5997), which provides that every person intending to commence the business of distilling, shall execute a bond to the Commissioner of Internal Revenue, conditioned that he shall faithfully comply with all the provisions of law, under penalty of both fine and imprisonment; section 3263 (Comp. St. § 6001), which provides that a plan of the distillery shall be transmitted to the Commissioner of Internal Revenue, with a verification of its accuracy.

Turning, now, to the National Prohibition Act, we first observe that

its title is:

"To prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

As indicated by the title, we should expect the provisions of the act to be broad and comprehensive, and thus we find them.

Title 2, section 3, of the act provides:

"No person shall, on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacure, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act."

Congress apparently intended that whatever authorization there should be for the manufacture of liquor was to be found in the National Prohibition Act, and not in any other act. The act is full of provisions with respect to the authorization of the manufacture and sale of liquor for nonbeverage purposes and wine for sacremental purposes.

[3] Title 2, section 25, of the act provides:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property."

Then follows the provision for the issue of search warrants and seizure in pursuance of the warrants, with the provision that liquor or property so unlawfully held or possessed, or that had been so unlawfully used, and all property designed for the manufacture of liquor, shall be destroyed, unless the court shall otherwise order. The words "property designed for the manufacture of liquor," in this section, are broad enough to include a still and distilling apparatus, whether set up or not, and broad enough to include mash, wort, and wash.

Referring, now, to the complaint usually embodied in the first count of the indictments under consideration, how can it be said that a defendant attempted to defraud the United States of the internal revenue tax on spirits distilled by him, when he probably was willing to pay the tax, provided he could continue his distillation. But manufacture by him for beverage purposes was wholly forbidden by the National Pro-

hibition Act. If he complied with all the provisions of the Revised Statutes passed to secure revenue to the United States, he could not manufacture whisky, because of the prohibition of the National Prohibition Act, unless he was authorized to do so by the very terms of that act.

It seems to me that the indictments under consideration should not have been based upon violations of the Revised Statutes, but upon violations of the terms of the National Prohibition Act. This is confirmed when we see the penalties in the latter act for offenses which clearly embrace the denunciations of the revenue laws. We have already observed the provision for the forfeiture of liquor and property designed for the manufacture of liquor. There are other provisions for forfeiture, as, for instance, of the vehicle in which liquor may be transported.

Title 2, section 29, of the act provides that—

"Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than \$1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than \$200, nor more than \$2,000, and be imprisoned not less than one month nor more than five years."

[1] The penalty for the first offense is made less than any of the penalties attached to the offenses specified in the sections of the Revised Statutes upon which the indictments are drawn, but the penalty for the second offense is greater than in said sections of the Revised Statutes. There is clearly, then, an inconsistency in the matter of punishment, at least between the later act, which provides, in the main, more extreme penalties, and the sections of the Revised Statutes, which do not provide for such extreme penalties. But has the act any repealing clause? We find one relating to the repeal of inconsistent prior statutes relating to alcohol, and in the second title of the act, which relates to prohibition of intoxicating beverages, we find section 35, as follows:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of \$500 on retail dealers and \$1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve any one from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

The portion of the act just quoted contains a further provision for a penalty different from any penalty imposed for a similar offense under the Revised Statutes, so far as the same have been brought to our notice. We mention this because, as will be seen, the change in

the penalties is very important in determining whether or not, as between acts somewhat similar, the later repeals the former.

But it is apparent, from the first part of the section last quoted, that all the provisions of law which are inconsistent with the National Prohibition Act are repealed to the extent of such inconsistency. Are the provisions of the later act now under consideration inconsistent with the provisions found in the Revised Statutes? That they are apparently so may be urged from the difference in their purposes. The Revised Statutes, as we have said, were intended to protect the United States from loss of revenue in the conduct of what may or may not have been the lawful business of manufacturing intoxicating liquor for beverage purposes, whereas it appears in the National Prohibition Act, title 2, section 3, that—

"All the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

There is a plain inconsistency between the purpose of the earlier acts and the purpose of the later act in such respect. Again, the later act is so broad and inclusive that it is difficult to find anything permitted by the Revised Statutes to be possessed or used in the manufacture of liquor which is not the subject of forfeiture and condemnation in the later act, except so far, perhaps, as that act relates to liquor for non-beverage purposes. So far as forfeitures go for violation of the revenue laws, there appears to be nothing which may be excluded from forfeiture under the National Prohibition Act.

With respect to the penalties, it is observed that the penalties in the later act may be wholly different from the penalties imposed for violations of the Revised Statutes. Indeed, there seems to be such a clear repugnancy between the provisions of the Revised Statutes and the National Prohibition Act that the former must give way to the latter in prosecutions for the offenses set out in the indictments under consideration. Support for this position is found in the case of United States v. Tynen, 78 U. S. (11 Wall.) 88, 20 L. Ed. 153. In that case, Mr. Justice Field, who delivered the opinion, after considering two acts of Congress, uses the following language:

"The first act makes the punishment for the offenses designated imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the court; it thus permits what the first law prohibits.

"Again, the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this also it permits what the first act forbids.

"Again, the act of 1813 declares that the fine, when imposed, shall not be less than \$500. The act of 1870 allows the fine to be as low as \$300, thus authorizing what the first act declares shall not be done.

"When repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses shall be subsequently treated."

It is sufficient to hold, therefore, that the sections of the Revised Statutes are repealed, at least in respect to the penalties therein provided.

[2] In the treatment of those indictments drawn under the Revised Statutes, we have not been disposed to quash the same, for the reason that, while the several counts charged violations of the revenue laws, yet there may be found in the indictment a charge that the defendant committed an offense under the National Prohibition Act. If he manufactured spirits for beverage purposes, he violated the later act. If he had a still or distilling apparatus set up, or wort, wash, and mash fit for distillation, he violated the National Prohibition Act, because he had in his possession property designed for the manufacture of liquor intended for use in violating title 2 of said act.

We have recognized the ruling in Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509, that where an indictment properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the United States attorney may have supposed that the offense charged was covered by a different statute.

UNITED STATES v. DODSON.

(District Court, S. D. California, S. D. September 16, 1920.)

No. 2062.

1. Intoxicating liquors = 134—"Preserved sweet cider" defined.

Under National Prohibition Act, tit. 2, § 4(f), permitting the manufacture for sale of "vinegar and preserved sweet cider," preserved sweet cider is cider without alcohol and in which the possibility of the natural development of alcohol has been prevented through treatment or the use of some sort of preservative.

2. Intoxicating liquors \$\infty\$=134—Sweet cider containing preservative not "preserved sweet cider."

Sweet cider to which has been added one-tenth of 1 per cent. of benzoate of soda which retards, but does not prevent, the development therein of substantially the normal maximum of alcohol, held not "preserved sweet cider," within the meaning of National Prohibition Act, tit. 2, § 4(f), although known in the trade as "preserved sweet cider."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Preserve.]

3. Intoxicating liquors 236 (13) — Charge of selling not sustained by proof of sale of sweet cider.

An information charging defendant with the sale of cider containing more than one-half of 1 per cent, of alcohol *held* not sustained by evidence of the sale of sweet cider containing less than such per cent, of alcohol, although it later developed a larger content.

Criminal prosecution by the United States against John B. Dodson. Verdict of acquittal directed.

An information was filed against the defendant, alleging that on or about the 2d day of April, 1920, he did "knowingly, willfully, and unlawfully manufacture, prepare for market, and sell for beverage purposes and not for the

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

purposes of export certain intoxicating liquors in the manner as follows, that is to say: Said John B. Dodson did, at said time and place, manufacture, prepare for market, and sell to H. E. Houk, one 50-gallon barrel of cider, which said cider so manufactured and sold by said John B. Dodson was not put up and marketed in sterile closed containers, and was not treated in a manner to prevent fermentation, and to insure the alcoholic contents of said cider to remain below one-half of 1 per cent. of alcohol by volume, and which cider so sold by said John B. Dodson to said H. E. Houk then and there contained alcohol in excess of one-half of 1 per cent. by volume."

Subsequently the defendant was brought to trial before a jury on the information and it was developed therein that defendant was the manager and directive head of a company engaged in the manufacture and sale at wholesale of cider, the expressed juice of apples; that said company regularly added benzoate of soda, in the proportion of one-tenth of 1 per cent. by volume, to such juice so manufactured by it at the time of its manufacture; that this benzoate of soda did not, under normal conditions of heat and exposure to the air, prevent the fermentation of the cider so manufactured and so treated, but that it would merely retard such fermentation; that ultimately, in spite of the addition of the ingredient above named, the cider, in the course of a few days, under normal conditions, through the usual processes of fermentation, would develop its usual and normal maximum alcoholic content. The barrel of cider alleged to have been sold by defendant to Houk, a jobber, was finally purchased by a retail vender, and by him sold, in due course, to counter customers as a beverage. Upon its being tested, some days after delivery to the vender, and presumably several days after its manufacture and chemical treatment, as hereinabove referred to, it was found to possess alcohol to the extent of 4.8 per cent., by volume.

The proofs further showed, that apples of the sort and kind used in the manufacture of this particular cider, unaffected by the addition of any chemical agent, would, upon fermentation, develop a maximum alcoholic content of about 5 per cent. Proof was also adduced that in the trade, fresh cider, to which has been added one-tenth of 1 per cent. of benzoate of soda, is known as "preserved sweet cider." It was also in evidence, and uncontradicted, that the cider manufactured by defendant's company, at the time of its delivery to the vender above referred to, being immediately subsequent to its manufacture, contained less than one-half of 1 per cent. of alcohol. Upon the close of the case, defendant moved for an instructed verdict on the ground that proof had failed to show defendant guilty of any crime charged in the information or known to the law.

J. Robert O'Connor, U. S. Dist. Atty., and Burton Briggs Crane, Asst. U. S. Dist. Atty., both of Los Angeles, Cal.

Hudson P. Hibbard and Louis Kleindienst, both of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge (after stating the facts as above). Counsel in this case have severally indicated that the matter involved is one of great importance, and in consequence the argument had on the motion made took a wider scope than was necessary for the determination of the bare question before the court. Appreciating the importance to the industry involved of a decision of the matter thus broadly presented, I have endeavored in the time available to give to the contentions advanced the consideration of which they were obviously deserving.

am constrained to disagree with the main argument advanced by defendant, and yet entertain no hesitation as to my duty to grant the

motion made by him. This follows because I believe that the only thing for which the defendant could be convicted in this case at all would be the crime of selling a beverage which contained more than one-half of 1 per cent. of alcohol. There is no adequate proof that he did that. Leaving out the suggestion that it was sold by the corporation rather than by defendant, the proof offered by the government is to the effect that, tested several days after it had been sold, and when, under all the evidence, and under the information that comes to us by means of common knowledge, the alcoholic content would have grown and increased, the beverage sold by him contained alcohol in excess of the amount allowed by statute. This is overcome by defendant's proof, however, that, when sold, the excessive alcoholic content was not present.

Considerable reliance was placed in argument by defendant on an unreported case decided by Judge Augustus N. Hand, of the Southern District of New York, August 17, 1920, Hildick Apple Juice Co. v. Williams, 269 Fed. 184. The controversy there arose over the question of the sufficiency of the allegations in the bill of complaint in a suit to compel the issuance of a permit to manufacture preserved sweet cider. Section 6, tit. 2, Volstead Act (41 Stat. 310). A motion was made to dismiss the bill, and Judge Hand indicates that he was bound by the allegations contained in the bill, with the consequent admission of their verity in virtue of the motion to dismiss, and, not having the facts before him, he held the bill sufficient in its averments to justify the relief asked. The case is hardly a precedent here; yet, if it goes to the extent claimed, I feel constrained to dissent from it in some of

its broader aspects. If anything is well settled and determined, it is that the Volstead Law, enacted pursuant to, and in consequence of, the adoption of the Eighteenth Amendment to the federal Constitution, was intended and calculated by Congress, and by those interested in its passage, to prohibit the manufacture, sale, and transportation, for beverage purposes, of any and every kind of intoxicating liquor within the United States; and Congress expressly defined such "intoxicating liquor" to be any spirituous, vinous, malt or fermented liquor or liquid "fit for use for beverage purposes" containing alcohol to the extent of "one-half of one per cent. or more" by volume. Volstead Law, tit. 2, § 1. So that by this law, which was enacted after much consideration of the circumstances and of the obvious intent and purpose of the people of the -United States, as reflected by their ratification of the amendment, it was definitely and positively determined that any liquor or liquid, fit for use as a beyerage, and possessing alcohol in excess of the maximum mentioned, might not be manufactured, sold, or transported in the United States. Even its mere possession was similarly prohibited, save under exceptional, severely necessary, and obviously harmless circum-

This conclusion results, not only from the reading of the act in its entirety, looking at the big purpose in view and the means to be employed to gain the end sought, but also from the language of section 3 of title 2, the controlling section of the act, which is to the effect that:

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Here, in unequivocal language, we have a declaration on the part of Congress that, however this act may be viewed, and tested by every means known to those whose duty and function it is to construe statutes, in every instance the statute "shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." Nothing can be plainer than that, and it seems to me that Congress there, as it might properly do, has said that the courts shall not seek to construe the statute so as to permit the use of intoxicating liquors as a beverage, but that they shall use all reasonable means to construe it so as to prevent such use.

In so far as the prohibition above mentioned applied to the manufacture, sale, or transportation of beverages, actually, as opposed to constructively, intoxicating, because of their alcoholic content, the congressional enactment was but an express recognition of the constitutional mandate. In so far as Congress, in aid of the general purpose of making possible the practical enforcement of prohibition, fixed a definite, maximum alcoholic content to "nonintoxicating" beverages, it was acting clearly within its competency, and was proceeding in a way calculated to the attainment of the ultimate and in view and the successful performance of the duty imposed upon it by the constitutional amendment. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946, decided June 7, 1920; Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. —.

In connection with the language herein above quoted from section 3, there is a matter referred to by Judge Hand in his decision. Hil-

dick Apple Juice Co. v. Williams, supra. He says:

"It is important to note, however, that section 3, in spite of the prohibition clause, and the clause providing for a liberal construction of all the provisions of the act, in order to prevent the use of intoxicating liquor as a beverage, contains a careful limitation of its sweeping provisions in the words 'except as authorized in this act.'"

Now, that is true; but I cannot indulge in the implication therefrom that seems to have been indulged in by Judge Hand. This exception is merely in keeping with, and in recognition of, other specific provisions in the act permitting the manufacture, sale, possession, etc., of "intoxicating liquor" for certain nonbeverage purposes, such as sacramental, medicinal, etc., and for its possession in private dwellings only (title 2, § 25) for beverage purposes. It is in no wise inconsistent with, or counter to, the general purpose of the act, as I have endeavored hereinabove to set the same forth.

The position of the defendant herein is that, in virtue of certain provisions contained in section 4 of title 2 of the Volstead Law, he is authorized to make cider—express the juice of apples—and that he converts his immediate product into what is "known to the trade" as

"preserved sweet cider," merely by the addition of one-tenth of 1 per cent. of benzoate of soda, and that, thus treated, he may distribute, and his distributees may lawfully vend, the resulting product, irrespective of the alcoholic content or intoxicative effect that may develop after it shall have left his hands. And in this connection it must be remembered that under the proofs herein it is shown that the addition of benzoate of soda, in the minute quantity named (but being the maximum quantity usable in food products under the National Pure Food Law [Comp. St. §§ 8717-8728]), will not suffice at all to prevent fermentation and consequent development of alcohol; it merely retards such action. Under favorable (normal) conditions of heat, in this climate, fermentation will in the course of a few days proceed, and approximately the normal and usual quantity of alcohol, dependent upon the sugar content of the apple juice, will accrue in spite of the previous addition of the benzoate of soda.

In this wise, despite the admixture of the bonzoate of soda, the apples generally used by defendant, under the conditions normally obtaining, would develop alcohol to about 5 per cent. by volume. The cider in evidence herein showed almost that alcoholic content. Admittedly, such a beverage would be intoxicating. Obviously, it is clearly in excess of the alcoholic content permitted by the express terms of the Volstead Act, as already indicated. Section 4 of title 2,

which has been referred to, says:

"The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this act, if they correspond with the following descriptions and limitations, namely:

"(a) Denatured alcohol," etc.

"(b) Medical preparations manufactured in accordance with formulas," etc., "unfit for use for beverage purposes.

"(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes. "(d) Toilet, medicinal, and antiseptic preparations and solutions that are

unfit for use for beverage purposes. "(e) Flavoring extracts and syrups that are unfit for use as a beverage, or

for intoxicating beverage purposes.

"(f) Vinegar and preserved sweet cider.

"A person who manufactures any of the articles mentioned in this section * shall secure permits to manufacture such articles," etc.

To my mind, the idea there was that any one who prepared and manufactured the things specified should not be at all subject to the penal provisions of the act; in other words, any one had the right, pursuant to regulations which should be had, and in virtue of the permit provided for, to manufacture and prepare for the open market any of the things specifically named and described.

As showing that Congress, even in its grant or recognition of this privilege, was very careful with respect to the precise right to be enjoyed, it is to be observed that, not only were the sanctioned articles named and described with definiteness, but, in order that they should be within the exception created by the section, they had to "correspond with the following descriptions and limitations." This language, to my mind, indicates a sedulous endeavor on the part of Congress to

provide that the things which might be sold (by the manufacturer and thereby serve to protect any subsequent vender) must clearly and undisputably fall within the "descriptions and limitations" prescribed in detail. It seems clearly declaratory of, and in strict conformity to, the general purpose that "the use of intoxicating liquor as a beverage" was to be "prevented." And among the things "described and limited," which might be sold, in conformity with the general purpose an-

nounced, was "preserved sweet cider."

If, then, the thing actually manufactured and sold by defendant at wholesale was "preserved sweet cider," in virtue of the positive language of section 4, notwithstanding it might possibly develop, through the usual processes of fermentation, an alcoholic content in excess of the amount allowed by law, it was not at that time, or at any time thereafter, to be construed to be subject to the penal provisions of the Volstead Law. Parenthetically, however, if, at the time of its manufacture and distribution by the defendant, it was merely "nonintoxicating," because below the prohibited alcoholic content, yet was not in fact "preserved sweet cider," and it afterwards developed the proscribed alcoholic content—in the language of the street, "acquired a kick"—its subsequent sale would render the vender liable to all the provisions of the act respecting an unlawful marketing of a prohibited article, viz. "intoxicating liquor."

So it would seem that, in substance, under the argument addressed to the court by defendant, the duty of the court is to declare what Congress meant in section 4 by the use of the words "preserved sweet cider." It is hornbook law, of course, as declared in 36 Cyc. 1106, that:

"The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority. But where the language of the statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions the duty devolves upon the court of ascertaining the true meaning. If the intention of the Legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law."

The same authority (page 1114) states the rule to be that:

"In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification."

And in this behalf I understand the practice to be general among courts, in endeavoring to ascertain what the "ordinary signification" of a word or phrase is, to have recourse to the usual avenues of information made use of by those concerned with the meaning of a word or phrase, to wit, acknowledged and accepted lexicographical authorities. In such an exigency, I have turned to the Century Dictionary, which I understand to be a recognized authority in the matter of definitions of terms in common use, and dependent upon popular usage and general acceptance for their meaning, and there find definitions which I deem of aid to the court in the pending controversy.

"Cider" is defined as:

"Formerly, any liquor made of the juice of fruits; now, the expressed juice of apples, either before or after fermentation."

That is the definition of the generic term "cider." Descending to the species, the definition proceeds:

"Hard cider—fermented cider; cider that has lost its sweetness from fermentation."

In passing, I think that is a definition and description that has long been familiar to the great mass of the common people, viz. that "hard cider" was cider that possessed a stimulating and intoxicating effect, due to its acquisition of a substantial and potent alcoholic content, through the processes of fermentation.

"Sweet cider," another species, "is cider before fermentation, or cider in which fermentation has been prevented," That definition seems simple and decisive. It is to the effect that sweet cider is cider which has not yet become "hard cider"; that is, has not acquired an alcoholic content by fermentation. "Fermentation" is defined in the same dictionary as:

"A decomposition produced in an organic substance by the physiological action of a living organism, or by certain unorganized agents."

This description conforms in every respect to the testimony given in this case, respecting the production of alcohol in cider through the processes of fermentation. The Century continues:

"It may be checked or altogether prevented by anything which prevents the growth of organisms, as by exclusion of the germs or spores, by subjection to a temperature too high or too low, by the presence of too large a proportion of sugar, or of a substance called an antiseptic, which acts as a poison to the organism. Alcoholic fermentation in saccharine solutions," of which cider is one, "or fermentation in its most restricted sense, may be produced by one of several organisms."

The same authority says of the word "preserve," of which "preserved" is the past participle, that it means:

"To prepare in such a manner as to resist decomposition or fermentation; to prevent from spoiling by the use of preservative substances, with or without the use of the agency of heat."

Now, I gather from these definitions, coming from a recognized authority, that "preserved sweet cider," that article which is to be without the terms and beyond the purview of the penal provisions of the Volstead Law, must be not only "sweet cider"—cider which has not fermented; cider which is devoid of alcoholic content coming from fermentation—but also that it must be "preserved"; it must be cider to which some preservative, in the nature of heat or otherwise, has been applied, contributed in sufficient quantity to insure that its sweetness and its nonfermented, nonalcoholic state may be maintained. In other words, it must not only be "sweet cider," within the meaning to be accorded to that term, as defined by authorities; it must be "preserved" sweet cider. Or, to phrase it still more simply, "preserved sweet

cider," under the accepted definition, is cider without alcohol, and in which the possibility of the natural development of alcohol has been prevented, through the use of some sort of preservative.

[2] Evidence has been offered, similar to the allegation in the same behalf in the Hildick Case, supra, that in the trade, and by the custom and usage of the cider business, "preserved sweet cider" is understood to be merely ordinary cider "to which one-tenth of 1 per cent. of benzoate of soda has been added." As above adverted to, it is also in evidence that such addition does not prevent the accrual of substantially the normal maximum alcoholic content. It merely serves to retard such accrual.

The net result is that in the long run, by the time the consumer goes to purchase it at retail (if a few days shall have elapsed), the maximum alcoholic content will have developed, despite the addition of the chemical; and, the maximum alcoholic content being approximately $4\frac{1}{2}$ or 5 per cent. by volume, an actual and substantial intoxicative effect will likewise have developed. In the case at bar, four or five days after delivery to the vender by the defendant, the cider was found to contain alcohol to the extent of 4.8 per cent. by volume.

Now, I do not believe that Congress, when, with obvious and solicitous care it enacted the Volstead Law, ever intended that any such result should be made possible under its permissive terms. Having determined that prohibition should be made effective and a fact, and that the general possession and use of intoxicating liquors should not be allowed; having, in furtherance of that broad purpose, in a sense at least, stricken down the great vineyard interests of this and of other states, by saving that their fermented products might not be manufactured and vended, as they theretofore had been, I cannot believe that it at the same time intended to exclude and except, from the limitations and liabilities resting upon all other people, merely those persons who were so fortunate as to be involved in the growth or the vending of apples, or the cider that might be expressed therefrom. In other words, no possible reason may be advanced why Congress, deliberately and by decisive language, should have prohibited the sale of the juice of the grape, whatever its alcoholic content, so long as it equaled or was in excess of one-half of 1 per cent., and at the same time openly, avowedly, and intentionally permitted the sale of the juice of the apple, irrespective entirely of what its alcoholic content might be, or might become, so long, forsooth, as it contained onetenth of 1 per cent, of benzoate of soda. It cannot be imputed to Congress that it had any such unjust and inconsistent intention—an intention directly counter to the general purpose of the act, as I have heretofore indicated, and an intention, as a matter of fact, going in the very teeth of the constitutional amendment itself, which prohibited the manufacture, sale, and transportation of all "intoxicating liquors," whether they were the product of the apple, the grape, or otherwise.

The rational construction of the act, and of this portion of it, therefore, I conceive to be to the effect that he who would make a vendible beverage from apples is under the same sort of general obligation and limitation as he who would make a vendible beverage from

grapes; if it be intoxicating, it cannot be sold; if it be not intoxicating, it may be sold. And again, for purposes of emphasis, no less than of clarity, the degree of alcoholic content specified in the statute is determinative of whether or not it is, within the terms of he law, intoxi-

cating.

Counsel argues that there was no reason for inserting the clause referring to "preserved sweet cider" in section 4 unless it was the intention thereby to legalize the manufacture and sale of cider of normal alcoholic content; in other words, that cider without the proscribed alcoholic content could be sold anyhow, and in complete disregard of the act, because of its lawful and innocuous nature, and that the actual insertion and mention of the thing referred to as "preserved sweet cider" was itself a demonstration that something, which under the law otherwise might not be sold, might, in view of this specific provision, be sold anyhow.

The difficulty with this argument is that, taken in connection with other things referred to in section 4, and particularly in clause (f), it proves too much. "Vinegar" is mentioned in clause (f) as a thing that, "having been manufactured and prepared for the market," shall not be "subject to the provisions" of the act. If counsel's argument were well taken, vinegar, which ordinarily would fall in the same category as nonalcoholic cider, with respect to its harmlessness and vendibility, need not have been mentioned in the statute. The fact that it was expressly mentioned shows that Congress was not intending, by section 4, to permit the sale of something which otherwise might not

have been permitted.

A possible, and I think the probable, reason for the insertion of both these items was because of the apprehension that might have been indulged in by Congress that perhaps, in spite of all of the steps that might be taken, in conformity to regulations or otherwise, to insure the preservation of the nonalcoholic quality of either "vinegar" or "preserved sweet cider," it might possibly eventuate that, due to the operation of natural agencies and chemical changes, fermentation might ensue or continue, and alcohol in prohibited quantity thereby For that reason the provision was made that if the things mentioned, to wit, "vinegar and preserved sweet cider," corresponded with the designated "descriptions and limitations," they should not, after having been manufactured and prepared for the market, pursuant to and in accordance with the terms of the permit to be exacted, be subject to the provisions of the act. In other words, if the thing was in fact "preserved sweet cider" at the time of its manufacture and preparation for the market, but thereafter developed some alcoholic element or content in excess of the amount allowed by law, in spite of provision taken to prevent such result, that fact or condition should not serve to render it an unsalable thing. But by the same token it was expressly declared, as I sense it, that the thing that is to be manufactured and prepared for the market was to be "preserved sweet cider"; that is, cider devoid of the prohibited alcoholic content, and preserved in such a way as that the subsequent development of the prohibited alcoholic content would, in all probability, be prevented.

This conclusion, I think, is substantially supported by another clause in the act, found in section 29, the section devoted to penalties, and reading as follows:

"The penalties provided in this act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar."

It must be remembered that the "liquor" referred to in this provision is, as above stated, any liquid of the proscribed alcoholic content. So the provision is declaratory that the penalties provided for the manufacture of any liquid containing alcohol in excess of the one-half of 1 per cent. without a permit shall not apply to a person for manufacturing nonintoxicating cider (that is, cider containing less than one-half of 1 per cent. of alcohol) exclusively for home use. But in this connection a positive inhibition is laid upon the sale of such cider to any one except to a person having a permit, and therefore intending to use the cider, for the manufacture of vinegar. In other words, it may not be vended for beverage purposes,

If, as broadly contended by defendant, it had been intended by secton 4 that intoxicating cider might be manufactured and vended with impunity, Congress would never have inserted the provision that non-intoxicating cider might be made merely for home use, and that its sale should be restricted to those who were intending to use it for vinegar only. In other words, the net result of the inclusion of this provision is to make more manifest the general intent and purpose of Congress heretofore adverted to, viz. that the vendibility generally, and the possession and use outside of the home, of intoxicating liquors for

beverage purposes, is taboo.

Referring again to the decision of Judge Augustus N. Hand in the Hildick Case: He seems to have felt himself bound by the language of the complaint which was before him, and the verity of which was admitted by the motion to dismiss. It was therein alleged that the product resulting from the expressed juice of fresh apples, treated by the admixture of one-tenth of 1 per cent. of benzoate of soda, "is and for many years has been known as 'preserved sweet cider.'" It was also alleged, further on in the bill, that the products therein under consideration "are made from unadulterated juice of apples, and that they are preserved in the best way practicable, and that their product is 'preserved sweet cider.'"

This is merely another way of stating the fact and contention, above adverted to, that if the cider actually made has been treated with one-tenth of 1 per cent. of benzoate of soda, and is therefore in the trade known as "preserved sweet cider," then, irrespective and in spite of its actual alcoholic content and intoxicative effect, it is still vendible and possessable, in the face of the prohibitory provisions of the Volstead, Law. However, I do not think that the understanding or practice of the trade, or a custom or usage of the art involved, is to control the construction of an act of Congress. Usage or custom is frequently resorted to, in practice, to explain or render less uncertain what the

parties may have had in mind in entering into a given contract. In Union Pacific R. R. Co. v. U. S., 10 Ct. Cl. 548, however, it was held that, as to a statute, its construction, and therefore enforcement, must be in accordance with the rules applicable to the construction of statutes, rather than according to the rules applicable to the construction of contracts.

In the same spirit, the Circuit Court of Appeals of the Eighth Circuit, in U. S. v. Pine River Logging & Improvement Co., 89 Fed. 907, at page 915, 32 C. C. A. 406, at page 414, had occasion to construe the meaning to be accorded to the phrase "dead timber," as used in a certain statute applicable to the controversy. The defendants had offered testimony to the effect that the phrase had acquired a certain meaning in consonance with their contentions "by reason of a well-known custom or usage prevalent throughout the United States, or prevalent throughout a large portion of the United States." In response to this the court said:

"The proper office of a custom or usage is to explain the meaning of a private contract which is so vague or uncertain that the intent of the parties thereto cannot be determined without the aid of such extrinsic evidence. Barnard v. Kellogg, 10 Wall. 383; Robinson v. U. S., 13 Wall. 363. And, while it may be that proof of a custom or usage is sometimes admissible to aid in the construction of a statute, as well as a private contract, yet when it is offered for that purpose, and with a view of altering the ordinary meaning of ordinary words or phrases, the evidence concerning the usage ought to show that it was prevalent in all sections where the law was to become operative, and was so far universal in the sections where it prevailed, as to leave no room for doubt that the usage was known to the lawmaker, and that the statute which it serves to modify was enacted with reference thereto."

It suffices to say that the proof in this case, irrespective of what the allegations in the complaint before Judge Hand may have amounted to, falls short of measuring up to the requirements stated in the opinion just cited. There may have been a custom in the trade respecting the name to be accorded to cider treated with the slight percentage of benzoate of soda. There is nothing to indicate, however, that Congress was apprised of such usage or custom; and if the recognition of such usage or custom carries with it the implication that any cider so treated, irrespective of its actual alcoholic content and intoxicative effect, might be vended and possessed generally, as defendant herein contends, it is so opposed to the general spirit and intent and assumed purpose of Congress in the enactment of the Volstead Act as to justify the conclusion that Congress was not in any way advised thereof.

So, in conclusion, my holding is that Congress, in the enactment of this statute, did not, in any wise or at all, intend to permit the general and unrestricted sale of cider, if at the time of such sale it actually contained an amount of alcohol in excess of that allowed by law, irrespective of whether or not it had previously been treated by a preservative; in other words, that the intent of Congress was, that for cider to be vendible, the alcohol should be out of it; not merely that a preservative should be in it.

[3] The defendant herein, however, is charged with having sold cider that did contain more than one-half of 1 per cent. of alcohol. There is matter contained in the information to the effect that the cider manufactured and sold by him was not—

"put up and marketed in sterile closed containers, and was not treated in a manner to prevent fermentation, and to insure the alcoholic contents of said cider to remain below one-half of 1 per cent. of alcohol by volume."

The language quoted, and apparently made a part of the charge sought to be placed against the defendant, is taken from section 36 of the Regulations adopted and promulgated by the Commissioner of Internal Revenue, pursuant to authority vested in him in the Volstead Act (section 1 of title 2). It specifies the means whereby the expressed juice of the apples may be converted into and continued as "preserved sweet cider." No statute, however, makes a violation of any such regulation a punishable crime, and therefore defendant may not be penalized in this proceeding, even if it be shown that he has committed such violation. U. S. v. Eaton, 144 U. S. 677, 688, 12 Sup. Ct. 764, 36 L. Ed. 591.

In so far as we are concerned with the case, the only charge is a sale of cider containing the proscribed alcoholic content. Of this there is no proof in the case that will satisfy me, and therefore I feel that I am justified in instructing the jury to return a verdict of not guilty on both counts, with respect to the crime lawfully and appropriately charged.

UNITED STATES v. BORKOWSKI et al.

(District Court, S. D. Ohio, W. D. May 24, 1920.)

1. Searches and seizures —3—Magistrate must find probable cause before issuing search warrant.

Under the Fourth Amendment, a federal search warrant may be issued only on an application on oath showing probable cause and particularly describing the place to be searched and the things to be seized, and whether facts are shown sufficient to constitute probable cause must be determined by the magistrate, who is not authorized to issue a warrant pro forma merely because an affidavit is filed.

- 2. Searches and seizures \$\iiiis 3\$—Must be in strict compliance with statute.

 In obtaining and in proceeding under search warrants, there must be strict compliance with whatever formalities are required by statute.
- 3. Searches and seizures \$\iffsize 3\$—Description in warrant of place to be searched.

 The description of the place to be searched in a search warrant is sufficient, if such as to enable the officer to whom the warrant is issued to locate the same with certainty, as by street number; but a misdescription as to ownership will render the warrant void.
- 4. Searches and seizures \$\iiist\$ 3—"John Doe" warrants to be avoided.

 Where the name of the accused person is known, it must be stated in the affidavit and search warrant, and if not known that fact should be stated; but where it can reasonably be done "John Doe" warrants are to be avoided.

 Searches and seizures ←3—If made at night, authority should appear in warrant.

So far as reasonably practicable, searches should be executed in the daytime, and if to be made at night the authority for so doing should appear in the warrant.

 Intoxicating liquors \$\iff 247\to Officer smelling commission of crime may search and arrest.

Where prohibition agents smelled raisins cooking in a nearby house, which through their experience told them that a crime was being committed, their entry and search of the house, the arrest of defendants found there conducting an illicit still, and seizure of the apparatus used held within their authority.

Criminal prosecution by the United States against Felix Borkowski and John Lucas. On application for return of property seized. Denied.

James R. Clark, U. S. Dist. Atty., and R. T. Dickerson, Asst. U. S. Dist. Atty., both of Cincinnati, Ohio.

Murphy, Elliff & Leen, of Dayton, Ohio, for defendants.

SATER, District Judge. [1] This case is one of several, in which application was made, prior to entering upon trial, for the return of property seized without a search warrant, or on the alleged ground that the warrant on which the officers acted in making the seizure and the affidavit on which such warrant was based were insufficient. It is appropriate that in deciding this case I should, on account of the rather unusual situation existing here, say something that may operate as a guide in the future on the subject of search warrants. The government's officers and those whom they called to their assistance cannot be said to have been wanting in diligence in performing their work. I am satisfied that the officers have acted according to the light that is within them, and yet the procedure in the filing of affidavits and the issuing of warrants has been so unfortunate that no one connected therewith will desire its continuance. From direct inquiry I have learned that the government's officers were either not instructed at all or imperfectly instructed as to their rights and power. Their want of instruction as to legal requirements makes their action appear amateurish.

The Fourth Amendment to the federal Constitution provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. The provision of the Fifth Amendment, that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, will not be considered in what is to be said.

The language of the Fourth Amendment is substantially adopted in the several states. Their statutes may vary in minor particulars, but in the main are similar. Original section 1014, Rev. St. U. S. (Comp. St. § 1674), was adopted as early as 1789. It provides that, for any crime or offense against the United States, the offender may,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

by any justice or judge of the United States, or by any commissioner of a Circuit [District] Court to take bail, or by any chancellor, judge of the Supreme or superior court, chief or first judge of common pleas. mayor of a city, justice of the peace, or other magistrate of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense, etc. The use of the language "agreeably to the usual mode of process against offenders in such state" is to be noted. Proceedings for holding an accused person to answer to a criminal charge are assimilated to those under the laws of the state in which the proceedings take place, and all the regulations and steps incident to the proceeding before a United States commissioner, from its commencement to its close, are guided by the state laws, so far as they may be applicable to the federal courts, if no rule upon the same subject has been prescribed by the federal statutes. U.S. v. Sauer (D. C.) 73 Fed. 671. To section 10, Byrne on Fed. Cr. Proc., are cited some of the cases which make it clear how a search warrant should be obtained and what the prerequisites are. The form of affidavit and search warrant found in Swan's Treatise (21st Ed.) pp. 933, 934, Loveland's Forms, Fed. Prac. vol. 1, pp. 1088, 1089, and the form shown in Kercheval v. Allen, 220 Fed. 262, 265, 135 C. C. A. 1, decided by the Eighth Circuit Court of Appeals, are safe guides for procedure in both state and federal

[2] The rule is that there must be compliance with whatever formalities are required by statute. 19 Ency. Pl. & Pr. 327; 25 Am. & Eng. Ency. Law, 147. On this point it is said in Archbold's Crim. Pr. & Pr. (8th Ed.) 131:

"The proceedings upon search warrants should be strictly legal, for there is not a description of process known to the law, the execution of which is more distressing to the citizen. Perhaps there is none which excites such intense feeling in consequence of its humiliating and degrading effects."

A search warrant may issue only upon probable cause, supported by oath or affirmation. The question of probable cause must be submitted to the committing magistrate, so that he may exercise his judgment as to the sufficiency of the ground for believing the accused person guilty. 25 Am. & Eng. Ency. Law, 147 et seq. The United States commissioner, or other officer with whom an affidavit is filed, may not, simply because such affidavit is presented, issue a warrant. The affidavit must itself be sufficient, must state facts which justify the issuance of a warrant and the commissioner or such other officer is required by law to satisfy himself of the sufficiency of the affidavit and that the circumstances call for the issuance of a warrant. Note, for instance, the language of the Ripper Case, 178 Fed. 24, 26, 101 C. C. A. 152, decided by the Eighth Circuit Court of Appeals, in which it is said that the oath in writing (affidavit) should state the facts from which the officer issuing the warrant may determine the existence of probable cause, or there should be a hearing by him with that purpose in view.

The immunity granted by the Constitution should not be lightly set aside by a mere general declaration of a nonjudicial officer that he has reason to believe and does believe, etc. The undisclosed reason may fall far short of probable cause. See, also, U. S. v. Tureaud (C. C.) 20 Fed. 621.

[3] In describing the place to be searched, it is sufficient if the officer to whom the warrant is directed is enabled to locate the same definitely and with certainty. This does not necessarily require the exact legal description to be given, such as ordinarily appears in deeds of record in the county recorder's office. The description may be such as is known to the people and used in the locality in question, and by inquiry the officer may be as clearly guided to the place intended as if the legal record description were used. In 19 Ency. of Pl. & Pr. 329, it is said that a designation which identifies with reasonable certainty the place or places to be searched is sufficient, as by describing the house as of a certain number on a certain street and as occupied and owned by the named person; but the description as to ownership must be such as to identify certainly the place to be searched, and a misdescription in this regard will render the warrant void. In the notes to the text are cited cases indicating to what extent the description of the place should coincide with that found in a deed for the conveyance of land. The text of 35 Cyc. 1266, and the cases cited to the point of particularity in description, will be found instructive, some of which are Smith v. Mc-Duffee, 72 Or. 276, 283, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916D, 947; Rose v. State, 171 Ind. 662, 668, 87 N. E. 103, 17 Ann. Cas. 228; McSherry v. Heimer, 132 Minn. 260, 261, 262, 156 N. W. 130; Metcalf v. Weed, 66 N. H. 176, 177, 19 Atl. 1091.

[4, 5] Where the name of the accused person is known, it should be stated in the affidavit and search warrant. Indeed, it is said in 3 Cyc. 930, that an affidavit which fails to name in its body a known defendant is insufficient. Frequently the name of the party is not known. In that case the rule stated in Dougherty v. Gilbert, Tappan, 39, may be followed; it being there said that a warrant may be legal, although the name of the person charged is not inserted in it, provided he be properly described and it be stated that his name is unknown. Where it can reasonably be done, "John Doe warrants" are to be avoided. U. S. v. Doe (D. C.) 127 Fed. 982; West v. Cabell, 153 U. S. 78, 85, 86, 14 Sup. Ct. 752, 38 L. Ed. 643; Weaver v. Ficke, 174 Ky. 432, 192 S. W. 515. It is also advisable that as far as is reasonably practicable, at least, searches should be executed in the daytime. If a search is to be made at night, the authority for so doing should appear in the warrant. Act June 15, 1917, 40 Stat. 217 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 104961/4j). Upon the subject of searches and seizures at night, see 220 Fed. 267, 268, 135 C. C. A. 1; 1 Archbold, Cr. Pr. & Pl., 129.

There are several federal statutes under which search warrants have from time to time been issued, as, for instance, under the customs law (section 3066, Rev. St. U. S. [Comp. St. § 5769]), and the internal revenue law (section 3462, Rev. St. U. S. [Comp. St. § 6364]). The federal statute of 1917, relating to search warrants which I find to be much the same as that of Alabama, is specifically referred to in the Volstead Act,

and reference should be made to it in cases brought under such last-named act.

[6] What has been said has some bearing on the Borkowski and Lucas Case, in consideration of which we are to keep in mind Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B. 834, Ann. Cas. 1915C, 1177, and Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, decided January 26, 1920. We have this situation: A warrant had been issued for the search of a nearby house. While engaged in the search, the officers smelled raisins in the process of cooking somewhere. They saw a light in the cellar of a house, perhaps two or three doors away. Persons could be seen there moving around. The officers went to such a house and, entering the cellar, found a still in operation. They discovered the defendants in the commission of an act of a criminal character, a felony, and, having declared their purpose to search the premises, proceeded to do so. The evidence, although somewhat controverted, is that there was no objection made by either of the defendants to the search, and that one of them assented to its making; but the pending application may be decided without determining that question one way or the other. The fact is admitted that raisins were cooking on a stove in that cellar, that a still was in fact in operation, that raisin whisky and mash were found, and that the articles used in making the whisky and in the process of distillation were seized. Lucas admitted then and at his trial that he "was making a little whisky for Easter."

The rule, state and federal, is that officers may arrest those who break the peace or commit crimes in their presence. Bishop's New Crim. Proc. § 183; Byrne, Fed. Crim. Proc. § 10; Wolf v. State, 19 Ohio St. 248. Byrne states that officers may avert a criminal act in the process of commission before them, either by arresting the doer or seizing and retaining the instrument of the crime. See, also, Ross v. Leggett, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608, Ex parte Morrill (C. C.) 35 Fed. 261, Bad Elk v. U. S., 177 U. S. 530, 20 Sup. Ct. 729, 44 L. Ed. 874, and Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight.

The conclusion reached is that the officers properly arrested the defendants, and properly seized the utensils that were employed in the

commission of the crime.

UNITED STATES ex rel. ABERN v. WALLIS, Commissioner of Immigration.

(District Court, S. D. New York, October 19, 1920.)

1. Aliens 53-Membership in Communist Party ground for deportation.

The manifesto and programme of the Communist Party, for the overthrow of the present system of government by mass strikes and the substitution of communist rule, even if not directly advocating force and violence, do not exclude the use of such means, so that the holding of the Department of Labor that the party is an organization for the overthrow of the government by force and violence, membership in which is ground for deportation of an alien, will not be set aside on application for habeas corpus.

2. Aliens 54—Denial of violent intent by member of Communist Party does not prevent deportation.

A denial by a member of the Communist Party of intention to use force or violence for the overthrow of the government does not prevent deportation of that member, if the programme of the party fairly supports a finding that the party advocated the use of force and violence.

3. Aliens 53—Improbability of success of violent organization does not

prevent deportation.

If the ultimate purpose of an organization is the overthrow of the government by force and violence, its alien members can be deported, though there is no apparent possibility of such overthrow in the imme-

Habeas Corpus. Proceeding by the United States, on the relation of Martin Abern, against Frederick A. Wallis, Commissioner of Immigration at the Port of New York. Writ dismissed.

Charles Recht, of New York City (T. Jefferson Healy, of counsel). for relator.

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes and Theodor Megaarden, Asst. U. S. Attys., both of New York City. of counsel), for respondent.

KNOX, District Judge. [1] A careful perusal of this record does not convince me that the conclusion reached herein by the Department of Labor is so clearly untenable as to warrant me in sustaining the relator's writ. I realize with regret that I must, in consequence, place myself, with respect to several important particulars, in disagreement with Judge Anderson, who in Colver et al. v. Skeffington, as reported in 265 Fed. 17, rendered an elaborate and able opinion to the effect that an alien's mere membership in the Communist Party of America does not subject him to deportation.

Notwithstanding, I am of opinion that the manifesto and programme of the Communist Party, together with other exhibits in the case, are of such character as to easily lead a reasonable man to conclude that the purpose of the Communist Party is to accomplish its end, namely, the capture and destruction of the state, as now constituted, by force and violence. Since the party has seen fit to use words of general application, which in their popular and ordinary sense may fairly import, and which are appropriate to the use of, force and violence, and

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

which have been found to have that meaning, there is no obligation upon the court to refine and construe the language so as to reach a different result. If force and violence be not within the contemplation of the party, it would be a simple matter to have the absence of such thought clearly appear. As it is, the language used would seem designed to mean all things to all men, and to be fairly susceptible of meaning, even though it does not unequivocally declare in favor of, force and violence. The manifesto asserts that there is at the present time a—

"tendency of the workers to start mass strikes—strikes which are equally a revolt against the bureaucracy of the unions and the capitalists. The Communist Party will endeavor to broaden and deepen these strikes, making them general and militant, developing the general political strike. The Communist Party accepts as the basis of its action the mass struggles of the proletariat, engaging directly in these struggles and emphasizing their revolutionary implications."

Under the head "Political Action," the following statements appear:

"The proletarian class struggle is essentially a political struggle. It is a political struggle in the sense that its objective is political—the overthrow of the political organizations upon which capitalist exploitation depends, and the introduction of a proletarian state power. The objective is the conquest by the proletariat of the power of the state. Communism does not propose to 'capture' the bourgeois parliamentary state, but to conquer and destroy it. As long as the bourgeois state prevails, the capitalist class can baffle the will of the proletariat. * * * The conquest of the power of the state is accomplished by the mass power of the proletariat. Political mass strikes are a vital factor in developing this mass power, preparing the working class for the conquest of capitalism. The power of the proletariat lies fundamentally in its control of the industrial process. The mobilizing of this control against capitalism means the initial form of the revolutionary mass action that will conquer the power of the state."

The party, according to its programme, thinks it necessary that the proletariat organize its own state for the coercion and suppression of the bourgeois state. Part of the programme of the party is as follows:

"The Communist Party is the conscious expression of the class struggle of the workers against capitalism. Its aim is to direct this struggle to the conquest of political power, the overthrow of capitalism and the destruction of the bourgeois state. The Communist Party prepares itself for the revolution in the measure that it develops a program of immediate action, expressing the mass struggles of the proletariat. These struggles must be inspired with revolutionary spirit and purposes. The Communist Party is fundamentally a party of action. It brings to the workers a consciousness of their oppression, of the impossibility of improving their conditions under capitalism. The Communist Party directs the workers' struggle against capitalism, developing fuller forms and purposes in this struggle, culminating in the mass action of the revolution."

In the application of the Communist Party for membership in the executive committee of the Communist International, the international secretary of the Communist Party of America uses this language:

"The Communist Party realizes the immensity of its task. It realizes that the final struggle of the Communist Proletariat will be waged in the United States, our conquest of power assuring the world Soviet Republic. Realizing all this, the Communist Party prepares for the struggle. Long live the Communist International! Long live the World Revolution!"

The manifesto of the Communist International indicates "The Way of Victory" as follows:

"The revolutionary era compels the proletariat to make use of the means of battle which will concentrate its entire energies, namely, mass action, with its logical resultant, direct conflict with the governmental machinery in open combat. All other methods, such as revolutionary use of bourgeois parliamentarianism, will be of only secondary importance."

The same manifesto of the Communist International says that-

"Seizure of political power by the proletariat means destruction of the political power of the bourgeoisie,"

It continues:

"The organized power of the bourgeoisie is in the civil state, with its capitalistic army under the control of bourgeois junker officers, its police and gendarmes, jailers and judges, its priests, government officials, etc. of the political power means not merely a change in the personnel of ministries, but annihilation of the enemy's apparatus of government; disarmament of the bourgeoiste, of the counter-revolutionary officers, of the White Guard; arming of the proletariat, the revolutionary soldiers, the Red Guard of workingmen; displacement of all bourgeois judges and organization of proletarian courts; elimination of control by reactionary government officials and substitution of new organs of management of the proletariat. Victory of the proletariat consists in shattering the enemy's organization and organizing the proletarian power; in the destruction of the bourgeois and upbuilding of the proletarian state apparatus. Not until the proletariat has achieved this victory and broken the resistance of the bourgeoisie can the former enemies of the new order be made useful, by bringing them under the control of the communist system and gradually bringing them into accord with its work."

The relator says that the Communist Party of America programme is in accord with that of the Third International. It says that each country shall adopt the methods that are best possible to obtain political power. It does not bind itself to an international agreement so far as tactics are concerned. The relator's construction of the paragraph last above quoted is that, when the proletariat has control, it may abolish the organizations of the so-called capitalistic state, and establish in their places those forms which are best possible for proletariat success. It would thus seem to be fairly inferable that the tactics set forth in the manifesto of the first congress of the Communist International, from which the last-mentioned quotation was taken, are in reality in store for us at such time as the communists believe they possess the force to make such tactics successful.

[2] It is only fair to the relator to quote the following words from his examination:

"Q. What do you mean by 'open combat'? A. As I am doing here. I am using all legal means to protect myself.

"Q. Do you believe that 'open combat' means conflict at arms? A. No; that is ridiculous."

The difficulty with this denial, so far as the present proceeding is concerned, is that it is not the interpretation of the relator which is to control the decision, but the interpretation which may fairly be

placed upon the entire record by those who are charged with the duty of determining the purpose and object of the Communist Party.

It is suggested by counsel for the relator that communism, an abstract human idealism, is on trial in this proceeding. With such statement I cannot agree. With the theory of communism this court, while thoroughly disagreeing therewith, has, for present purposes, no fault to find with those who entertain a belief in its principles and who seek by legitimate means to bring it about. If those who support the Communist Party in its present declaration of principles hope for success—and I must assume that they have such hope—I cannot do otherwise than conclude that they must contemplate the employment of force and violence. In other words, I am unable to perceive how the expropriation of private property can be accomplished without the employment of forbidden instrumentalities. I say this because of the fact that up to the time of the capture and destruction of the present government its officers will be, as they now are, charged with the protection of property rights, and I cannot imagine that such officers and those whose property the Communists hope to take, will meekly capitulate the moment the Communists demand a transference to them of all such rights. Should such a transfer be demanded and refused. could it for a moment be supposed that the Communists, if they considered their strength sufficient, would hesitate and seek peaceful means of persuasion? It seems to me that they would unquestionably exert whatever coercion and employ whatever force and violence was necessary to the achievement of their success.

[3] It may, of course, be suggested that some regard should be had for the imminence of such a possibility, and I am free to say that from the party's organization, as appears in the record, such possibility is not of the immediate future. The act of Congress, however, under which this proceeding was instituted, provides for the deportation of aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force and violence of the government of the United States. It will thus be observed that the question here is not one of degrees of imminence of overthrow by force and violence, but rather whether that is the ultimate purpose of the organization.

Counsel for the relator in his brief makes this statement:

"We are opposed to violence. We dread it. We hope to end all wars, all greed, all carnage. We are in that sense pacifists, if you please; but we are no fools. We know our history, and we know the temper of the ruling classes. There shall, there unfortunately will, be violence. We shall not invite it. If we must meet it on the road to our goal, we shall not avoid it. But we are no more advocating or preaching violence than the policeman who is setting out to recover fortunes stolen from their rightful owners by a band of armed pirates."

With counsel's concluding statement I must disagree. In what precedes, however, he has, I think, clearly set forth what, if need be, will be, and to that extent concedes that which the Department of Labor held to be contemplated by and fairly inferable from the party's purpose and platform.

I shall dismiss the writ. I will, however, stay relator's disposition, and admit him to bail, pending an appeal from the order to be entered herein.

UNITED STATES v. STAFOFF et al.

(District Court, E. D. Missouri, E. D. October 18, 1920.)

No. 7400.

1. Intoxicating liquors = 132—Repeal provision of Volstead Act merely

states general rule.

Volstead Act, tit. 2, § 35, providing that existing statutory provisions not inconsistent with the act are not repealed, but are additional thereto, is only declaratory of the general law concerning repeals by implica-

2. Statutes \$\infty\$=165—Subsequent statute, imposing punishment for same of-

fense, inconsistent with earlier statutes.

Where a subsequent statute imposes a penalty for the same offense as that for which a prior statute imposed a different penalty, there is an inconsistency between the statutes, to which the rule of repeal by implication applies, especially where the punishment imposed by the latter statute is less than that imposed by the earlier.

3. Intoxicating liquors = 132-Volstead Act repealed statute punishing pos-

session of unregistered still or mash.

Volstead Act, tit. 2, section 25 of which made it unlawful to possess any liquor or property designed for the manufacture of liquor intended for use in violation of the title, imposed a penalty for the same act as Rev. St. § 3258 (Comp. St. § 5994), making it a crime to set up a still not registered with the collector of internal revenue, and section 3282 (Comp. St. § 6022), forbidding the making of a mash fit for production of distilled liquors on premises not authorized as a distillery, so that the Volstead Act repealed those two sections of the Revised Statutes.

Chris Elioff Stafoff, alias Chris Elioff, and another, were indicted for setting up a still without registering it, and for making a mash fit for the producton of distilled spirits, and they demur to the indictment. Demurrer sustained.

Vance J. Higgs, Asst. Atty. Gen.

J. H. Mackler and Bass & Bass, all of St. Louis, Mo., for defendants.

FARIS, District Judge. Defendants are being prosecuted on an indictment wherein the first count charges them with the violation of section 3258, R. S. (Comp. St. § 5994), and the second count thereof with the violation of section 3282, R. S. (Comp. St. § 6022). They demur to these counts, for that, as they contend, sections 3258 and 3282 were repealed by the provisions of the Volstead Act. Act Oct. 28, 1919 (41 Stat. 305). Sections 3258 and 3282, supra, are contained among the provisions of the law relating to internal revenue, and they were obviously intended and designed originally as parts of the necessary machinery of that law, for the better enforcement of the collection of the revenue. Section 3258, supra, makes it a crime to set up a still without having theretofore registered such still with the collector of internal revenue of the appropriate district; while section 3282, supra, forbids the making of a mash fit for the production of distilled spirits on any premises except those of an authorized distillery.

[1] Section 35, tit. 2, of the Volstead Act, provides that all existing statutory provisions which are not inconsistent with the provisions of the Volstead Act are not to be held as repealed thereby, but to be additions to such act. Conversely, it follows that there is a repeal of all former existing laws when such former laws are inconsistent. This provision is only declaratory of the general law. A repeal by implication would occur, absent such statutory declaration, if the new law is inconsistent with the old law on the same subject.

Holding that sections 3258, 3279, and 3281, R. S. (Comp. St. §§ 5994, 6019, 6021), were repealed by the Volstead Act, Judge Smith, in the case of United States v. Windham (D. C.) 264 Fed. loc. cit. 377, said:

"The general rule for the construction of statutes is that, when a later statute is enacted inconsistent with a preceding statute and covering the entire ground of the subject matter, it supersedes and impliedly repeals the preceding statute. Especially is this the case when the later statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when imposed in a later statute, is presumed to supersede the earlier and heavier."

There can, of course, be no manner of doubt as to the correctness of the applicatory rule of law as stated by Judge Smith in the above excerpt. U. S. v. Tynen, 11 Wall. 88, 20 L. Ed. 153. If, therefore, the provisions of the Volstead Act are inconsistent with the provisions of the older revenue laws, a repeal has occurred. In passing, I may observe that there is in title III of the Volstead Act, which title deals with the manufacture of alcohol, a similar provision (section 19, title III, Act Oct. 28, 1919), providing for the repeal of all inconsistent laws. Besides, title III, in section 9 thereof, expressly declares that section 3258, R. S., is not applicable to industrial alcohol plants.

The provisions of title II of the Volstead Act as to the manufacture of distilled spirits designed for medicinal purposes are somewhat meager. In order to lawfully manufacture such spirits a permit must be obtained from the Commissioner of Internal Revenue. Section 6, title II, Act Oct. 28, 1919. If such spirits shall be made without such permit, an offense is committed, which offense, on conviction, is punishable by the provisions of section 29 of title II thereof. Section 3258, R. S., required the registration of a still, when set up, to be made with the collector of internal revenue of the appropriate district, as already stated. If a distiller of spirits for medicinal uses should under the provisions of the Volstead Act procure a permit to manufacture such liquors from the Commissioner of Internal Revenue, it may well be doubted whether he could be successfully prosecuted under section 3258, R. S., for that he had

not theretofore registered with the collector of internal revenue the still which the permit allowed him to use in such manufacture.

The theory of the old revenue laws made the manufacture of liquors lawful and recognized it as a lawful way of producing government revenue. The Volstead Act no longer recognizes it as a producer of revenue, but outlaws both the making of and the traffic in liquor, except for stated and limited uses, for which uses, and pursuant only to a permit, it may now only be made at all.

Sections 3258 and 3282 were enacted as a part of the necessary machinery to safeguard the government against the loss of revenue. Answering the question expressed in the doubt set forth above, I am clearly of the view that no registration with the collector of the appropriate district would afford any protection to the owner of the still against punishment, should liquor be made in such still, and should such distiller have no permit from the Commissioner of Internal Revenue to manufacture liquor. In general, I agree with much that is said on this and germane questions by Judge Smith in the Windham Case, supra. See, also, opinion by Pollock, J., in U. S. v. Fortman, 268 Fed. 873. But I do not think it is necessary, upon the point up for judgment, to go so far as Judge Smith has gone in the discussion of this point.

[2] A test that is fair, and I think all-embracing, upon the question of inconsistency vel non, may be applied in the case at bar by considering whether the acts charged against defendants under sections 3258 and 3282 are provided for and made punishable by the Volstead Act. If he may under the Volstead Act be punished (a) for setting up a still, and (b) for having in his possession mash fit for the production of distilled spirits, then he may be punished under two laws for identically the same act. If such a condition exists, it would in my opinion constitute an inconsistency meet for the application of the rule of repeal by implication, and one which falls precisely within the purview of the rule which I have quoted above.

[3] Apposite to this question it will be noted that section 25 of title II of the Volstead Act says:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property."

It follows that, if there has been actual manufacture of liquor, the defendants can be punished for the act under the first clause of section 29 of the Volstead Act. If they have not actually made distilled spirits, but simply had in their possession a still adapted and designed for the making of such spirits, absent a permit allowing them to make the same, or if they had in their possession any mash so adapted and designed, in either case the still (whether set up or not set up) and the mash constitute property within the meaning of said section 25, and upon conviction the defendants may for either offense be punished under the provisions of the second clause of section 29 of title II of the Volstead Act.

It ought to be fairly obvious that no one should be liable for the

same act to punishment under two sections of the criminal statutes. Neither ought it to be a greater crime, or a crime punishable by a more infamous or severe punishment, to intend to commit, or to make preparation for the commission, of an offense, than it is to commit the offense itself. In other words, if a man manufacture liquor, either wine, beer, or whisky, he is punishable for the first offense either by a fine, or a jail sentence; but (if the contention of the government here be correct) if he has merely set up a still, or merely has mash in his possession, he may be sentenced to the penitentiary for the first offense for a term as great as two years, regardless of whether he had actually made liquor. In no jurisdiction has an assault with intent to kill ever been regarded as more heinous, nor has it ever been more severely punished, than has willful murder itself. I cannot bring myself to think that Congress had in mind so anomalous a situation. Rather I am constrained to believe Congress had in mind the very situation which has arisen here; that is, that inevitably there would be a largely increased number of violations of the law by the use of the necessary paraphernalia in the forbidden manufacture of liquor. And that Congress did not intend that (based upon the record of violations of this law, as compared with the total population) some one-tenth of 1 per cent. of the inhabitants of the United States would or could be annually incarcerated in the penitentiary.

So far as I can see, the Volstead Act covers and punishes, not only the acts charged against the defendants here, but also every other act and situation which can possibly arise. Without more, I conclude that the demurrer to the counts which attempt to charge offenses under the provisions of sections 3258 and 3282, R. S., ought to be sustained.

It is so ordered.

UNITED STATES v. COHEN.

(District Court, E. D. Missouri, E. D. October 28, 1920.)

No. 5454.

1. Nuisances =1—Common-law definition.

At common law a "nuisance" is a wrong arising from an unreasonable or unlawful use of property, to the discomfort, annoyance, inconvenience, or damage of another, and, even if the definition does not always specify the element of continuous or recurrent acts, it includes that element.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

2. Constitutional law \$253—Eminent domain \$2(1)—Statute cannot declare a nuisance that which is obviously not one, and thus deny due process of law or take property without just compensation.

A statute cannot declare a thing a nuisance which is obviously not a

A statute cannot declare a thing a nuisance which is obviously not a nuisance, the abatement of which as a nuisance would violate the constitutional guaranty of due process of law and just compensation for private property taken for public use.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

(268 F.)

3. Constitutional law \$\iii 81\$—Broad police power is modified by rights of individuals.

As a general rule, the valid exercise of the police power includes all things essential to the conservation of the public safety, public health, and public morals: but that rule is modified, in consideration of the rights of the private individual, to the protection of the public generally, as distinguished from that of a particular class, and to the use of means reasonably necessary to accomplish the purpose, and not unduly oppressive to individuals.

4. Intoxicating liquors €=259—Volstead Act presumed to use "nuisance"

in ordinary significance.

It must be presumed that Congress, in enacting Volstead Act, § 21, declaring places for sale of intoxicating liquor common nuisances, and section 22, authorizing the abatement of such nuisances, used the word "nuisance" in its usual and ordinary legal significance, having in mind that it could not pass a law which would wipe out the constitutional rights of the citizen in private property.

5. Intoxicating liquors \$\infty\$260—Sales must be continuous or recurrent, to

make place nuisance under Volstead Act.

Under Volstead Act, § 21, declaring a place for the unlawful sale of intoxicating liquor a common nuisance, it must appear that the sales therein were continuous or recurrent, since authorizing abatement for a single sale would be to authorize a suit in equity, where the legal remedy by prosecution for the sale was adequate.

6. Intoxicating liquors = 274—Bill to abate nuisance should allege facts

showing inadequacy of legal remedy.

A bill for the abatement as a nuisance of a place wherein intoxicating liquor is kept for unlawful sale, brought under Volstead Act, § 22, should allege facts which show that the legal remedy by prosecution under that act is inadequate to protect the rights of the public; otherwise, the proceeding, in which defendant is not entitled to a trial by jury, either before the injunction is issued or in proceedings to punish for contempt, under Volstead Act, § 22, and Act Oct. 15, 1914, c. 323, § 24 (Comp. St. § 1245d), might deprive defendant of his right to a trial by jury, guaranteed by Const. Amend. 6.

7. Injunction \$\ifosim 129(1) \to Affidavits insufficient to authorize temporary iniunction do not require dismissal of bill.

The insufficiency of affidavits to warrant the issuance of a temporary injunction does not warrant the dismissal of the bill, if its allegations are sufficient to warrant the issuance of an injunction after a final hearing.

8. Intoxicating liquors \$\insertain 13\$, 274—Congress has full police powers under Eighteenth Amendment as to intrastate transactions; bill to abate nui-

sance need not allege sales were in interstate commerce.

Const. Amend. 18, conferred on Congress the full police powers with reference to intoxicating liquors which it could have exercised theretofore with respect to such liquors in interstate commerce, and which the states could have exercised with respect to liquor within their jurisdiction; so that a bill under Volstead Act, \ 22, to abate a place for the unlawful sale of liquor as a common nuisance, need not allege that the sales therein were in interstate commerce.

9. Intoxicating liquors \$\infty\$21—Congress can authorize abatement as nuisance

of place for illegal sale.

Congress had authority, under Const. Amend. 18, to enact Volstead Act, §§ 21, 22, declaring a place for the unlawful sale of intoxicating liquor a common nuisance, and authorizing its abatement by injunction.

Liquor Nuisance. Suit by the United States against Jacob Cohen to enjoin the maintenance of a common nuisance under the Volstead

Act. On defendant's motion to dismiss the bill. Motion sustained for defects in form.

Vance J. Higgs, Sp. Asst. Atty. Gen., for the United States. McCarthy, Morris & Zachritz, of St. Louis, Mo., for defendant.

FARIS, District Judge. The United States filed its bill under the provisions of section 22 of the Volstead Act (41 Stat. 314) to enjoin defendant from maintaining a common nuisance on his premises by the illegal sale thereat of intoxicating liquors, and by unlawfully keeping for sale at and on such premises liquors which contain alcohol in quan-

tities forbidden by that act.

Defendant moved to dismiss plaintiff's bill on divers grounds. Among those demanding notice are: (a) That no cause of action, and no facts sufficient to entitle plaintiff to relief in equity, are set out in the bill; (b) because the supporting affidavits do not sustain the allegations of the bill; (c) because the provisions of the Volstead Act, relied on by plaintiff, invade the police powers of the states, and that the provisions relied on are not warranted by or within the purview of the language of the Eighteenth Amendment; (d) because the bill fails to allege an interstate sale or transportation, whereby alone a federal court could obtain jurisdiction; and (e) because both sections 21 and 22 of the Volstead Act are unconstitutional, for that they deprive defendant of his property without due process of law, and deprive him of the right of trial by a jury of his peers.

Section 21 of the Volstead Act defines the common nuisance, the enjoining of which in a court of equity is provided for by section 22 of the act. This statutory definition, so far as concerns the facts be-

fore me, is:

"Any room, house, * * * place where intoxicating liquor is * * * sold, kept or bartered in violation of this title * * * is hereby declared to be a common nuisance."

[1] The above definition does not specifically include the notion of a continuous or a recurrent violation. Neither does it specifically exclude this feature. The common-law definition, without always specifically setting out the elements of a continuousness or recurrence of the things, facts, or acts which constitute the nuisance, yet connotes this notion. Generally, at common law, a nuisance is a wrong arising from an unreasonable or unlawful use of a house, premises, place, or property, to the discomfort, annoyance, inconvenience, or damage of another. Pritchard v. Edison, etc., Co., 92 App. Div. 178, 87 N. Y. Supp. 225.

[2] The word "nuisance" has a well-defined meaning in the law, and a thing cannot be declared a nuisance by statute, and abated as such, when in fact it is obviously not a nuisance. The rule laid down by the Supreme Court of the United States upon this point is that—

"While the Legislature has no right arbitrarily to declare that to be a nulsance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed." Lawton v. Steele, 152 U. S. loc. cit. 140, 14 Sup. Ct. 502, 38 L. Ed. 385.

This is clearly the farthest limits of the rule, so far as concerns the extent to which the Legislature may encroach on private rights, in the destruction, abatement, or damage of private property as a public nuisance. Further encroachment is forbidden by those provisions of the organic law having reference to the constitutional guaranty of due process of law and forbidding the taking of private property for public use without just compensation. Lawton v. Steele, supra; Austin v. Murray, 16 Pick. (Mass.) 121; Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394; Brown v. Perkins, 12 Gray (Mass.) 89.

[3] The extent of the encroachment upon the rights and property of the individual, permissible to the law-making bodies in the valid exercise of the police power, has been always a most strongly mooted question. Those urging broader constructions have won much ground, but it has been surrendered grudgingly. Generally, in the valid exercise of the police power are included all things essential to the conservation of the public safety, public health, and public morals. But this sweeping general rule is modified by a consideration of the rights of the private in-

dividual. Hedging it about is the consideration that—

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." Lawton v. Steele, 152 U. S. loc. cit. 137, 14 Sup. Ct. 501, 38 L. Ed. 385.

[4] The Congress, therefore, must be deemed to have used the word in its usual and ordinary legal significance, and to have had in mind that it could not pass a law which had the effect to wipe out the

constitutional rights of the citizen in private property.

[5] The idea of either continuousness of existence of the things, or facts, or acts, which constitute the alleged nuisance, or the recurrence of such acts, so as to create damage, annoyance, discomfort, or inconvenience, is connoted by the presence of the word "use" in the common-law definition. Discussing a very similar statute of the state of Kansas, the Supreme Court of the United States said:

"The statute is prospective in its operation; that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the Legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the state to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used as to make it a common nuisance." Mugler v. Kansas, 123 U. S. loc. cit. 672, 8 Sup. Ct. 303, 31 L. Ed. 205.

I conclude that Congress, by the use of the words "sold, kept, or bartered" in violation of law, meant either habitually, or continuously, or recurrently so sold, kept, or bartered. I do not think that a single sale, without more, and with no evidence of the continuation or

recurrence of law violation, or of facts strongly indicating either habitual sales, or long-continued violations, or such a recurrence of unlawful acts or sales as to colorably indicate that the criminal prosecutions and penalties provided by other parts of the act are inadequate to cope with the situation, would constitute a nuisance or warrant the interference of a court of equity by injunction; for in such case it is not the crime of selling liquor, or selling a single drink of liquor, by a given person, at a given place, which constitutes the nuisance, but it is the maintenance and use of the room, house, or place as a situs for the doing thereat of unlawful or criminal acts, which constitute the nuisance.

If the Volstead Act is construed to mean that a single sale is sufficient to constitute a nuisance, I should seriously question its validity, for upon such a view we are met by the rule which forbids equity taking jurisdiction where an adequate remedy at law exists, as also the rule that even Congress may not say a thing is a common nuisance, when in fact it is not. For a single sale, without more, and without other overt acts, can be punished by a fine or imprisonment, and a subsequent sale by both such fine and imprisonment. Such remedy was seemingly deemed sufficient, or at least sufficient punishment; otherwise, Congress would have made the penalty more severe. It is fairly well settled that equity will not enjoin the commission of a crime.

[6] The bill before me does not aver that defendant has ever been either prosecuted, or convicted, for making illegal sales of liquor at the premises named in the bill, or at any other place or premises. Neither does it aver, or sufficiently aver, facts meet to constitute a nuisance at common law. It may be that conviction and punishment therefor, as provided elsewhere in the act, would be wholly adequate to stop the alleged unlawful acts of defendant without a resort to a court of equity. Besides, section 21, supra, which defines what shall constitute a common nuisance, also provides:

"That any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned not more than one year, or both."

In effect, the government is here contending that it may at its election arbitrarily select its forum, either upon the law side or the equity side of the court, in order to initially determine whether defendant is guilty of the maintenance of such a nuisance. If this provision conferring jurisdiction in equity to declare the existence of a common nuisance is to be upheld at all as constitutionally valid, of necessity, I think, it must be upon some such ground that any and all other remedies are inadequate. Some facts ought to be pleaded tending to show such adequacy of the law remedy or remedies.

Moreover, absent all such allegations in the bill, and, on a hearing, absent proof thereof, it is questionable whether defendant is not, upon any other view, deprived of the right of trial by jury, guaranteed to him by the Sixth Amendment to the Constitution. This arises from the fact that, after the granting of an injunction, any violations of such injunction constitute, under the provisions of section 21, supra, a contempt of court, which contempt of court is summarily triable by the

court without a jury. Section 22 of the Volstead Act; section 24 of Act of October 15, 1914, c. 323, 38 Stat. 739 (Comp. St. § 1245d). And upon a finding by the court that the defendant is guilty of contempt he must be punished by a fine of not less than \$500 nor more than \$1,000, or by imprisonment, not less than 30 days nor more than

12 months, or by both such fine and imprisonment.

I am mindful of what was said as to a jury trial in the case of Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. But I do not think the point here involved is the same as the point there involved; for there the contention made, or at least the question seemingly discussed by the Supreme Court of the United States, was whether the defendant, in a trial before the chancellor sitting to hear the action in equity for abatement as a common nuisance and injunction, was entitled to a jury. The Supreme Court held that no federal constitutional guaranty was violated by a state statute which denied to the accused a jury on such a trial. Here the point is whether, in view of the definition of a nuisance as contained in section 21 of the Volstead Act, and in view of the misdemeanor there denounced for the maintenance of the nuisance, and of the statutes making the illegal manufacture and sale of intoxicating liquors punishable offenses under said act, there do not exist remedies at law which preclude equitable jurisdiction till the remedy at law has been followed and has measurably failed to accord relief, or until by apposite averments in the bill it can be seen that the remedies at law will not afford relief. State ex rel. v. Crawford, 28 Kan, 726, 42 Am. Rep. 182.

[7] The affidavits here are in my view insufficient as a matter of law to warrant the issuance of a temporary injunction. It is to be noted, however, that the affidavits are to be construed only as apposite upon the point touching whether the court before a final hearing shall issue a temporary injunction. Insufficient affidavits, present a sufficient bill, would not preclude a perpetual injunction after a final hearing. In short, the affidavits seem to go to the authority of the court to issue a temporary injunction, and, the bill being sufficient, these affidavits have no bearing upon the authority of the court, after

a final hearing, to perpetually enjoin.

I conclude that, upon the two points first above reserved for discussion, the motion to dismiss ought to be sustained. These are curable, however, by amendment of the bill, if so it be that plaintiff is so ad-

vised, and the facts at hand so warrant.

[8] The points urged that the provisions of section 22 invade police powers of the state, and that, since no phase of interstate commerce is involved, the plaintiff has no standing and the federal court no jurisdiction, may be considered together, and disallowed almost out of hand, under the doctrine announced by the Supreme Court in the case of Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 64 L. Ed. 946, It may be conceded that the provisions of the Volstead Act, in so far as they provide for the exercise of police powers by the Congress, would have been unwarranted and unconstitutional before the adoption of the Eighteenth Amendment; but one of the chief things accomplished by that amendment was, as to the manufacture, trans-

portation, and traffic in intoxicating liquor, to confer police powers on Congress, and to extend those powers into the territories of the several

states. State of Rhode Island v. Palmer, supra.

[8] Practically the effect of the Eighteenth Amendment was to confer on Congress the same powers to deal with the manufacture, sale, and transportation of intoxicating liquors intrastate as it formerly possessed interstate, and also to confer on Congress the same police powers therein, and in any state, that the several states themselves had within their own territorial limits, on the same subjects, before the adoption of the Eighteenth Amendment. Taking this view, which is a hurried expression and construction of a far-reaching condition, and of a far-reaching statute, it follows that what a state could do within its own territorial limits before the adoption of the Eighteenth Amendment to stamp out the manufacture, sale, and transportation of liquor, Congress may now do.

It follows that this is true, not only as to interstate commerce, but as to intrastate commerce. If a state could, as a part of its police powers, in furtherance of its efforts to prevent the manufacture, sale, and transportation of intoxicating liquors enjoin the use of houses, premises, and places of manufacture and sale as a common nuisance, Congress may now likewise pass a law to enjoin within any state such things as common nuisances. The power of a state to do this identical thing by a statute very similar to that before me here, came before the United States Supreme Court in the case of Mugler v. Kansas, supra, wherein (123 U. S. at page 672. 8 Sup. Ct. 303 [31 L. Ed. 2051) it was

said:

"Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, the jurisdiction of courts of equity seems to be of a very ancient date and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable, not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information, also, lies in equity to redress the grievance by way of injunction.' 2 Story's Eq. §\$ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. District Attorney v. Lynn & Boston Railroad Co., 16 Gray, 242, 245; Attorney General v. New Jersey Railroad, 2 Green, Ch. 139; Attorney General v. Tudor Ice Co., 104 Mass. 239, 244; State v. Mayor, 5 Porter (Ala.) 279, 294; Hoole v. Attorney General, 22 Ala. 190, 194; Attorney General v. Hunter, 1 Dev. Eq. 12; Attorney General v. Forbes, 2 Myl. & Cr. 123, 129, 133; Attorney General v. Great Northern Railway Co. 1 Drew & Sm. 154, 161; Eden on Injunctions, 259; Kerr on Injunctions (2d Ed.) 168."

I conclude, therefore, from the above premises that (a) the bill before me does not state sufficient facts to warrant granting the relief prayed for; (b) that the affidavits filed in support of the bill do not warrant the issuance of a temporary injunction; (c) that, present facts to justify, the bill may be amended so as to state a cause of action; (d) that, being so amended, upon final hearing a perpetual injunction is grantable under the provisions of sections 21 and 22 of the Volstead Act, should the facts adduced in evidence so warrant; (e) that the remedy by injunction to abate a common nuisance defined by section 21 of the Volstead Act, when construed as herein, is a lawful and appropriate method and remedy for the enforcement of the objects of that act in aid of the law remedies provided, whenever the latter are shown to be inadequate; (f) that sections 21 and 22 are warranted by and are within the constitutional purview of the Eighteenth Amendment and that when properly construed they are not unconstitutional; (g) that while, when enforced within the body of the state in matters purely intrastate, they invade the police powers of the several states, yet such invasion is provided for and warranted by the Eighteenth Amendment, and is therefore not forbidden and is not now unconstitutional; (h) that proper facts being shown as antecedently existing to warrant equitable jurisdiction, the right of trial by jury is not infringed; (i) that defendants are not entitled to a trial by a jury either upon a hearing of a suit to abate and enjoin, or upon a trial of any contempt which may grow out of a violation of any injunction which may be granted. 38 Stat. 739.

It results, however, that the motion to dismiss for defects in form and pleading should be sustained to the bill as now drawn. Let it be

so ordered.

BLACK v. BOLEN, Collector of Internal Revenue.

(District Court, W. D Oklahoma. September 14, 1920.)

No. 1869.

Internal revenue \$\iff 38\$—Claim for refund of income tax not necessary before suit, when abatement has been depied.

Where a claim for abatement of income tax has been rejected by the Commissioner of Internal Revenue, it is not necessary to file a claim for refund of such part of the tax, paid under protest, before commencing suit for its recovery.

Internal revenue 7—Profit made, but embezzled, and not received, not taxable as income.

Where plaintiff, although engaged in other business, during the tax year speculated in stocks, through which he made a profit, but such profit was embezzled by his broker, and was never received nor recovered by him, held, that he was not taxable on such sum as a part of his income.

At Law. Action by George E. Black against Hubert L. Bolen, Collector of Internal Revenue. Judgment for plaintiff.

William A. Sipe, of Tulsa, Okl., for plaintiff.

John A. Fain, U. S. Atty., of Lawton, Okl. (Frank E. Ransdell, Asst. U. S. Atty., and Herbert M. Peck, U. S. Atty., both of Oklahoma City, Okl., on the brief), for defendant.

POLLOCK, District Judge. This is an action at law, brought by plaintiff to recover from defendant the sum of \$614.47, paid as tax on his income for the year 1915 under protest. On issue joined the case stands submitted for decision on stipulation of facts; a jury to try the case having been waived. Briefly stated, the facts as stipulated are these:

During the period for which the tax was laid by the government the plaintiff, who lived at Tulsa, in this state, was engaged generally in the oil business, buying and selling oil leases, and developing the same, etc.; also, he was engaged in buying and selling oil stocks and shares in many oil corporations. In the conduct of this latter business plaintiff bought stocks, and sold the same on the New York curb, of approximately the value of \$100,000 during the taxable year of 1915, through his broker, named R. H. Reid. Out of the conduct of this business there arose a profit of \$16,544, with which plaintiff intended there should be purchased Standard Oil stock. However, the broker, Reid, embezzled this money of plaintiff, committed suicide, and his estate, when settled, paid but two one-hundredths of 1 per cent. of his indebtedness. For this loss in income, plaintiff, having paid his income tax aside from this, applied for an abatement of the tax imposed thereon to the Commissioner of Internal Revenue. This application or claim was disallowed by the Commissioner. Thereafter the Commissioner, in response to a letter written by the representative of plaintiff on January 19, 1918, in response to specific request therefor, replied as follows:

"A claim for abatement having been filed in this case, and rejected by this office, it is unnecessary that a refund claim be filed before suit is instituted."

This action was instituted by plaintiff thereafter on June 20, 1919. To a recovery by plaintiff of the amount of the income tax levied by the government on the money embezzled by the broker, the collector, defendant herein, defends on two grounds, viz.:

(1) That plaintiff filed no claim for a refund of this portion of his income tax paid under protest, after it was by the Commissioner's office ruled he was liable therefor, and before this action was instituted.

(2) That the money so made and lost by plaintiff did not arise out of any trade or business in which plaintiff was engaged; hence he is not entitled to deduct and charge off the loss from his gross income, before computing the income tax thereon.

[1] That the first defense made by the collector under the circumstances of this case is untenable is expressly ruled by the Circuit Court of Appeals for this circuit in Weaver v. Ewers, 195 Fed. 247, 115 C. C. A. 219, and other cases cited in the brief for plaintiff. Not only is the rule announced by the court in the above case controlling here, but under the peculiar facts of this case it would seem unseemly for

the Commissioner's office, after having reviewed the claim of plaintiff to abatement of his income by loss, and denied this claim on its merits, and thereafter having advised plaintiff no claim for a refund was necessary to be made before action instituted, to permit the collector to defeat recovery on such ground. The honorable Commissioner should either have not given any advice to plaintiff on the subject, leaving him to work out his rights under the law as he was advised by his counsel, or, the Commissioner having advised plaintiff as he did, should then have instructed his collector such defense is no longer open to be urged in this case.

[2] Did the profit on the sale of the corporate shares, which would have accrued to plaintiff and become part of his income, had his broker not embezzled the same, arise out of any trade in which plaintiff was engaged or business by him conducted? The ground of disallowance, as stated by the honorable Commissioner in his letter of November 23,

1917, to plaintiff, reads as follows:

"The claim of George E. Black, Tulsa, for the abatement of \$602.43 additional income tax for 1915 has been examined. Claimant was originally assessed a tax of \$1,571.02, based on his return on Form 1040. He was later assessed a further tax of \$602.43, due to the disallowance of a deduction of \$16,544, representing money which he intrusted to a broker with which to purchase stocks for his account and which was embezzled by the broker. No part of this money was ever recovered by claimant, and he now contends that, since the additional tax is based principally on this disallowed deduction, and since it was a loss incurred in his business, that the tax should not have been assessed. This office regards the above-mentioned loss as one of a purely personal nature, and not one incurred in business. Such a loss has been consistently held by this office not to be an allowable deduction. The claim is hereby rejected, and you will please proceed without further delay to collect the outstanding assessment.

Daniel C. Roper, Commissioner."

It may well be true that speculating in stocks on the New York curb was not the exclusive, or even principal, business in which plaintiff was engaged at the time the tax was levied by the government. However, a man may be engaged in many trades, callings, occupations, professions, or kinds of business within the period of one single year. Indeed he may engage in many such at the same particular time, and the amount of money or profits derived by him from the aggregate of all constitutes his taxable income. One thing is true: Had plaintiff in this case not engaged in the business of buying and selling on the New York curb stocks in oil corporations, his income would have been less, by the \$16,544, than that on which he was actually assessed. The fact that this profit made in the transaction was embezzled by a faithless broker constituted a loss to plaintiff in the income he should and would have received, and on which, if by him received, he would have been compelled to pay the government tax. As this money was not received by plaintiff, under the agreed facts, but was embezzled by his broker, and thus lost to him, plaintiff did not profit, and the government should not do so, at his expense. I am of the opinion plaintiff properly charged off this loss in his business, and should not have been ruled to pay an income tax thereon.

Therefore let judgment go for the plaintiff as prayed. And it is so

ordered.

In re INTERNATIONAL PIANO MFG. CO.

(District Court, D. Massachusetts. November 3, 1920.)

No. 28044.

1. Bankruptcy 211-Title to property ordinarily tried by bankruptcy, instead of state, court.

Title to property in the possession of and claimed by bankruptcy trustees should ordinarily be determined by the bankruptcy court, and only in exceptional cases will the property be delivered to a state court for such determination.

2. Bankruptcy =211-Vacation of referee's order permitting replevin in-

validates previous replevin proceedings.

Where a bankruptcy referee's order permitting replevin proceedings against the trustees is vacated, the rights of the parties are unaffected by the actual replevin of the goods, since the replevin action falls with the order on which it was based.

In Bankruptcy. In the matter of the International Piano Manufacturing Company, bankrupt. Order of referee permitting replevin proceedings against trustees vacated, and goods directed to be returned to trustees.

Wood & Brayton and L. Elmer Wood, all of Fall River, Mass., for trustees in bankruptcy.

Frank A. Pease, of Fall River, Mass., for petitioner.

MORTON, District Judge. [1] Controversies over the ownership of property which comes into the actual possession of the bankruptcy court ought to be settled there as far as possible. It is only under very exceptional circumstances that property in the possession of and claimed by trustees in bankruptcy should be surrendered to the state courts, in order that the title to it may be tried there, instead of in the bankruptcy court. No such circumstances are shown in this case, and it seems to me that the usual practice should have been adhered to. See In re Brockton Ideal Shoe Co. (Dist. Ct. D. Mass., No. 17836, opinion dated November 18, 1912) 212 Fed. 764.

[2] Inasmuch as the proceedings to review the referee's order permitting the replevin were seasonably taken, the rights of the parties are not affected by the fact that the goods have actually been replevied under the order of the referee; the replevin action will fall with the order on which it was based.

Let an order be entered, vacating the order of the referee, and directing the return of the goods in question to the trustees.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

EX PARTE GOLDSTEIN (268 F.)

Ex parte GOLDSTEIN.

(District Court. D. Massachusetts. November 19, 1920.)

No. 1876.

 Army and navy \$\sim 20\$—Notice mailed by Adjutant General under Selective Service Act to wrong address insufficient to bring man into military service.

Under Selective Service Regulations, § 133, requiring the Adjutant General to notify delinquents by mail, etc., to report for instructions, a notice mailed to the wrong address, and never received by the delinquent, is insufficient to bring him into military service.

- Judgment \$\insert 17(1)\$—Actual or constructive notice necessary for judgment in personam.
 - A judgment in personam cannot be rendered against one who has not received actual or constructive notice.
- 3. Army and navy —44(2)—Civil law governs until inducted into military service.

Until inducted into the military service, the rights of a party are determined by the civil law, instead of the military or courts-martial law.

Habeas Corpus. Petition by Louis Goldstein. Writ to issue.

Bernard E. Carbin and Atteridge & Carbin, all of Boston, for petitioner.

MORTON, District Judge. The decisive question is whether the petitioner is subject to military jurisdiction as a member of the United States Army. He was within the draft ages, and he duly registered and filed his questionnaire. He was placed by the local board in class I b. Being dissatisfied with this classification, he went to the local board about it, but the classification was not changed. He was duly notified by the local board to appear for physical examination and failed to do so.

Upon this default his name was sent by the local board to the Adjutant General of the state as a delinquent, with the comment that he was a "real slacker"; but his address was by mistake omitted. This was the last action that the local board took with reference to him; it never called him for service. The Adjutant General's office mailed to him a peremptory notice to report for instructions on or before a specified time; but the notice did not bear any street or house number, and was addressed to "Norwood," while the petitioner was a resident of Dedham, a different town, and worked in Boston, and had given both addresses correctly in his registration and questionnaire.

This notice never reached Goldstein; it was returned to the Adjutant General by the post office. The petitioner did not respond to it, and never presented himself for service. He has been arrested by the army authorities as a deserter, and is on trial by court-martial for desertion.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The Selective Service Regulations (section 133) provide that the Adjutant General, upon receiving notice from a local board that a registrant is a delinquent, shall forthwith notify the delinquent, by mail, telegraph, or in person, to report to him (the Adjutant General) for instructions not later than a specified day and hour, which shall not be less than ten days from the date of the notice. The regulations further provide that, unless the notice be modified:

"From and after the day and hour so specified, such persons shall be in the military service of the United States."

- [1] It is obvious, I think, that the notice given to Goldstein did not comply with the requirements of this section. No attempt was made to notify him in person or by telegraph. The only notice given was that by mail, which was sent to an altogether wrong address, and never in fact reached him. It was in legal effect no notice at all. It was insufficient under the regulations to bring him into the military service.
- [2, 3] Moreover, it is a cardinal rule of law that a judgment in personam cannot be rendered against one who has not received actual or constructive notice. Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444. Until inducted into military service, the rights of a party are to be determined, not according to military law or the law of courts-martial, but according to the standards of the civil law. The notice given was not a reasonable notice, upon which an induction upon default could properly be based.

Writ to issue.

SUDDUTH v. STORM KING COAL CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 12, 1920.)

No. 3411.

1. Contracts \$\infty\$=10(4)—Corporations \$\infty\$=458—Contract for sale of stock and assets not invalid, as unilateral.

A contract for the sale by a corporation of all its capital stock and assets, reciting a consideration of \$100, and providing for payment by the purchaser of \$45,000 in the manner therein stated, *held* not unilateral, or even an option contract, and not invalid.

Contracts \$\infty\$ 93(5)—Mistake of one party held not to prevent enforcement.

Where one of the parties to a contract was not mistaken as to its terms and is not charged with fraud, the mistake of the other parties as to the consideration provided is not a defense to a suit for enforcement of the contract.

Evidence *held* insufficient to show that a contract for the sale of all the stock and assets of the corporation was executed by the corporation's officers under a mistake as to the amount of consideration provided.

4. Corporations ← 458—Negligent mistake as to consideration of contract does not entitle party to relief.

Where an officer of a corporation, signing a contract for the safe of its stock and assets, had a full and fair opportunity to examine it in detail, his mistaken belief as to the consideration provided was due to his own negligence, and does not justify relief in equity, unless the mistake was a mutual mistake of all parties.

 Corporations \$\infty 458\$—Contract held one for purchase of all capital stock and assets.

A contract by a close corporation owned by three men, who managed its business informally and two of whom signed the contract as officers, by which it agreed to transfer all shares of its capital stock and deliver possession of a mining lease and improvements, *held* a contract for the sale of all its capital stock and assets, and not merely the stock issued to the stockholders.

6. Equity 56-Disregards form and looks to substance.

A court of equity is not concerned with outward forms, but will disregard form and look to the substance of every transaction.

 Corporations = 116—Purchase price of corporation's property is sufficient consideration for agreement to transfer stock.

The payment to a corporation of the purchase price of all its property is a sufficient consideration for the agreement of its stockholders to transfer their stock to the purchaser.

8. Corporations =116—Officers signing corporation's agreement for sale of stock and assets bound by agreement as to their stock.

Stockholders who, as officers, signed a corporation's contract for the sale of all its property and stock, could not deny their consent to the transfer of their stock in connection with the sale of the corporate property.

9. Corporations \$\infty 425(6)\$—Contract to sell stock and assets estops corporation to deny authority to sell stock.

A corporation contracting to sell all of its capital stock and property is estopped to defend an action to enforce the contract on the ground that it had no authority to sell the stock in the hands of the stockholders.

10. Corporations \$\infty 452\$—Secretary held to have attested corporate act.

and not merely witnessed signature of vice president.

Where a contract was signed in the name of the corporation by its vice president, followed by the words: "Attest: C., Secretary"-C. signed officially as secretary to attest the corporate act, and not merely as witness to the vice president's signature.

11. Tender 515(6)—Not insufficient because in form of certificate of deposit, when refused on other grounds.
Where the tender of a certificate of deposit was not refused because made by certificate of deposit, but because the contract under which the tender was made was made by persons without authority, any other or further tender was unnecessary.

12. Corporations \$\iii 432(1)\$—Presumption of general authority arises from

recognition of particular contract.

Where one of the three officers and stockholders of a corporation recognized a contract signed by the others for the sale of all the stock and property of the corporation, the presumption of general authority to make such a contract arises, in the absence of evidence to the contrary.

13. Corporations 410—A stockholder and officer, having general authority

from others to make contract, did not require specific authority.

Where one of the three stockholders and officers of a corporation had general authority from one of the others to sell all the corporate stock and assets, specific authority to contract was not required.

14. Evidence \$\infty 75\$—When letter not produced, oral evidence of its contents

accepted as correct.

Where defendants failed to produce a letter written by one of them to another, and shown by oral evidence to have authorized the making of the contract involved, the oral evidence as to its contents will be accepted as correct.

15. Corporations \$₹ 432(12)—Evidence held to show written authority of a stockholder and officer to act for others in selling corporation's property and stock.

Evidence held to show that one of the three stockholders and officers of a corporation had written authority from another to make a sale of the corporation's property and stock at the best price obtainable.

Appeal from the District Court of the United States for the Eastern District of Kentucky at London; Andrew M. J. Cochran, Judge.

Suit in equity by Walton Sudduth against the Storm King Coal Company and others. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded, with directions.

A. F. Kingdon and D. E. French, both of Bluefield, W. Va., for appellant.

James H. Jeffries, of Pineville, Ky. (James H. Jeffries, of Pineville, Ky., and W. F. Hall, of Harlan, Ky., on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. This is an appeal from a decree of the United States District Court for the Eastern District of Kentucky in an equity cause in which Walton Sudduth was the plaintiff and the Storm King Coal Company, J. W. Nolan, L. E. Yoder, A. M. Clark. and the First National Bank of Hazard were the defendants. It appears from the evidence that the Storm King Coal Company is a corporation, that J. W. Nolan is its president, L. E. Yoder its vice president and general manager, and A. M. Clark its secretary; that these

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three individuals own, or on the 23d day of April, 1918, did own, all of the capital stock of that company that had been issued to that date, amounting in the aggregate to \$38,500. On the date above named a contract in writing was executed by the parties whose names are signed thereto, which contract reads in the words and figures following:

"This contract, made and entered into by and between Storm King Coal Company, a Kentucky corporation, of the first part, and Walton Sudduth, of the second part, witnesseth: "Whereas, first party is incorporated with a capital stock of fifty thousand dollars; and whereas, said company is now the owner of a certain lease of coal land in Perry county, Kentucky, and has made certain improvements on said lease; and whereas, said company is indebted in the sum of approximately eighteen thousand dollars:

"Now, in consideration of one hundred dollars, cash in hand paid to first party by second party, the receipt of which is hereby acknowledged, and other consideration as hereinafter stipulated, first party hereby agrees to sell, transfer, and assign, and cause to be sold, transferred, and assigned, all of the shares of the capital stock of said corporation, viz. fifty thousand dollars, and to deliver possession of said lease and improvements of the said Storm King Coal Company free from all liens and incumbrances on May 1, 1918, and from all claims of damages due to any act of first party prior to May 1, 1918. Second party agrees to pay therefor the sum of forty-five thousand dollars-eight thousand nine hundred dollars in cash, on taking possession of said lease, mine improvements, and said stock properly transferred; nine thousand within six months; and nine thousand within twelve months thereafter. It is agreed that second party also assumes the indebtedness of first party to the extent of eighteen thousand dollars, which sum is to be paid to the debtors of first party as same become due. Second party shall execute his notes to first party for the deferred payment herein, with 6 per cent. interest from date thereof. It is understood by the parties hereto that there is an option outstanding on said property, which expires May 10, 1918, and it is agreed that said option be assigned to the second party by first party, and in event the same is exercised by the grantees therein within said time second party shall be entitled to the benefit accruing by reason of same. "Witness our hands April 23, 1918.

"Storm King Coal Company,
"By L. E. Yoder, Vice President & G. M.

"Attest: A. M. Clark, Secretary.
"Walton Sudduth.
"Witness: T. L. Hudgins."

At the time this contract was executed, Sudduth gave his check payable to the Storm King Coal Company for \$100. This check was deposited in the Perry County State Bank at Hazard, Ky., to the credit of the payee, and was in the due course of business paid by the Commercial Bank of Bluefield, W. Va., upon which it was drawn. On the 1st day of May, 1918, the persons holding the option mentioned in the foregoing contract elected to take the property at the price named therein, to wit, \$75,000; but it appears that the coal company had agreed to pay \$10,000 for negotiating this sale. It further appears that Sudduth was orally advised of that fact at the time the contract was signed, and agreed to that arrangement.

On the 1st day of May, Sudduth came to Hazard prepared to make the cash payment and take over this property. On account of missing his train connection at Shelby Junction, he did not reach Hazard until about 6:30 or 7 o'clock on the evening of that day; but he sent a telegram from Ashland to the Storm King Coal Company, advising that he had missed connections at Shelby, but would arrive at Hazard that evening. When he reached Hazard, he discovered that the individuals who had elected to take under the prior option were already there to arrange for the transfer of the property to them. He was then informed that Nolan, the president, repudiated the contract made by Yoder and Clark, and that Yoder and perhaps Clark, also, were disposed to treat it as invalid, because they had no authority from Nolan to make such a contract.

All parties, however, were willing to have the sale consummated to the first option holder, and in order to facilitate this deal and permit it to go through without friction, a trust agreement was entered into between Sudduth, on the one part, and Nolan, Yoder, and Clark, on the other, that \$20,000 of this purchase price, in United States government Second Liberty Loan bonds, should be deposited in the First National Bank of Hazard, Ky., to be held by that bank in trust for the benefit of whichever of these respective claimants might later be adjudged the owner by decree of any court of competent jurisdiction. The First National Bank of Hazard, Ky., has no other or further interest in this controversy, but merely holds these bonds subject to the order of the court.

Sudduth then brought this action in equity in the District Court of the United States for the Eastern District of Kentucky, making the Storm King Coal Company, Nolan, Yoder, Clark, and the First National Bank of Hazard, Ky., defendants, and praying for a decree against the Storm King Coal Company for the sum of \$20,000, with interest from the 1st day of May, 1918, and costs of suit, for a decree against the First National Bank of Hazard, Ky., directing that bank to deliver to him the bonds held by it under the trust agreement, and for such other and further equitable relief as the court might find to be just and proper. His cause of action is based upon the contract of April 23, 1918.

The defendants, other than the First National Bank of Hazard, filed an answer, denying that Sudduth had performed or attempted performance of his part of the contract, and alleging that the contract never was valid, binding, or enforceable, because it is unilateral in its nature, and does not contain any stipulation on the part of Sudduth to perform any act whatever; that by mutual mistake of the parties thereto at the time, and of the draftsman who prepared the same, the price named therein is \$45,000, when it should have been \$63,000; that the contract is not signed by either of the individual defendants, Nolan, Yoder, or Clark, and is therefore not a valid or binding contract against either of them; that the Storm King Coal Company was not then or at any other time authorized to sell or transfer the stock held by these defendants; that the plaintiff was intending and attempting to purchase nothing else than all the shares of capital stock and the assets of said defendant coal company, and neither the coal company, Yoder, or Clark were authorized or empowered to sell or transfer any share of the capital stock in said corporation then held and owned by the defendant J. W. Nolan, who at that time owned in his own right one-third of the issued and outstanding shares of the capital stock of this company; that the Storm King Coal Company was the owner of

135 shares of unissued treasury stock, and that Yoder, vice president, and Clark, secretary, were not then or at any time, either jointly or severally, authorized or empowered to sell, transfer, or convey any of said 135 shares of treasury stock so belonging to said corporate defendant.

Upon the issue so joined, the District Court found that by mutual mistake of the parties the written contract did not embody the oral contract, and allowed recovery in favor of Sudduth for the \$100, without interest, paid by him upon this contract, and ordered and directed the First National Bank of Hazard, immediately after the expiration of 30 days from the date of the decree, to deliver the bonds deposited with it to the defendants Nolan, Yoder, and Clark, and dismissed the plaintiff's bill.

[1] The first question presented by this appeal is the validity of the contract sued upon. It is clearly not a unilateral contract. Sudduth paid \$100 cash upon the purchase price named therein; he agreed to pay \$8,900 in cash on taking over lease and mine improvements and stock properly transferred. This, with the \$100, would make \$9,000. He also agreed to pay the further sum of \$9,000 in 6 months, and \$9,000 in 12 months, and to pay in addition to these sums the indebtedness of the coal company to the extent of \$18,000 as the same became due. This aggregates the full sum of \$45,000 which he agreed in this contract to pay for this property. It is therefore apparent that this was not even an option contract, but rather a contract for the purchase of the property, that, if not invalid for other reasons, would be clearly enforceable, not only against the Storm King Coal Company and these stockholders, but also against Sudduth himself.

[2] Coming, now, to the consideration of the evidence in reference to the mutual mistake of parties, we are compelled to the conclusion that this evidence wholly fails to establish such a mistake. It is clear that Sudduth was not mistaken about it. He testifies that he caused this contract to be prepared by an attorney in conformity with his understanding of the terms of the oral contract. He still insists that it fully expresses the contract agreed upon between the parties prior to the signing of this written paper. There is not a single syllable of evidence in this record that he was mistaken about it. Either this written contract expresses his understanding of the terms of the oral contract, or he purposely and willfully caused this contract to be written in the manner and form in which it was executed by the parties thereto, for the purpose of fraudulently securing this property at a price less than he had agreed to pay for it. The answer of these defendants, however, does not charge him with fraud, nor do they ask a rescission of this contract for that reason; so that, even if either of these defendants were mistaken as to the terms of this contract when it was signed, the mistake was not a mutual one, and they are entitled to no relief for that reason.

[3] Aside from this consideration, it does not clearly appear from the testimony of Clark that he was mistaken about it. On the contrary, it would seem that he fully understood all of it, especially as to price. He does not deny the testimony of Sudduth that he told Sud-

duth the others "want to kick out of the contract." He then offered to transfer all of his stock to Sudduth at the price named in the contract, without making any claim whatever as to mistake in it. Yoder's testimony is, at best, unsatisfactory. He says he read this paper, and assumed that "we were getting \$45,000 for the stock." The evidence shows that he is a man of large business experience, and perfectly capable of taking care of himself in a transaction of this kind. The language of the contract is plain, explicit, unambiguous, and of easy understanding. He testified that, after Sudduth had presented this contract, he and Clark went into the back room for a little conference, and when they came out of that room Clark signed the contract and it was delivered to Sudduth.

This contract, or a copy of it, remained in the possession of Yoder from its date until May 1st, and yet no objection was made by him, nor was notice given to Sudduth that it did not fairly state the agreement of the parties. Yoder testifies that "up here on the ground after a few days" he did make such a statement to Sudduth. Later he testified that it was Sudduth's counsel he notified the first day he came to Hazard, but he does not inform the court when he discovered that mistake. Certainly it was not between the time that Sudduth reached Hazard and the time of the signing of the trust agreement. Mr. Wooton, a member of the bar of Hazard, Ky., was present at these early conferences, and particularly the conferences about May 3d between Sudduth and his counsel and these defendants, and he heard no statement from any one in reference to a mistake in the contract. Clark does not testify that he had at any time called Sudduth's attention to any mistake in this contract, or that he heard Yoder do so, until some time after the trust agreement was made. Mr. Nolan, when he told Sudduth that Yoder and Clark had no authority to act for him, and that the Storm King Coal Company had no authority to transfer this lease without the consent of the owner of the fee, did not mention anything about mistake. Evidently up to that time Yoder had not communicated that information to him.

[4] Contracts are reduced to writing, not only for the purpose of evidencing the terms and conditions agreed upon, but for the further purpose of preventing misunderstanding and mistake. It is the duty of every person, competent to contract, to use due care and diligence to ascertain, before signing a written contract, that it fully and fairly expresses the agreement he has made or intends to make. Courts cannot act as guardian for either of the contracting parties, nor can they treat a written contract as "mere scraps of paper." On the contrary, it is the duty of a court to enforce all the terms of a contract as written, unless it shall appear by the evidence, either that there was a mutual mistake of all persons party thereto, or that the signature of one or more of these parties was obtained through undue influence, fraud, or fraudulent representation. If Yoder signed this contract under the mistaken belief that it provided for a consideration of \$63,000, instead of \$45,000, that mistake was due to his own fault and negligence; for it is not claimed that he was deprived of a full and fair opportunity to examine it in detail as to all of its terms. A court (268 F.)

cannot grant him relief merely because he was negligent, and it is equally powerless to grant relief if he was in fact mistaken as to its terms,

unless that mistake was a mutual mistake of all the parties.

[5] The claim is made in brief of counsel for appellees, and is also discussed at considerable length in the opinion of the trial court, that Sudduth was buying only the stock of this corporation that had been issued to Nolan, Yoder, and Clark. It is clear that this was not the intent or purpose of either party to this contract. Paragraph 5 of appellees' answer expressly avers that Sudduth—

"was intending to and attempting to purchase nothing else than all of the shares of the capital stock and assets of said defendant the Storm King Coal

Company."

This is not only the claim of the appellant, but would seem to be a correct interpretation of this contract, which in terms provides for the transfer and assignment of the capital stock and—

"the delivery of the possession of the lease and improvements of the Storm King Coal Company, free from all liens and incumbrances."

For this reason we cannot agree with the construction reached by the trial court that the subject-matter of this contract was solely and only the capital stock of the corporation. It is, of course, true that a corporation cannot sell the stock it has issued to its stockholders; but it must be remembered that this was a close corporation, owned entirely by these three men, all of whom testified that there were very few directors' meetings, and that the management of the corporate business was all informal. It was no more than a legal entity through the agency of which this property was acquired and these business activities conducted.

[6] A court of equity is not concerned with the outward forms, but, on the contrary, will disregard form, and look to the substance of every transaction. Chicago Co. v. Minn. Civic Association, 247 U. S. 490-501, 38 Sup. Ct. 553, 62 L. Ed. 1229; Iron Co. v. Arctic Co., 261 Fed. 15-17, 171 C. C. A. 611; Kalamazoo Spring & Axle Co. v. Winans, Pratt & Co., 106 Mich. 193-198, 64 N. W. 23; Eureka Iron & Steel Co. v. Bresnahan et al., 60 Mich. 332-337, 27 N. W. 524; Conely v. Collins, 119 Mich. 519, 78 N. W. 555, 44 L. R. A. 844; Harrison & Co. v. Blacker, 15 Ohio N. P. (N. S.) 377.

The transfer of the stock was merely incident to the sale and transfer of all the property of the corporation. If a corporation disposes of its entire assets, its stock in the hand of its stockholders is worthless, and might just as well be transferred to the purchaser of its property. It is the usual and ordinary method by which the transfer of, not only all the corporate property, but the control of the corporation itself, is

accomplished.

In this particular case the final contract with F. E. Hadley provided, just as in the Sudduth contract, not only to deliver possession of the lease and all improvements, but also for the transfer and assignment of all of the capital stock of the Storm King Coal Company. This fully appears from the following provision found in the last paragraph but two of the Hadley contract that—

"This contract, and the said sale and transfer of said property, stock, lease, and equipment, fully consummated, shall not be exceeding fifteen days from date hereof."

And it is further provided in the last paragraph but one of this contract that—

"It is understood that the Storm King Coal Company executed to H. H. Cupler an option to purchase the said property and stock of the said Storm King Coal Company on April 10, 1918, and that said option expires May 10, 1918."

It therefore not only appears from these several contracts, and particularly from the construction given the Cupler contract by these defendants themselves, as that construction is expressed in the last paragraph but one of the Hadley contract, that they not only contemplated in all of these contracts the sale of all the property and assets of the corporation, as well as the transfer of stock to the purchaser, but that they in fact did accomplish the transfer and sale to Hadley of all corporate property and all stock of the corporation in this identical manner.

[7, 8] The owners of the capital stock are the sole and only beneficiaries of the purchase price to be paid the corporation for its entire property. The payment of this purchase price by Sudduth to the corporation itself was sufficient consideration for the contract and agreement on their part to transfer their stock to the purchaser of the corporate property. To permit the stockholders who signed this contract to deny that they consented and agreed to the transfer of their stock in connection with the sale of the corporate property would be to put a premium on fraud. If they in fact had authority from Nolan to make and enter into this contract, he is equally bound by its terms.

If this contract contemplated merely a transfer of stock in the corporation, then provision as to payment of debts would have been wholly unnecessary, for the corporate property would still remain subject to the payment of these debts. That these provisions are made in this contract to pay all the outstanding debts of the corporation is some evidence, at least, that the purpose and intent of the contracting parties was that all of the property of the corporation should be transferred to Sudduth. The fact that this contract was made in the name of the Storm King Coal Company is almost conclusive proof that the main object and purpose of that contract was the purchase and sale of the corporate property of that corporation. It is hardly conceivable that men experienced in business affairs, intending either to buy or sell only the shares of the capital stock held by the separate stockholders, should attempt to accomplish that purpose by a contract in the name of the corporation itself. Certainly the lawyer who wrote the contract would not be guilty of such a monumental folly.

[9] This corporation that has entered into this contract with Sudduth is now defending jointly with these stockholders, upon the theory that it had no authority whatever to sell the shares of its capital stock in the hands of its stockholders. It would seem unnecessary to say that the corporation is estopped from making any such defense. The fact that it agreed to transfer this stock carried with it the assurance

to the other contracting parties that it had such authority. However, it did have the authority "to deliver possession of said lease and improvements of the said Storm King Coal Company free from all liens and incumbrances on May 1, 1918." This undoubtedly was the main object and purpose of the contract, and yet it did not offer to perform this important part of the contract that it had full power and authority to perform. If it had done this, it would have at least shown good faith on its part to the extent of its power and ability to perform. Undoubtedly this would have amounted to a substantial performance, for in view of the fact that the corporation had no other or further property, and that the outstanding stock was therefore valueless, Sudduth could have recovered no more than nominal damages for

failure to perform the full contract according to its terms.

[10] It is claimed, however, that Clark did not sign this contract, except as a witness to the signature of Yoder. The word "Attest," before the signature of Clark as secretary, does not mean that he is merely signing it as a witness, but, on the contrary, that he is signing it officially as secretary of the company. This is the usual formula employed in the execution of all deeds and contracts by the president and secretary of a corporation, and where witnesses are required, as in the execution of a deed or other paper of like character, other persons must be called in to act in that capacity. If Clark did not understand that he was signing this as secretary of the company, he should have signed his name as witness, after the signature of Sudduth, and along with the other witness, T. L. Hudgins. In that case the word "Secretary," after his name, would be wholly unnecessary and superfluous. On the contrary he did sign his name in the proper place as secretary, attesting, not the signature of Yoder, but the corporate act.

[11] It is also claimed on the part of the appellees that Sudduth did not perform or tender performance on his part. The evidence establishes the fact that he went to Hazard on the evening of May 1st, having wired to the appellees that he had missed connections at a way station and could not reach there earlier in the day. One of them met him at the train. Later he talked with all of them in reference to the completion of this contract. He had in his possession a certificate of deposit for \$10,000. The banks were closed, and he could not obtain the money in currency, and tender the exact amount of the first payment; but he did tender to at least two of them the entire certificate of deposit for \$10,000. To this form of tender they made no objection whatever, but then and there informed him that this contract would not be carried out, and the only reason given, either by Clark or Nolan, was that Clark and Yoder had no authority from Nolan to make this contract. Yoder claims he did tell Sudduth's counsel that there was a mistake in the contract as to the purchase price; but the preponderance of the evidence would seem to be the other way. Regardless of how that may be, they all flatly refused to carry out this contract, except Clark, who offered to transfer his stock to him. Yoder also testified that he offered to transfer his stock to Sudduth; but his testimony is not clear and definite as to whether it was at the price of \$45,000 or \$63,000. While equity will follow the law, the law does not require any one to do a useless thing. If these appellees had refused to carry out this contract, because the tender was made by certificate of deposit, instead of cash, then it would have been the duty of Sudduth to procure the cash and make the tender in that way; but the basis of their refusal was for other reasons, and therefore Sudduth was not required to make any other or further tender of the cash payment at that time.

[12, 13] The most serious question in this case is the question of the authority of Yoder and Clark to represent Nolan in this transaction. Nolan testifies they had no authority from him to make this particular contract; but he absolutely fails to testify that Yoder had no general authority from him to make a sale of the corporate property, including the transfer of the stock held by each of them. In view of the fact that he recognized the Cupler contract, signed only by Yoder and Clark, the presumption obtains, in the absence of evidence to the contrary, that Yoder had such general authority, and in that event specific authority to make this particular contract would not be required.

Yoder and Clark made many option contracts for the sale of this property. They made the option contract with Cupler, under which Hadley & Co. finally purchased this property. Yoder insisted he had authority from Dr. Nolan to sell this property. Cupler demanded to be shown this authority, and Yoder produced a letter from Dr. Nolan authorizing Yoder to act for Nolan. There was no price fixed in this letter. Both Nolan and Cupler testified that Nolan signed this option contract; but later Cupler was recalled to the stand, and the original contract was exhibited to him, which he identified as the original by the fact that he had glued a corner down as he was going to New York, because it kept coming apart, and from the paper itself it appeared that it was not signed by Dr. Nolan, but only by Yoder, vice president, and A. M. Clark, secretary. Later, however, when Cupler transferred this contract to Hadley, Dr. Nolan signed his name as a witness to the signature of Cupler to the transfer. This no doubt explains the former testimony of Cupler, and the testimony of Nolan, that Nolan had signed the original contract.

[14] Yoder evidently thought he had authority to sell for \$63,000 at least, and no doubt based his assumption of authority upon this letter; but the letter, according to the evidence of Mr. Cupler, did not stipulate any particular price, so that, if that letter was his authority to sell for \$63,000, it was also his authority to sell for \$45,000. There is no dispute in the evidence in reference to this letter, or its contents, as testified to by Mr. Cupler. So far as disclosed by the evidence, that letter is still in possession of Yoder. It was important that it should have been produced on the trial and offered in evidence. The failure of defendants to do this, without explanation, necessarily leads to the conclusion that the evidence of Cupler as to its contents is correct.

[15] For this reason, this court has reached the conclusion that Yoder had written authority from Nolan to make the sale of this property at the best price obtainable and satisfactory to Yoder and Clark, and in making such sale to enter into such contract with refer-

ence to the transfer of stock and property of the corporation as might

be deemed necessary or proper by Yoder.

The judgment of the District Court is reversed, and cause remanded, with directions to the court to enter judgment for the appellant, and directing the First National Bank of Hazard, Ky., to turn over and deliver to Sudduth the bonds held by it under the trust contract, and also judgment for \$100 against the defendants for the advance payment made by Sudduth upon the purchase price of this property, together with costs of suit.

GRANT et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 10, 1920.)
No. 3346.

Criminal law =1177—Judgment sustained by one of two counts sufficient.
 A judgment of conviction, sustained by the second count, should not be reversed for failure of proof on the first count, where the conviction was upon both counts, and the sentence imposed could have been based upon either count.

2. Post office \$\iff 48(4)\$—Indictment regarding fraud in using mails sufficient.

An indictment that defendants used the mails to defraud by trickery, etc., to the grand jurors unknown, held sufficient against the objection that the specific trickery and chicanery to be employed were not stated, in view of Comp. St. \\$ 1691, and Judicial Code, \\$ 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, \\$ 1246), prohibiting reversal for nonprejudicial error.

3. Indictment and information 59—Purpose of indictment stated.

The object of an indictment is to fairly inform the accused of the charge against him, so as to enable him to prepare his defense and protect him against further prosecution.

4. Post office 50—Whether one accused of fraud in use of mails received a

letter a jury question.

In a prosecution for using the mails to defraud, evidence that a special delivery letter addressed to defendant was delivered at the hotel at which defendant was stopping, that it was later given to him, and that he accepted and acted upon it, held to make a jury question whether he received the letter in execution of the fraudulent scheme.

5. Post office 35-Receiving of letter charged to confederates.

If several defendants were associated in a scheme to defraud by use of the mails, the act of one in receiving a letter in the course of the scheme was the act of the other defendants also.

In a prosecution for using the mails to defraud, evidence that the defendant had previously been involved in a similar scheme, and that he had dealings with the other defendants during the course of the present scheme to defraud, etc., held to make his participation a jury question.

7. Post office ≈ 35—Success of scheme unnecessary to establish guilt.

In a prosecution for using the mails to defraud, a conviction may be had, although the scheme was unsuccessful.

 Criminal law \$\infty\$372 (1)—Evidence regarding similar swindle admissible, to show participation in fraud involved.

In a prosecution for using the mails to defraud, evidence that a defendant had been involved in a similar scheme two years previously is

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admissible to show his participation in the present swindle, provided the jury was convinced a common plan existed among defendants to perpetrate a swindle, even though the previous fraud did not involve use of the mails

9. Post office \$\infty\$49—Letter and telegrams held admissible.

In a prosecution for using the mails to defraud, a special delivery letter and telegrams addressed to defendant *held* admissible, under conflicting testimony as to when and by whom they were sent.

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Fred B. Grant, William F. Silva, and John Connell were convicted of using the mails to defraud, and bring error. Affirmed.

John B. O'Neal, of Covington, Ky. (Maurice L. Galvin, of Cincinnati, Ohio, on the brief), for plaintiffs in error.

Thomas D. Slattery, U. S. Atty., of Covington, Ky.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiffs in error, together with one Goulet and one Davis, were indicted under section 215 of the Criminal Code (Comp. St. § 10385), for using the mails to promote a scheme to defraud. Davis was not brought before the court. A demurrer to each of the two counts of the indictment was overruled. Each of the other four defendants pleaded not guilty and the case went to trial. A motion at the close of the evidence to direct verdict of not guilty was overruled, and the case submitted to the jury. Goulet was acquitted; plaintiffs in error were each convicted and sentenced. This writ is to review the judgment on conviction.

[1] 1. The Motion to Quash.—The same scheme to defraud was set out in each count of the indictment. The differences related to the use of the mails—the first count charging the causing of the letter in question to be deposited in the United States post office at West Hoboken, N. J. The second charged the taking and receiving of that letter from the United States post office at Newport, Ky., in which district plaintiffs in error were indicted. The conviction was upon both counts, and the judgment imposed could have been inflicted upon either. If, therefore, the second count was good, the judgment should not be reversed on account of any defect in or failure of proof as to the first count. Abrams v. United States, 250 U. S. 616, 619, 40 Sup. Ct. 17, 63 L. Ed. 1173; Hardesty v. United States (C. C. A. 6) 168 Fed. 25, 26, 93 C. C. A. 417; Bennett v. United States (C. C. A. 6) 194 Fed. at page 633, 114 C. C. A. 402.

[2, 3] The gist of the alleged scheme was the swindling of one Kaiser out of \$25,000 by fake betting on horse races, a scheme in many of its salient features not unlike that involved in Shea v. United States, 236 Fed. 97, 149 C. C. A. 307; Id., 251 Fed. at page 442, 163 C. C. A. 458. The details of the alleged scheme may be sufficiently summarized as embracing the making of Kaiser's acquaintance at Mt. Clemens, Mich.; the representation that Connell had been winning large sums of money on horse races (due to alleged advance information upon the

outcome thereof); the inducing of Kaiser to bet \$50 on a pretended horse race; the pretense that he had won that bet; the representation that the pool room was closed for the day, and that the alleged proprietor of the Mt. Clemens pool room would forward to a pool room at Newport, Ky., the ticket for the alleged winning of \$6,000; the persuading of Kaiser to accompany plaintiffs in error to the Newport pool room; the pretended receipt by Connell from Davis of the \$6,000 in question; the persuading of Kaiser to permit Connell to bet the whole of that sum on another pretended horse race, and so on until winnings aggregating \$75,000 should appear to be made (of which Kaiser's share was to be \$25,000); a representation that under the laws of Kentucky the winner on a horse race in that state must produce therein a sum of money equal to the amount of his winnings before he could collect them; the persuading of Kaiser to go to his home in New Jersey, get \$25,000, and bring it back in the form of a bank draft; the contriving to have the draft deposited in and collected by a Newport bank; and the fraudulent obtaining by defendants of either the draft or its proceeds.

The indictment contained due allegations of the false and fraudulent character of the material pretenses and representations charged. The only allegation in the indictment as to the specific means by which defendants were to fraudulently obtain possession of the draft or its proceeds is that—

"By trickery, artifice, chicanery, cheating, and by making false and fraudulent statements, representations and pretenses, and by other artifices, false representations, pretenses and deceptions, to the grand jurors unknown, to the said Fred Kaiser, the defendants would obtain possession of the said draft," etc.

The demurrer challenges the sufficiency of this statement. The demurrer was properly overruled. The statement in the indictment that the specific trickery and chicanery to be employed were unknown to the grand jurors expressed a situation not inherently unnatural, and, unless shown to be untrue, does not make the indictment defective. Durland v. United States, 161 U. S. 306, 314, 315, 16 Sup. Ct. 508, 40 L. Ed. 709. The object of an indictment is to fairly inform the accused of the charge against him, and sufficiently to enable him to prepare his defense and protect him against further prosecution therefor. Daniels v. United States (C. C. A. 6) 196 Fed. 459, 465, 116 C. C. A. 233; Bettman v. United States (C. C. A. 6) 224 Fed. 819, 826, 140 C. C. A. 265. The indictment, in our opinion, meets that requirement. Its frame is such as to preclude possibility of another prosecution for the same offense, as well as to enable the accused to prepare to meet the charge. The judgment should not be reversed on account of a criticism so obviously technical and unsubstantial. U. S. Comp. Stat. (1916) § 1691; Judicial Code, § 269, as amended February 26, 1919 (40 Stat. 1181, c. 48 [Comp. St. Ann. Supp. 1919, § 1246]); West v. United States (C. C. A. 6) 258 Fed. 413, 415, 169 C. C. A. 429; Grandi v. United States (C. C. A. 6) 262 Fed. 123, 124.

[4, 5] 2. It was not error to overrule the motion for directed ver-

dict. There was substantial testimony tending to support each of the allegations in the indictment necessary to conviction.

(a) As to the receipt of the letter: Kaiser had left Newport for West Hoboken on July 30th, for the purpose of raising the \$25,000. On August 1st he wired Grant that he was finding it difficult to get the full amount. To this Connell wired reply that Grant had arranged his part, to leave no stone unturned, and to wire when he should leave. On August 2d Kaiser mailed at West Hoboken a special delivery letter, addressed to "Mr. F. B. Grant, Vendome Hotel, Corner 9th St. and Washington St., Newport, Kentucky," stating, among other things, that he saw no reason why he should bring to Newport so much money, and asked whether the winning card could not be transferred to New This letter was brought to the hotel on August 3d and receipted for by the hotel proprietor's niece; on the evening of that day the proprietor's nephew brought the letter to defendant Grant while on the hotel porch; Grant then and there opened the letter, but on account of the darkness took it to his room, read it, and in reply wired Kaiser to bring the draft by the following Tuesday without fail, and that nothing more was required. The letter was retained by Grant, who later wired Kaiser, inquiring what the latter had done and on what train he would leave. Kaiser advised Grant by wire of the date he should start, came on to Cincinnati, and deposited the money in a bank there.

We think there was substantial testimony warranting the conclusion that the letter was received by Grant in the execution of the fraudulent scheme. Considering the errand on which Kaiser had been sent, it was fairly open to inference that Grant and his associates would naturally contemplate that the mails were likely to be used by Kaiser in communicating with defendants. Shea v. United States, 251 Fed. at page 448, 163 C. C. A. 458; Goldman v. United States (C. C. A. 6) 220 Fed. 57, 62, 135 C. C. A. 625. The carrying of the letter by Grant to his room, the not unreasonable probability that the postmark would suggest, even before the letter was read, that it was from Kaiser, coupled with the retention of the letter and the reply thereto, all tended to show that the letter was knowingly received as in the execution of such scheme. Goldman v. United States, supra. There is no controlling force in the claim asserted by Grant's testimony (even if taken as true) that precautions had been taken and instructions given to avoid the use of the mails in carrying out the fraud. Preeman v. United States (C. C. A. 7) 244 Fed. 1, 17, 156 C. C. A. 429. There is, however, evidence to the contrary in the testimony of Kaiser that defendants claimed at Mt. Clemens and at Newport that the winning ticket was sent from the former place and received at the latter by special delivery letter. It scarcely need be said that if Connell and Silva were associated with Grant in the execution of the fraud, the latter's act in the natural course of the scheme was their act also. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 249, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; Shea v. United States, supra, 251 Fed. at page 448, 163 C. C. A. 458.

The trial court properly submitted to the jury the question whether

Grant received the letter from the post office establishment with the instruction that if, when he received it from the proprietor's nephew, he knew that it had been received on his behalf and that it was from Kaiser, and he retained it and acted upon it, he thereby ratified the act of the niece in directly receiving it from the United States mails as fully as if he had in the first instance authorized her to so receive it; and that if the evidence is found to justify a conclusion that defendant Grant did so act, and thereby receive the letter from the United States mails, he and his confederates in the scheme equally received it. [6, 7] (b) As to participation generally in the fraudulent scheme: As to Grant and Connell there was abundant evidence showing their active participation in the fraudulent attempt to swindle Kaiser. This evidence need not be set out. As to Silva, the testimony is less direct and complete: but we think there was substantial evidence warranting the submission of the charge as to him and so sustaining the verdict and judgment. The so-called pool room in Newport, to which Kaiser was introduced on his arrival with Grant and Connell from Mt. Clemens, was on Washington street. There was substantial testimony that the furniture and equipment of this room had been used in large part in a room used for the same purpose on Sixth street in the same city in 1916, and that those who owned or controlled the Sixth street place exercised similar control at the Washington street place in 1918; that Silva was connected with the 1916 operations at the Sixth street place and assisted in there swindling a victim by fake horse race betting of the same general nature as that involved here; that after the Sixth street transactions in 1916 were closed Silva and Goulet were partners in a gambling house at the same location.

Grant, Connell, and Kaiser left Detroit for Cincinnati on July 28, 1918. At 6:48 that evening a telegram over the initials "J. B," was sent from Detroit to Silva at Newport, reading: "Children will arrive to-morrow morning 7:50 Union Station." No explanation of this telegram is given. However, Grant, Connell, and Kaiser arrived at the Union Station, Cincinnati, the next morning at about 7 o'clock. It was fairly open to inference that the term "children" related to the three persons last named. On July 30, at 7 a. m., there was received at the Newport post office a special delivery letter, postmarked Mt. Clemens, and addressed to Silva. On the evening of August 5th, after Kaiser had returned to Cincinnati from West Hoboken, and shortly after Grant had visited Kaiser in his room at a Cincinnati hotel, Silva was seen to meet and talk with Grant on Fourth street, Cincinnati, near the hotel. It was testified that Silva left Grant, went to a drug store, and called up a number by telephone, and rejoined Grant; the two continuing their conversation on the street and spending some minutes together in a saloon. It was fairly open to inference that, when Grant met Silva, the latter was waiting for the former to come from Kaiser's room. Kaiser testified that Silva looked like the man who sat at the ticker in the Newport pool room, although he could not definitely identify him. The alleged fraudulent scheme failed of consummation, but it is a commonplace that success is not necessary to guilt. Foster v. United States (C. C. A. 6) 178 Fed. 165, 173, 101 C. C. A. 485.

- [8] 3. The jury was instructed that evidence of the fake horse race betting frauds carried on at the Sixth street pool room in 1916 could be considered in determining whether or not Silva and Goulet were connected with the Kaiser transaction in 1918, provided the jury was convinced that there was a common scheme or plan between Silva and Goulet and the persons shown to be connected with the Kaiser transaction to swindle people by fake horse race betting. The instruction was later amplified as stated in the margin of this opinion. We think there was substantial evidence tending to sustain the theory of such common scheme. This being so, the instruction was not erroneous. The earlier acts would in such case not be merely similar acts, and so admissible only for the purpose of showing the intent of the later acts. Shea v. United States (C. C. A. 6) 236 Fed. 97, 102, 149 C. C. A. 307, Id., 251 Fed. 440, 442, 163 C. C. A. 458. And see Schoborg v. United States (C. C. A. 6) 264 Fed. 1, 7. The fact that there is no proof that the 1916 frauds involved the use of the mails is not important. Shea v. United States (C. C. A. 6) 236 Fed. 99, 102, 149 C. C. A. 307, and cases there cited.
- [9] 4. The Admission of Evidence.—Complaint is made of the admission in evidence of the special delivery letter and various telegrams addressed to Silva. In our opinion the court committed no error in this respect. It is not conclusively established that Grant, Connell, and Kaiser had all left Mt. Clemens when the telegram of July 28th was sent Silva. Nor does it appear when the special delivery letter given Silva July 30th was actually sent from Mt. Clemens. Granting that Kaiser had not reached Mt. Clemens when one or more of the telegrams were sent Silva, they are not thereby rendered incompetent. It was not necessary to the guilt of defendants that Kaiser should have been selected as victim at the outset, or at any particular time. Shea v. United States (C. C. A. 6) 251 Fed. at page 439, 163 C. C. A. 451. Moreover, Grant and Connell conceivably had at Mt.

1 "If the evidence justifies a conclusion at your hands that the four defendants, Grant, Connell, Silva, and Goulet, were parties to the fraudulent scheme or swindling operations of 1916, and the swindling operations of 1916 were substantially the same in character as the attempt to swindle Frank Kaiser, and it is a reasonable and fair inference therefrom that there was a common scheme on the part of these four defendants, a common plan on their part, to swindle in that way any person that they could, and that that common plan and common scheme continued down until the time of the attempt to swindle Kaiser, you have a right to consider that circumstance, the existence of that common scheme and plan, in determining whether or not they were actually connected with the attempt to swindle Kaiser. That is the sole bearing of that evidence upon that point. It is essential that that common scheme or plan should have continued down until 1918, the time of the transaction charged here, in order that the evidence should be used to connect Silva or Goulet with the wrongful act charged in the indictment and on trial before you here. If Silva or Goulet withdrew, or abandoned or ceased to be a party to the common plan or scheme, then there is nothing before the Kaiser transaction, there is nothing in those operations of 1916, that is of any significance or bearing on this case, as tending to show that either one of them was connected with the Kaiser transaction."

Clemens at least one confederate in the man who posed as "manager" of the "club" at that place.

We find no error in the record, and the judgment of the District

Court is affirmed.

MYLROIE v. BRITISH COLUMBIA MILLS TUG & BARGE CO.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1920.)

No. 3448.

1. Towage =14—Towing company cannot contract against liability for unseaworthiness.

In a contract to perform towage service there is a warranty implied by law that the towing tug shall be seaworthy, properly equipped, and manned by a crew adequate in number and competent for their duty with reference to all the exigencies of the intended voyage, which may reasonably be anticipated, and the contractor cannot relieve himself by anything in the contract from liability for failure to provide these essentials.

2. Towage 5-11(1)—Failure of tug to keep lookout is negligence.

Failure of a towing tug to provide a lookout stationed forward while navigating dangerous waters at night in stormy weather held culpable negligence, and to render the tug unseaworthy, and tug and owner liable for stranding of the tow.

3. Towage = 11(1)—Custom cannot relieve tug from duty to maintain lookout.

A custom to the contrary cannot relieve a towing tug from the legal duty to maintain a proper lookout, especially at night in dangerous waters.

4. Towage @ 11(1) - Sudden change of course by tug without warning

gross negligence.

The action of a towing tug in suddenly changing her course at night, without warning to her tow, resulting in a jerk that broke the tow's shackle and cast her adrift, causing her wreck on the shore of an island, held gross negligence, which rendered tug and owner liable for the loss.

Appeal from the District Court of the United States for Division No.

1 of the District of Alaska; Robert W. Jennings, Judge.

Suit in admiralty by A. W. Mylroie against the British Columbia Mills Tug & Barge Company. Decree for respondent, and libelant appeals. Reversed.

The appellant, as owner of the barge Bangor and cargo, brought this libel in the court below against the appellee, Tug & Barge Company, for damages sustained by reason of the barge going ashore on Mary Island while in tow of the appellee's tug Commodore. The libel, as twice amended, alleged in substance the barge to be a vessel of 511 gross registered tons, and that it was at all times in question staunch and seaworthy, and properly equipped, manned, and supplied for a voyage from the port of Seattle, in the state of Washington, to the port of Anchorage, in the district of Alaska, of which barge the libelant was the sole owner; that on March 22, 1917, the barge, laden with a cargo of lumber and general merchandise, of the greater part of which the libelant was the owner, and of the remainder of which he was the lawful bailee for hire, sailed in tow from Seattle, bound for Anchorage, Alaska, and by agreement of the respective parties to the libel was on the way picked up by the tug and taken in tow for the rest of her voyage to Anchorage: that the tug proceeded with the barge in tow, arriving off Port

Simpson: British Columbia, at about 5 p. m5 of the evening of the 25th of the month, without accident or casualty, the glass then being low and the wind east-southeast and rising; that the tug, with the barge in tow, proceeded on the voyage, without any lookout stationed on the tug; at about 2 o'clock in the morning of the 26th of March, 1917, still off and close to the east shore of Mary Island, in the waters of southeastern Alaska, in a heavy sea and snowstorm, and with the wind blowing east-southeast at the rate of about 60 miles an hour, said tug with the barge in tow then being out of her course, and being under a full head of steam and sighting land, through the negligence and want of reasonable care, caution, and maritime skill upon the part of those in charge of her, put her wheel hard over, and suddenly changed her course to avoid the dangers of reefs and rocks on the east shore of Marv Island, and by reason of the sudden strain and due to the sudden change of course of the tug at full speed, the shackle to which the towline from the tug was attached was broken and the barge went adrift; that immediately the barge's bow anchor was hove out with 55 fathoms of chain, which fetched the barge up, after which, by reason of the force of the wind and sea, she drifted in about 20 minutes on the east shore of Mary Island, where about 2½ hours after being cast adrift she finally grounded, resulting in the damage for which the libel was brought, aggregating \$33,562.47.

The libel as amended further alleged that at the time the towline parted the barge was following properly and carefully in the wake of the tug and obeying all her directions, and that there was a competent man at the wheel on the barge; that nothing could have been done by the barge to prevent the shackle from parting, or to prevent the barge from drifting and grounding, all of which was caused solely by the negligence and want of reasonable care, caution, and maritime skill on the part of those in charge of the tug; that immediately prior to and at the time the tug picked up and took the barge in tow, as alleged, and at all times thereafter during the voyage and towage, up to and including March 26, 1917, the tug was unseaworthy, in that it was improperly and insufficiently manned, and had not a sufficient crew to enable it to station a proper or any lookout on the tug at any time, and especially at night. By his second amendment the libelant alleged in substance that at the inception of the towage the tug was unseaworthy and was insufficiently manned, in that she did not have a sufficient crew to maintain a legal lookout on the vessel during the voyage.

In its amended answer the respondent and claimant, after making certain admissions and denials, set up a written contract under which it alleged the towage in question was done, the pertinent provisions of which are as follows:

"Memorandum of agreement made the 14th day of March in the year of our Lord one thousand nine hundred and seventeen, between the B. C. Mills Tug & Barge Co., Limited, whose registered office is situated in the city of Vancouver, in the province of British Columbia (hereinafter called the tug company), of the one part, and Anchorage Supply Co., of Seattle, Washington, and Anchorage, Alaska (hereinafter called the charterers), of the other part, witnesseth:

"1. That the tug company agree to tow during the spring, summer, and autumn of the year 1917 the barge Bangor on a succession of round trips between the western boundary line of United States waters, and Anchorage, Alaska, for the sum of \$4,500 for each such round trip, the said barge to be loaded on the north-bound trip and light on the south-bound or return trip.

"2. The tug company will employ their tug Commodore in said service, barring accident to hull and/or machinery, government requisition, or other causes beyond the control of the said tug company.

"3. That the tug will render to the said barge Bangor reasonable assistance from time to time in any emergency which might arise, and whilst discharging at Anchorage the tug is to be within call of the barge at all times to render such reasonable assistance in case of any emergency which might arise. The tug company is not to be held liable for any damage which might happen to the said barge Bangor or its cargo while in tow or at anchor.

"4. A round trip is to be considered completed on return of said barge Bangor at western boundary line of United States waters off the southern entrance to Plumper Sound, and the said sum of net \$4,500 shall be paid by the charterers to the tug company on completion of each round trip and before another is commenced."

The amended answer further alleged: That the respondent "with its said tug proceeded with said barge in tow until early in the morning of the 26th day of March, 1917, when, in the neighborhood of Mary Island, in the waters of Southeastern Alaska, and during a heavy wind and snow storm, and without any fault or negligence of any kind on the part of the said tug or those in charge of her navigation, and not on account of any defect in any of the machinery or towing appliances of the said tug, but solely through the force of said storm and of a defect in the equipment of said barge, the said barge broke loose from said tug and grounded in the vicinity of the east shore of Mary Island. That all of the damage and injury which was sustained by said barge and her cargo, and by the libelant herein, was a direct and proximate result of the force of said storm and wind and of the defect in the equipment of said barge, and for causes wholly beyond the control of the said tug, or those in charge of the navigation thereof or of this respondent. That by reason of the terms and conditions of said memorandum of agreement of March 14, 1917, hereinabove set out, and under which said towage services were being performed by said respondent and its said tug, and by reason of the facts herein alleged, and a lack of any defect in the equipment of said tug, or any fault or negligence in her navigation, in the absence of any fault or negligence in said tug, her owner, master, or crew, and because of the fault and negligence and lack of proper equipment of the said barge, neither this respondent nor its said tug is liable for or chargeable with any of the damage or injury sustained by the libelant as alleged in the libel."

Both the libelant and claimant introduced an unusually large amount of evidence, resulting in a decree by the court below dismissing the libel at the libelant's cost.

William H. Gorham, of Seattle, Wash., for appellant. Farrell, Kane & Stratton, of Seattle, Wash., for appellee. Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] In support of the decree below the proctors for the appellee insist that, even though the evidence be held to show that the stranding of the barge and the consequent damage was caused by the negligence of the tug, yet its owner cannot be held liable therefor because of that clause of the contract between the parties reading:

"The tug company is not to be held liable for any damage which might happen to the said barge Bangor or its cargo while in tow or at anchor."

The contention of the appellant that there was a contrary verbal agreement cannot be sustained. In view of the record, we regard it as clear that that clause must be taken as appears in the written contract.

But the point also made for the appellant that the tug was not allowed by law to avoid by contract the consequences of its own negligence remains to be considered and determined. This court said in effect that it would not be in the case of Alaska Commercial Co. v. Williams, 128 Fed. 362, 63 C. C. A. 92, citing in support thereof The Steamer Syracuse, 12 Wall. 167, 20 L. Ed. 382, In re Moran (D. C.) 120 Fed. 556, The Somers N. Smith (D. C.) 120 Fed. 569, The M. J. Cummings, (D. C.) 18 Fed. 178, and The Jonty Jenks (D. C.) 54 Fed. 1021. It is

said, however, for the present appellee, that the question was not contested in Alaska Commercial Co. v. Williams, but was decided on the "assumption" that the defendant in error there had correctly stated the law to be that such a contract, exempting such a tug from liability for its own negligence, is contrary to public policy and void.

We are not prepared to accept the correctness of this suggestion, for, while this court held that the contract relied on in the Williams Case was not proved, it gave as a further reason for its judgment in the case that, conceding such contract to have been proven, the towing vessel would still have been liable for the failure of her master to exercise reasonable care and maritime skill in conducting the towards service.

It is not claimed that the decision of the Supreme Court in the Case of the Steamer Syracuse has ever been expressly reversed, or, indeed, criticized by that court; but it is contended in effect that it has been practically reversed, because it denied a petition for a writ of certiorari in the Case of The Oceanica, decided by the Circuit Court of Appeals for the Second Circuit, 170 Fed. 893, 96 C. C. A. 69, in which the majority of that court—one judge dissenting—held that a contract of towage by which the tow assumes all risks releases the tug from liability from her own negligence resulting in injury to the tow; the majority of the court conceding in its opinion on rehearing that its decision to that effect was a departure from previous decisions.

A careful examination of the prevailing opinions in that case we think shows that the decision was really based upon the law prevailing in the state of New York, under which even a common carrier may contract against its own negligence, and such may have been the theory upon which the Supreme Court denied the petition for a writ of certiorari in the case. In Boise Commercial Club v. Oregon Short Line R. Co., 260 Fed. 769, 772, 171 C. C. A. 495, 498, this court said:

"We assume that ordinarily the denial of the writ of certiorari by the Supreme Court may not indicate the expression of an opinion in affirmance of the law of the case as applied by the Circuit Court of Appeals; but where there is a single question involved, and that question is entirely one of jurisdiction, and there have been radically diverse decisions by the lower federal courts, the denial of the writ would fairly imply that the court was satisfied that the jurisdictional point had been rightly decided."

It seems to us that, if the Supreme Court had been dissatisfied with its previous decision in the Case of the Steamer Syracuse, it would have granted the writ of certiorari in the Case of The Oceanica, and have reconsidered the question, and that we would not be justified in regarding its denial of the writ in the last-mentioned case as in effect departing from the rule announced in the Case of The Syracuse which has stood unreversed, and, so far as we are advised, without criticism by it, for so many years—particularly as the case was relied upon in both the prevailing and dissenting opinions in The Oceanica Case, and the further consideration of the question specifically requested in the following concluding clause of the opinion of the majority of the Court of Appeals on rehearing:

"We do appreciate keenly that the decision of the majority of the court as to the right of a tug to contract against her own negligence is a departure

from previous decisions. The question should, and we hope will, be set at rest * * * by the Supreme Court."

But the appellant insists that, even if the attempted limitation of the liability of the tug contained in the contract be valid, the latter was based upon a warranty of the seaworthiness of the tug, which it is contended did not exist, for the reason that, immediately prior to and at the time of the making of the contract and throughout the towage service, the tug lacked a sufficient complement of men to enable it to station a lookout upon it at any time during the voyage, and that because of the lack of a proper lookout the disaster occurred. In the towage case of The Lady Pike, 21 Wall. 1, 22 L. Ed. 499, the Supreme Court said:

"Standard authorities show that the first duty of the carrier, and one that is *implied by law*, is to provide a seaworthy vessel, well furnished with proper motive power and furniture necessary for the voyage. Necessary equipment is as requisite as that the hull of the vessel should be staunch and strong, and she must also be provided with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route, and with a competent and skillful master, of sound judgment and discretion, and with sufficient knowledge of the route and experience in navigation to be able to perform in a proper manner all the ordinary duties required of him as master of the vessel. Owners of vessels, employed as such carriers, must see to it that the master is qualified for his situation, as they are responsible for his want of skill and knowledge in that behalf and for his negligence and bad seamanship."

In the Pacific Mail S. S. Co. Case, 130 Fed. 76, 82, 64 C. C. A. 410, 416 (69 L. R. A. 71), this court held it to be the duty of the owners of a steamer carrying goods and passengers, not only to provide a seaworthy vessel, but that they must also provide the vessel with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended voyage, "not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, such, for example, as unfortunately did happen in the present case—the striking of the ship on a reef of rocks—and the consequent imperative necessity for instant action to save the lives of passengers and crew."

[2] In Wilder's S. S. Co. v. Low, 112 Fed. 161, 172, 50 C. C. A.

473, 484, we also said:

"For an officer to leave his vessel entirely without a lookout, especially when another vessel is known to be in the vicinity, is culpable negligence, and approaches very nearly the line of reckless navigation. The importance of the lookout and the high degree of vigilance required of the person occupying that position on a vessel, is clearly stated by the United States Supreme Court in The Ariadne, 13 Wall. 475, 478, 20 L. Ed. 542, 543, as follows: The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel, with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. * * * It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the ctrcumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated

until she vindicates herself by testimony conclusive to the contrary.' No deviation from this statement has been made by the Supreme Court in later cases (The Oregon, 158 U. S. 186, 193, 15 Sup. Ct. 804, 39 L. Ed. 943), and it is therefore as binding to-day as when first made."

See, also, The Caledonia, 157 U. S. 124, 130, 15 Sup. Ct. 537, 39 L. Ed. 644; The Edwin I. Morrison, 153 U. S. 199, 210, 14 Sup. Ct. 823, 38 L. Ed. 688; The Queen (D. C.) 78 Fed. 155; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; The Drill Boat No. 4 (D. C.) 233 Fed. 589, 594; 35 Cyc. 245.

According to the uncontroverted testimony of the captain of the tug in the present case, its crew consisted of two engineers, two firemen, and two coal passers, all of whom were confined entirely to the engine department, one cook, whose duties were confined to the galley, one deck hand, whose duties were to walk around the deck all day and sleep at night "unless called for something," and two other deck hands, whose duties were to stand watch and watch as helmsmen—the other three men on the tug being the captain thereof (Johnson), one mate, named Dawe, and Capt. Bjerre, who, according to the testimony of the captain of the tug, was "shore skipper," and "don't make trips like" the one in question, but was on that voyage entered on the articles as "purser" and acted as "pilot."

The captain of the tug, on direct examination by the proctor for the libelant, was questioned, and answered, as follows:

"Q. Do you remember the night that the barge broke adrift off of Mary Island? A. Yes. Q. Who was on watch—what members of your crew were on watch that night after 12 o'clock? A. Capt. Bjerre, Sam Dawe, and myself. Q. Did you have a man in the wheel house? A. Quartermaster or deck hand. Q. You had a man in the engine room? A. Yes. Q. Did you have a lookout? A. Well, we were all on the lookout. A. I asked if you had a lookout? A. Yes. Q. What lookout did you have? A. The three of us in the wheel room. Q. And that is all? A. That is all. Q. You had no lookout between the wheelhouse and the stem of the vessel? A. No."

And on cross-examination that witness was questioned, and answered, as follows:

"Q. How far is the wheelhouse from the stem of the vessel on the Commodore? A. Forty feet. Q. How high is the floor of the wheelhouse above the bow of the vessel on a straight line? A. About 12 feet, I should think. Q. Is there any obstruction between the wheelhouse and the stem of the vessel? A. No. Q. Is there anything to obscure the sight or prevent sound? A. Nothing at all. Q. Across the bow. That night, from 11:19 until the barge stranded—until the shackle broke—were the windows of the pilot house open? A. Yes. Q. Where were you stationed? A. Stationed looking out through the window; we had the window open, and we were laying out through there? Q. Laying out? A. Laying out. Q. Could you discern objects from the vessel better from the pilot house than from the stem of the vessel? A. Yes. Q. Could you discern objects from the wheelhouse better than from any other portion of the vessel? A. Yes. Q. How about hearing sounds from the wheelhouse as compared with hearing them from the stem of the vessel? A. Hear much better."

Croft was the deck hand who was on watch at the time of the accident. Being questioned what were his duties, he answered:

"My duties—we have to do everything, you know; when you are a deck hand, you do everything; we have a watch, and have to steer the vessel, the same as a quartermaster. Q. Helmsman? A. Yes; when you ship as a quartermaster, you don't have to do any other kind of work; when you ship as a deck hand, you have to do all kinds of work. Q. Did you act as helmsman on that voyage? A. Yes. Q. Every day? A. Yes."

As said by the court below in its opinion, this tug, with its tow, was—

"to go through the waters of Southeastern Alaska, themselves none too easy, up through the Gulf of Alaska, one of the most turbulent stretches of water in the world, out into the ocean, and up into Cook's Inlet, at the spring equinox."

The record shows that when the vessels passed Port Simpson the weather was squally, the wind being about 25 to 30 miles an hour, after which they passed Tree Point—that being the last point passed before the wreck at Mary Island, a distance of about 17½ or 18 miles from Tree Point. During that run the wind increased to about 30 miles an hour, with frequent snow squalls; the night being dark. Smoke obscured the vision of those in the tug's pilot house from Tree Point to 1 o'clock to some extent, and did not wholly disappear at any time before the accident; this, according to the testimony of her captain.

[3] It is conceded that the tug did not have at the time of the disaster, nor, indeed, at any time, a lookout stationed forward; but the contention of the claimant is that the men in the pilot house of the tug were all lookouts, and had a better vision than would have had a man stationed at the stem of the tug. The claimant furthermore contends that it was not customary for such tugs to have any lookout stationed forward, and the court below held that the preponderance of the testimony was to the latter effect.

The testimony was certainly conflicting upon the point; Capt. Johnson and Bjerre testifying that the proper place for such lookout was in the pilot house, and the witnesses Neilsen and Snoddy testifying in effect that the proper place was on the forecastle head. But, regardless of the question of the preponderance of evidence on the point, we think it clear that custom counts for nothing as against the law. See authorities supra, and The Catharine v. Dickinson et al., 17 How. 170, 177 (15 L. Ed. 233), where the Supreme Court, referring to the evidence given to prove such a custom, said:

"However this may be in the daytime, we think that such custom or usage cannot be permitted as an excuse for dispensing with a proper lookout while navigating in the night, especially on waters frequented by other vessels. Under such circumstances, a competent lookout, stationed upon a quarter of the vessel affording the best opportunity to see at a distance those meeting her, is indispensable to safe navigation, and the neglect is chargeable as a fault in the navigation."

But even if it be conceded that a man stationed in the pilot house of the tug, charged with the duty of keeping a lookout, would answer the requirements, the evidence in the case clearly shows, in our opinion, that neither of the men in the pilot house of this tug during the time in question constituted such a lookout; for one of the men was the helmsman, whose duty it was to watch the compass and steer the vessel under orders given him, and the other two were Capts. John-

son and Bjerre, who, when both were present, were part of the time examining the chart and engaged in conversation; it further appearing that at the time the dangerous situation was discovered and for a considerable period immediately preceding Capt. Johnson was not in the pilot house, but in some other part of the vessel. It cannot be properly held that before Capt. Bjerre, who was at the time directing the movement of the tug, saw the waves breaking upon the island, and suddenly, without any warning to the tow, ordered the wheel put hard over, thereby breaking the tow's shackle, and resulting in its being grounded, a lookout properly stationed would not have seen and reported the island ahead in ample time to have afforded the tug an opportunity to make a safe turn with the tow following. We entertain no doubt that under the law, applied to the existing conditions, the absence of a man to serve as a lookout was the absence of an essential part of the proper equipment of the tug, and rendered it to that extent unseaworthy.

[4] Moreover, we think it was gross negligence on the part of its directing officer—without giving any warning whatever to the tow—to suddenly order the wheel put hard over, resulting, as the evidence clearly shows, in a jerk that broke the tow's shackle, thereby causing her to drift, and resulting in her wreck upon the shore of the island. Had any notice of the intended change in the tug's course been given the tow, an opportunity for a corresponding change in the course of the latter would have been afforded, and the sudden jerk that broke the shackle of the tug have been lessened, and the break very likely avoided.

Regarding the shackle the court below said in its opinion:

"The shackle in question was purchased by libelant about 10 months before the accident; whether it was new or secondhand when purchased by him does not appear. How much, if any, usage it had been subjected to before its purchase by libelant does not appear. It does appear, however, that it had been used on this barge as an appliance for towing for a distance of about 10,500 miles—three trips from Seattle to Anchorage and return, and also the trip from Seattle to the place of the wreck. Several shipmasters give instances of shackles breaking without other apparent cause than crystallization resulting from long usage, and instances of other shackles breaking under strains in loads which they had a short time before borne with the greatest of ease.

"Now, this shackle showed crystallization. Avis, the expert for libelant, says that crystallization comes only from sudden severe shock, and that the shackle in question 'was broken by a stress very suddenly applied, which undoubtedly would have broken a shackle made from a much larger bar'; but Tinkham and Lingerfelt, experts for the claimant, deny this, testifying that the vibration which comes from much usage will in the course of time cause the iron in the shackle to become weakened by crystallization, and they are also of the opinion that the vibration of the aforesaid trips might have been sufficient to have caused the crystallization. It is in evidence that the tug in the case at bar carried and had in use a towing machine of the most approved pattern, a device designed and effective for the elimination of those sudden jerks of the towline which are caused by the sudden taking up of the slack when turns are made. * *

"The shackle was part of the equipment of the barge furnished by the libelant. The latter at least contracted that the appliances furnished by him should be suitable and strong enough for all strains to which it was not unreasonable to expect it would or might be subjected. The tug escaped, and

(268 F.)

if the barge had followed the tug it would have escaped. It did not follow the tug, because the shackle broke. The shackle broke, because it was not strong enough to stand the strain. I am satisfied from the evidence that negligence cannot be ascribed to the tug for its action or nonaction at or about the time the shackle did break."

The underscoring by the court below of the clause to the effect that it did not appear from the evidence whether the shackle "was new or secondhand" when purchased by the libelant would seem to indicate that the court concluded that the breaking of the shackle by the sudden and abrupt turn of the tug might likely have been occasioned by its secondhand condition when purchased by the libelant. But such was not the evidence. The substance of the only testimony upon the subject that has been cited or that we have been able to find is that the shackle was new when purchased by the libelant from a ship chandler on the water front in Seattle, and the witness Foster, who was supercargo on the barge, and according to his testimony had been a master mariner for about 25 years, and who testified that the barge itself and its equipment was at the time in question of the best, being asked specifically regarding the shackle, was questioned, and answered, among other things, as follows:

"Q. What was the condition of that shackle in respect to being of sufficient size as a part of the towing device for that voyage? A. I couldn't see where it could be in any place better, by previous work we done with it; the shackle was all right. Q. How long had you used that shackle before this voyage in question? A. Oh, we made two or three trips with it. Q. To where? A. Anchorage. Q. From where? A. Seattle, and the west coast of Port Simpson. Q. The same shackle? A. Yes, sir."

The evidence showing that the shackle was new when bought by the libelant, was of sufficient size, had been used successfully in several similar voyages to Alaska, and had stood the strain of the towing here in question in squally weather up to the very point where the unusual strain was put upon it by the sudden jerk of the tug, caused by its abrupt turn without any warning or opportunity given the tow to meet such strain by a conforming change in its course, leaves, in our opinion, no ground for any other conclusion than that the break would not have occurred but for the negligent navigation of the tug.

There remains only to consider the amount of damages sustained by the libelant that he is entitled to recover. On that point the contention of the appellant is that he is entitled to a decree for the aggregate amount of \$33,521.47 (with interest and costs) shown in a tabulated statement introduced in evidence as Exhibit R.

We are of the opinion that the evidence in the case is not sufficient to enable us to fix definitely the amount of damages for which the libelant is entitled to judgment. For example, it is claimed on behalf of the appellant that in determining the value of the barge at the time of her stranding the court "will take judicial notice of the enormous universal increase in value of all kinds of craft," growing out of the then war conditions, and likewise in determining the amount of demurrage to which the libelant is entitled. It is obvious, we think, that satisfactory evidence on all such questions is essential to the entry of a proper judgment.

Accordingly the decree appealed from is reversed, and the case remanded to the court below for further proceedings in accordance with the views above expressed, and with leave to the respective parties to introduce further evidence on the question of damages.

LANHAM et al. v. STATE BANK OF ROME, GA., et al. In re ARMUCHEE PANTS MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. October 13, 1920.)
No. 3564.

Bankruptcy \$\sim 269\$—Tender of sum paid necessary before setting aside sale.

Where a bill is filed by a trustee in bankruptcy to set aside a deed made to purchasers at a sale held under order of the bankruptcy court, on the ground that the order for such sale was procured by concealment of facts, a tender to the purchasers of the sum bid at such sale is necessary, and, on exception to said bill for failure to make such tender, no amendment being offered, the bill is properly dismissed.

2. Usury \$\inspec 95\$—Bill to cancel moregage for usury must tender payment, with lawful interest.

Under the law of Georgia, a bill by a trustee in bankruptcy for cancellation of a deed given to secure a debt by an owner of property, who afterward conveyed to the bankrupt subject to such deed, on the ground that the debt secured was usurious, held not to state a cause of action, where it made no offer to pay such debt, with lawful interest.

Appeal from the District Court of the United States for the Northern District of Georgia; Samuel H. Sibley, Judge.

Suit in equity by Henderson L. Lanham, trustee in bankruptcy of the Armuchee Pants Manufacturing Company, against the State Bank of Rome, Ga., and others. Decree for defendants, and complainant appeals. Affirmed.

John Mallory Hunt, of Atlanta, Ga., and Nathan Harris, of Rome, Ga., for appellant.

R. A. Denny, Graham Wright, and Barry Wright, all of Rome, Ga., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. This appeal is brought to review the decree of the court below in dismissing on motion a bill in equity brought by the appellant, Lanham, as trustee in bankruptcy of the estate of Armuchee Pants Manufacturing Company (hereinafter called the Armuchee Company), against the appellees. The bill alleged that:

On September 9, 1912, appellee Allie W. Watters owned in fee

On September 9, 1912, appellee Allie W. Watters owned in fee simple two certain tracts of land in Floyd county, Ga.; one known as the "130-acre tract," and the other as the "West Rome 5-acre tract." On said September 9, 1912, said defendant Watters executed to the State Bank of Rome, whose corporate name was then the American Bank & Trust Company, a deed to secure an alleged debt of \$7,500,

evidenced by a note maturing on December 15, 1912. Thereafter, on November 18, 1913, said Watters conveyed said 130-acre tract to said Armuchee Company for a consideration, stated in said deed, of \$30,000, receiving back as a part of the transaction a mortgage on said 130-acre tract to secure an alleged indebtedness of said Armuchee Company to said Watters of \$15,100, which was recorded on March 10. 1915. Said mortgage was held at said time and thereafter by A. W. Watters & Co., Incorporated, and at the time of the adjudication of said Armuchee Company to be a bankrupt was held and controlled

by said A. W. Watters & Co., Incorporated, as a transferee.

On September 9, 1912, said Allie W. Watters executed to said State Bank of Rome, Ga. (then the American Bank & Trust Company), a deed to said West Rome 5-acre tract to secure an alleged debt of S3.800, falling due November 15, 1912. On April 27, 1914, said Watters executed to said Armuchee Company a deed to said West Rome 5-acre tract, for a consideration recited therein to be \$2,200, and received back as a part of said transaction a purported mortgage, creating a lien on said 5-acre tract to secure an alleged indebtedness of \$2,200, which was recorded on November 16, 1915. Said mortgage was held at the time of the filing of said involuntary petition in bankruptcy against said Armuchee Company by said defendant A. W. Watters & Co., Incorporated, said Allie W. Watters, or Lucile Watters, a sister of said Allie W. Watters; but, whichever party claimed to be the legal owner thereof, said Allie W. Watters at all times controlled the same as fully as if he owned it individually.

At the time of the filing of the involuntary proceeding in bankruptcy against said Armuchee Company, and of its adjudication to be a bankrupt, the title to said 130-acre tract and of said West Rome 5-acre tract was vested in fee simple in said Armuchee Company, subject to said deeds to secure debt executed to said above-recited bank and to said purported mortgagees, both of which are alleged to be void as against the trustee in bankruptcy of said Armuchee Company and its creditors. On April 8, 1915, an involuntary petition in bankruptcy was filed in the District Court of the Northern District of Georgia, Northwestern Division, against said Armuchee Company. Said company was duly adjudged a bankrupt on April 24, 1915, and E. A. Green was appointed its trustee. He qualified and acted as such trustee until he was discharged, as hereinafter stated, and took possession of said two

tracts of land as trustee.

On June 24, 1915, said trustee filed before the referee an application to sell the real estate of said bankrupt. He prayed authority to sell said two tracts subject to the security deeds held by the State Bank of Rome, Ga. He alleged the making of the mortgage of November 18. 1913. now held by A. W. Watters & Co., Incorporated, as transferee for the alleged debt of \$15,100; said mortgage being on said 130-acre tract. He averred the making of the security deed to the American Bank & Trust Company, now the State Bank of Rome, and the subsequent deed of said property by said Watters to said Armuchee Company for a consideration of \$30,000, which was stated to be grossly excessive; that he in some manner secured the execution

of the above mortgage as a security to him against the indebtedness of said American Bank & Trust Company, but he held it off of the record for over a year, and recorded the same after said Armuchee Company had become hopelessly insolvent; that the said 130-acre tract had been appraised at \$14,500; that, if sold subject both to the security deed of the State Bank of Rome and the foregoing mortgage, nothing would be realized; and he prayed authority to sell said property subject to the just title, lien, and claim of the State Bank of Rome, Ga., but free from the liens, claims, and titles of said A. W. Watters & Co., Incorporated, which claims, liens, and titles should attach to the proceeds of such sale, petitioner reserving the right to contest the same.

On September 27, 1915, said referee passed an order authorizing said trustee to sell said 130-acre tract subject to said security deed held by the State Bank of Rome, Ga., and also subject to the lien of the mortgage held by A. W. Watters & Co., Incorporated, as transferee. Said sale was had on October 11, 1915, and the highest and best bid for such property was \$25, by J. H. O'Neill, bidding for the State Bank of Rome. Said sale was on said date reported by said trustee to said referee, with a recommendation that the sale be confirmed, which was done on said date; the said deed being executed to the State Bank of Rome, Ga., subject to said security deed of \$7,500, and subject to said purported mortgage to secure said indebtedness of \$15,100, claimed to be held by said A. W. Watters & Co., Incorporated.

On the 18th day of December, 1915, said referee also passed an order authorizing said trustee to sell said West Rome 5-acre tract, subject to the security deed held thereon by the State Bank of Rome, Ga., and of the purported mortgage to secure said debt of \$2,200, executed to said A. W. Watters. Said property was sold on January 11, 1916, and purchased by the State Bank of Rome at the sum of \$15, it assuming taxes for 1915 and 1916, which said sale was confirmed on January 12, 1916, and a deed executed by said trustee to said bank, conveying to it the equity in said West Rome 5-acre tract; said deed being subject to said security deed securing said debt of \$3,800, claimed by said bank, and subject to said purported mortgage to secure said debt of \$2,200, executed to said Watters.

Said State Bank has gone through a process of liquidation. The defendants J. H. O'Neill and W. S. Griffin secured all or a great part of the assets of said bank in said liquidation, and now claim to be the owners of said two tracts of land, subject to the rights of said defendant A. W. Watters & Co., Incorporated, or the said Allie W. Watters; one or the other of said last-mentioned defendants being now in actual possession of said two tracts of land under an arrangement with said bank hereinafter more fully set out. Said O'Neill and Griffin claimed said two tracts of land by virtue of a deed executed from said Bank of Rome, Ga., to Graham Wright, dated March 13, 1917, conveying said two tracts of land and various other property, real and personal, to said Wright, and by a quitclaim deed from said

Wright to said O'Neill and Griffin, dated March 1, 1918, conveying said two tracts of land, as well as various other real estate.

On September 9, 1912, the date of said security deeds from said Watters to said bank, O'Neill was an officer and stockholder in the bank, and Griffin was a stockholder in the bank. Watters was prior to its bankruptcy an officer and stockholder of said Armuchee Company. A. W. Watters & Co., Incorporated, was incorporated shortly after the bankruptcy of the Armuchee Company, and A. W. Watters has since its organization been an officer and stockholder thereof. Graham Wright did not pay the consideration of \$28,000 recited in the deed from said bank to himself, but was acting as an attorney at law, and as an agent for O'Neill, Griffin, and said bank; said O'Neill and Griffin using this method to obtain the legal title to the assets of said bank in said liquidation.

Said mortgages given by said Armuchee Company to said Watters were void as against said trustee and the creditors of said bankrupt, because the Armuchee Company, at the time they were each given, did not owe and was not indebted in any sum to said Watters. Said mortgage securing \$15,100 was put to record within four months of the adjudication of said Armuchee Company to be a bankrupt. Said A. W. Watters & Co. well knew at said time said Armuchee Company was insolvent. Said mortgage securing \$2,200 was not recorded until some time after said Armuchee Company was adjudged a bankrupt.

Each deed to secure a debt given to said State Bank of Rome was void, because the debt secured by each was usurious. Said bank, acting through O'Neill, and said A. W. Watters & Co., Incorporated, acting through A. W. Watters, and said Watters individually, entered into a scheme to defraud said trustee and creditors. They agreed that they would conceal the fact of the invalidity and voidness of these deeds and mortgages, and procure the sale of the property subject to the same; the bank agreeing to bid some nominal sum for the supposed equity in each of said two tracts of land. The parties entered into a written agreement, an exhibit to said bill, to the effect that said bank would buy said property, if obtainable, at a satisfactory price at the trustee's sale, and, if it became the purchaser thereat, would exercise its power of sale under its security deeds, and if it bought in said properties thereunder it would sell them to A. W. Watters & Co., Incorporated, on a credit, taking a first mortgage or security deed on said properties and certain other security. taneously with the closing of the transaction the mortgages executed to Allie W. Watters by the Armuchee Company were to be canceled.

The contract did not provide that the bank must buy, nor did it covenant that Watters was not to bid. Said scheme was put through, and said two tracts of land were procured to be ordered sold by said referee, subject to said security deeds held by said bank and to said mortgages, by withholding from the referee the fact that said purported security deeds and said mortgages were void. The total value of the 130-acre tract is alleged to be from \$12,000 to \$15,000, and of said West Rome 5-acre tract to be from \$4,000 to \$6,000.

The bill averred that the estate of said bankrupt had been theretofore wound up and the trustee discharged, that the estate has been since reopened by order of court, and plaintiff been appointed trustee. The dates of these occurrences are not alleged. The bill sought a cancellation of said security deeds and said mortgages as being null and void, and a cloud on the title to said land, and that the title and right of possession thereof be decreed to be in the plaintiff; that the land be ordered sold by plaintiff as trustee, and the proceeds paid out in accordance with law.

The defendants moved to dismiss the bill on a number of grounds, among which it is set up: That no averment of facts is made showing such fraud as would warrant setting aside said sales, said security deeds, or said mortgages. That no offer of tender is made, either of the purchase money paid on the sales attacked, or the principal of the debt attacked as usurious, with legal interest thereon. That the

bill shows plaintiff has been guilty of laches.

The court below sustained the motion to dismiss the bill for several reasons; one of these was because of laches. His opinion recites:

"The bill to set aside the trustee's sale and the referee's orders of confirmation was filed long after the bankrupt estate had been paid out and closed and the trustee discharged, and about four years after the sales occurred. No excuse whatever for the delay is averred. The title to the property involved seems now to be in O'Neill and Griffin, who obtained the same, with other property, at a price of \$28,000, upon the liquidation of the State Bank of Rome, the purchaser at the trustee's sale. The delay has therefore complicated the rights of parties interested and changed the parties themselves. Such laches appears as ought to deprive the petitioner of relief at this late date."

The learned District Judge also held the bill fatally defective for its failure to offer to repay the debts due to the State Bank of Rome, Ga., or the sums bid at the trustee's sale. He held that to cancel the mortgages given by the bankrupt to Watters, as a part of the transaction of the purchase of these tracts of land under the allegations of this bill, would be to enable the bankrupt to obtain the property on different terms than it had bargained for, and would be for the court to make a trade for the seller to which he had not agreed. The court also found that no fraud was sufficiently charged in the bill to authorize the setting aside of the sale.

It is alleged in the bill that "as a part of said transaction," to wit, the sale of said 130-acre tract, said Watters received back from said Armuchee Company a mortgage thereon to secure an alleged indebtedness of \$15,100, and that "as a part of said transaction," to wit, the sale of said West Rome 5-acre tract, a mortgage to secure an alleged indebtedness of \$2,200. It is further alleged that at the time of the filing of said petition in involuntary bankruptcy and of the adjudication of said Armuchee Company to be a bankrupt the title to each of said tracts of land was vested in said company, subject to said security deeds executed by said Watters to said State Bank of Rome, Ga., and to said purported mortgages; said deeds being charged to be void as made to secure a debt of Watters infected with usury, and said mortgages being alleged to be void because it is charged that

at the time each was executed the Armuchee Company did not owe and was not indebted to said Watters in any sum whatever. There is no allegation that the Armuchee Company, in purchasing said tracts of land, paid any sum of money to said Watters; and it is alleged that these mortgages were given as a part of the transaction of the purchase of each piece of said land.

It is quite consonant with the allegations of the bill that the sums secured thereby were a part of the consideration named in the deeds from Watters to the Armuchee Company. The amount of the debt secured by the mortgage on the West Rome 5-acre tract is the exact sum named as the consideration in the deed executed by Watters to

said company.

This is in harmony with the allegation in the petition of Green, trustee, alleging that the consideration named in the deed to said 130-acre tract—\$30,000—was grossly excessive, and asking that the sale thereof should be made free from the lien of said mortgage; the real claim, lien, and titles of the holder thereof to attach to the proceeds, said trustee reserving the right to contest the same. It cannot be, therefore, said that the bill charges that there is no consideration for the making of the mortgages, and there is no allegation of any payment or discharge thereof by said Armuchee Company since they were made.

[1, 2] The prayer of the bill is for the cancellation, not only of the trustee's deeds to the State Bank of Rome, Ga., but for the cancellation of the security deeds made by Watters to said bank, subject to which the two tracts were conveyed to the Armuchee Company, and the two mortgages executed by it to Watters as a part of the transaction of its purchase. No tender of the sums paid at the trustee's sale is made. No tender of the amount of the debts due to the State Bank of Rome, Ga., with legal interest, is made; but the prayer is for the cancellation of these deeds, without any payment of the debts secured thereby, stripped of any usury.

Without passing on the other questions involved, we think that the failure of the plaintiff to offer to pay the sums bid at the trustee's sale and the debt due the State Bank of Rome, Ga., are decisive of the case. The motion to dismiss the bill expressly pointed out these

failures, and no effort was made to cure the same.

The debt due the bank was due by Watters. The deeds were made by him. It was not a debt incurred by the bankrupt; but it had bought subject to the previous deeds made by Watters. But, even if it had made the deeds and contracted the debt to the bank, it is settled law that no proceeding by the debtor to cancel a deed securing an usurious debt can be maintained without tendering the debt secured and lawful interest thereon.

"Though a deed be void for usury, or a transfer of a bond for title be void because the debt to secure the payment of which the transfer was made was usurious, these papers will not be canceled or set aside * * * without payment or tender of the principal of the debt and lawful interest; and this upon the principle that whoever would have equity must do equity." Matthews v. Banks et al., 146 Ga. 732, 92 S. E. 52; Campbell et al. v. Murray et al., 62 Ga. 86.

Our conclusion is that the court did not err in sustaining the motion to dismiss the bill in this case, and the decree below is therefore affirmed.

THE WHISPER.

WOLFE v. THOMAS.

(Circuit Court of Appeals, Sixth Circuit. November 12, 1920.)

No. 3393.

1. Admiralty 60-Libel held to allege assault on steamboat showing ad-

miralty jurisdiction.

A libel, alleging that a steamboat plying on the Mississippi river was discharging freight consigned to a certain landing when libelant was assaulted, and that after the assault libelant was compelled to leave the steamboat, held sufficient to aver that the assault was committed while the boat was on the navigable waters of the Mississippi river and while libelant was on the boat, so that a court of admiralty had jurisdiction.

2. Admiralty \$\infty\$ 60-Jurisdictional facts need not be alleged with technical

accuracy.

While the libel must expressly state the facts on which admiralty jurisdiction depends, it is not necessary that those facts should be stated in such clear and positive language as to defy technical or hypercritical attack; but it is sufficient if the language conveys the idea to be expressed thereby to men of average intelligence, and especially to those engaged in the particular art, profession, craft, or business.

3. Evidence = 129(5) -Of subsequent separate assault on shore not ad-

missible.

On a libel in admiralty for an assault and battery by the master of the steamboat on a seaman, evidence that some appreciable time after the assault on the boat the master again assaulted the seaman while they were on shore, and inflicted injuries much more serious than those previously inflicted, is inadmissible, as tending to establish a separate assault, over which the court of admiralty had no jurisdiction.

4. Admiralty €=20—Action for assault on boat within jurisdiction, though

main injuries resulted from subsequent shore assault.

Where the master of a steamboat first assaulted a seaman while on the boat, and thereafter made a second assault after they were on shore, a court of admiralty can award damages which the libelant shows resulted from the first assault, although the principal injuries were sustained in the second assault.

Appeal from the District Court of the United States for the Western Division of the Western District of Tennessee; John E. McCall, Judge. Libel in personam by Henry Thomas against James E. Wolfe, owner of the steamer Whisper. Decree for libelant, and respondent appeals. Reversed and remanded.

H. N. Moon, of Memphis, Tenn., for appellant. Dan F. Elliotte, of Memphis, Tenn., for appellee.

Before KNAPPEN and DONAHUE, Circuit Judges, and COCH-RAN, District Judge.

DONAHUE, Circuit Judge. On the 14th day of July, 1919, Henry Thomas filed a libel in personam in the District Court of the United

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States for the Western District of Tennessee, Western Division, against James E. Wolfe, averring, among other things, that the respondent was the owner of a steamboat, registered under the name of Whisper, which steamboat was engaged in interstate commerce as a common carrier of freight and passengers for hire on the Mississippi river, between the city of Memphis. Tenn., and other points on that river in the states of Arkansas and Missouri, and that such steamboat was therefore under all obligations imposed by the admiralty laws of the United States of America; that John Lynch, at the time of the commission of the grievances stated in the libel, was "master of said steamboat"; that this libelant was a seaman thereon employed at the port of Memphis, Tenn., on the 8th day of July, 1919, for a trip from Memphis, Tenn., to Osceola, Ark., and return, at the rate of \$90 per month; that on the 9th day of July, 1919, while this steamboat was discharging freight consigned to Upper Turnages Landing, in Arkansas, and while libelant was performing the duties assigned to him as a mariner, the master of steamboat, without cause or provocation, assaulted and beat him with an iron pipe, inflicting severe and permanent injuries, and then and there forced and compelled him to leave the vessel, and refused and declined to furnish libelant with transportation to his home port, or to pay him the wages he had earned while serving in the capacity of a seaman or mariner, to his damage in the sum of \$5,000.

The respondent in his answer denied that John Lynch was "master of the vessel," that any assault was made upon libelant as recited in the libel, and averred that, if any assault did in fact take place, he is not liable therefor, for the reasons, first, that the assault did not take place on the boat or river, but on the Arkansas bank: second, that the assault, if it did take place, was a personal difficulty between Lynch, one employé of the boat, and the libelant, another employé on the boat; that whatever Lynch did in this respect was clearly without the apparent scope of his authority and not binding upon the respondent. who was not present and had not authorized Lynch to make such assault. He also denied that he or any one else connected with the vessel had anything to do with the libelant leaving the boat. The respondent further averred that, if the plaintiff suffered any damage whatever on account of injuries inflicted by Lynch, such injuries were caused by acts of Lynch upon the shore in the state of Arkansas, and for this reason clearly without the jurisdiction of a court of admiralty.

The District Court overruled the plea to its jurisdiction and awarded damages to the libelant in the sum of \$1,500, from which decree an ap-

peal was taken to this court.

[1] It is contended by counsel for appellant that the averment that this steamboat "was discharging freight consigned to Upper Turnages Landing, state of Arkansas," is not equivalent to an averment that this freight was then being discharged at Upper Turnages Landing, Ark. The language used would fairly inform the average man that this freight was being discharged at the point to which it was consigned; but, even if it were being unloaded at some other point along the banks of the Mississippi river, the presumption would necessarily obtain, in view of the other averments in the libel as to the business in which this

vessel was employed, that it had not left the navigable waters of the

Mississippi to unload this freight.

[2] While it is true that the libel must expressly state the facts on which jurisdiction depends, nevertheless that rule does not require that these facts should be stated in such clear and positive language as to defy technical or hypercritical attack. If the language is sufficiently clear to convey the idea sought to be expressed thereby to men of average intelligence, and especially to those engaged in that particular art, profession, craft, or business, it is also sufficiently clear to meet the needs of modern jurisprudence. Aside from this consideration, however, the libel expressly avers that the libelant "was then and there forced and compelled to leave said steamboat by the aforesaid master," so that it does appear from the libel itself that the assault upon libelant was committed on a vessel subject to the admiralty laws of the United states and plying in navigable waters. The case as stated in the libel comes clearly within admiralty jurisdiction.

The evidence is undoubtedly sufficient to support the finding of the trial court that John Lynch at the time stated in the libel was acting as master of the boat, at least in the absence of its owner, Wolfe, notwith-standing his original employment may have been as clerk. The evidence also sustains the finding of the trial court that Lynch, while so acting as master of the vessel, assaulted and beat libelant on board the steamboat Whisper while it was lying in the waters of the Mississippi river and discharging freight at Upper Turnages Landing. Lynch specifically denies this, but Thomas testifies that when he came back on the boat, after having dropped a package of crackers, Lynch struck him a couple of times with a piece of iron pipe; that he (Thomas) then ran around the boat; that after awhile Lynch came on the left-hand side of the boat and told him to go up forward. This evidence of Thomas is

corroborated by Lillie Cooper and George Cooper, who were on the boat at the time. This is all the evidence touching that particular trans-

action.

After this occurrence on the boat, Lynch ordered Thomas to assist some men in rolling a barrel of sugar up the hill from the landing. The evidence does not disclose how long it was, after he had struck Thomas with a piece of pipe on board the vessel, that he ordered him to assist these men with the barrel of sugar; but it is apparent from the evidence of Thomas himself that it was some considerable time. It was after Lynch had gone around upon the left-hand side of the vessel, which was the side away from the bank, discovered Thomas there, and ordered him forward. While assisting these men to roll this barrel of sugar up the hill from the landing, Thomas slipped and pulled two or three other men down with him. Thomas testifies that at that time Lynch "was behind me with a piece of pipe, and poking me with it, and when I slipped it hit me, and I trotted off a little piece, and he throwed the iron pipe, and the iron pipe hit me and stood me up, and I was too weak; I fell." He further testifies upon cross-examination that after he had fallen, "the engineer, night watchman, kicked me in my head, and the engineer stood me up." Thomas also testifies that Lynch, after throwing the iron pipe and knocking him down, drew a pistol and

threatened to blow his brains out if he came back on the boat; that he did not go back on the boat, but went out through the woods in the country. Later, when he was recalled to the witness stand, he testified that at Upper Turnages he did go back in the deckroom on the boat, but left at the next place. The testimony of other witnesses is to the effect that Thomas did go back on the boat, and remained with it until it reached the next landing place, Reverie, at which point he left it; but there is no evidence whatever that he was compelled by the master,

Lynch, to leave the boat at Reverie.

[3] The transaction on the shore was a wholly separate and independent transaction from the assault upon the boat. Whatever may have occurred upon the shore was clearly not a maritime tort, and not within the jurisdiction of a court of admiralty. It was prejudicial error to admit evidence in relation thereto, or to take into account, in the ascertainment of damages, the injuries sustained by the libelant from any assault made upon him on the Arkansas shore, either by the master or the engineer of the vessel. Leathers v. Blessing, 105 U. S. 626-630, 26 L. Ed. 1192; Martin v. West, 222 U. S. 191, 32 Sup. Ct. 42, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592; Johnson v. Elevator Co.,

119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447.

[4] It does not appear, however, that the injury sustained by libelant from the assault and battery on the boat was of so light and trivial a nature as to require the dismissal of the libel. On the contrary, it does appear that he was struck twice with an iron pipe. It is needless to say that these blows must have caused some pain and suffering. This libelant is entitled to recover damages in this action for whatever injury he suffered from the violence inflicted upon him on board the vessel, including such physical and mental pain and suffering as necessarily resulted therefrom. Erie Railroad Co. v. Collins, 253 U. S. 77-85, 40 Sup. Ct. 450, 64 L. Ed. 790; McDermott v. Severe, 202 U. S. 600-611, 26 Sup. Ct. 709, 50 L. Ed. 1162; Middlesex & B. St. Ry. Co. v. Egan, 214 Fed. 747-751, 131 C. C. A. 53; U. S. Express Co. v. Wahl, 168 Fed. 848, 94 C. C. A. 260; Ry. Co. v. Christison, 39 Ill. App. 495; Railway Co. v. Smith, 25 S. W. 1032; Enders v. Skannal, 35 La. Ann. 1000.

It is clear from all the evidence in the case that the major injuries to this libelant were occasioned by the assault and beating upon the shore. For that injury he has a remedy in another forum. He is also entitled to recover in a court of admiralty jurisdiction whatever damages he actually sustained from the injuries inflicted upon him on board the vessel. Spencer v. Kelley, 32 Fed. 838; The Sallie Ion, 153 Fed. 659; The Vueltabajo, 163 Fed. 594.

It is true that by reason of the second assault and beating on the shore, following so closely the first assault upon the boat, that it will be a difficult task for a court to determine the exact amount of damages suffered from injuries inflicted by the master when he struck him with the piece of iron pipe on board the vessel. It would be wholly impossible to do this from the evidence in this record. It may be possible, however, upon the retrial of this case, when the evidence is directed solely to this maritime tort, for a court to ascertain the exact

extent of these injuries and fix an award of damages consistent with that evidence. For this reason the cause will be remanded to the District Court for further proceedings in accordance with the findings and conclusions of this court as above stated.

Judgment reversed; cause remanded.

COLEMAN v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 12, 1920.)
No. 3409.

Obstructing justice \$\infty\$ 3—Unnecessary that person to be arrested be present to make offense of obstructing service.

The offense of obstructing an officer in serving or attempting to serve a warrant may be committed at any time while the officer is on his way to make the arrest, though the person to be arrested was not then present, and was in fact such distance away that a railroad journey was necessary.

2. Obstructing justice 515, 16—Evidence held admissible, but insufficient to show defendant knew officer had warrant to serve.

show defendant knew officer had warrant to serve.

Evidence that accused, at the time of assaulting the United States officer, who was then on his way to serve a warrant for the arrest of a person accused of illegal sale of liquor, exhibited an animosity against all United States officers, and stated that a man could not get a drink of whisky for them is admissible to show knowledge of the officer's mission, but is not alone sufficient to establish knowledge.

 Obstructing justice = 14—Government has burden of proving knowledge of warrant.

To establish the offense of knowingly and willfully obstructing an officer of the United States in serving a warrant for arrest under Criminal Code, § 140 (Comp. St. § 10310), the government has the burden of proving that accused knew that the officer at the time had a legal warrant, and was then on his way to serve it.

4. Assault and battery —48—Knowledge of warrant not essential to offense of assaulting officer.

It is not essential to a conviction for the offense of assaulting a United States officer who was serving a warrant, that the person committing the assault knew at the time that the officer had a legal warrant, which he was on his way to serve, if accused knew that the person he assaulted was an officer.

5. Criminal law = 1177—Sentence sustainable under either count not reviewed for error as to one count.

Where the indictment contained two counts, each charging a separate offense, a conviction and sentence which could be sustained under the second count of the indictment, which was supported by sufficient evidence, will not be reversed because the evidence was insufficient to establish one element of the offense in the first count, provided the sentence is not in excess of the sentence that might properly be imposed on either count in the indictment.

In Error to the District Court of the United States for the Eastern District of Kentucky, at Catlettsburg; Andrew M. J. Cochran, Judge. John Coleman was convicted of obstructing an officer of the United States in serving a warrant for arrest, and of assaulting such officer while serving the warrant, and he brings error. Affirmed.

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E. J. Picklesimer, of Pikeville, Ky. (E. J. Picklesimer, of Pikeville,

Ky., on the brief), for plaintiff in error.

H. Clay Kauffman, Asst. U. S. Atty., of Lancaster, Ky. (Thos. D. Slattery, of Covington, Ky., and H. Clay Kauffman, of Lancaster, Ky., on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. In December, 1919, an indictment was returned against John Coleman in the United States District Court for the Eastern District of Kentucky, the first count of which charged him with willfully, unlawfully, and knowingly obstructing, resisting, and opposing A. J. Potter, who was then and there a United States deputy marshal, within and for the Eastern district of Kentucky, in serving and attempting to serve a certain warrant, which warrant had been issued by proper authorities. The second count charged him with willfully, unlawfully, and knowingly assaulting, beating, and wounding A. J. Potter, an officer of the United States, who was then and there serving and executing a certain warrant, issued to him by a United States commissioner, within and for the Eastern district of Kentucky.

On November 22, 1919, A. J. Potter, a deputy United States marshal for the Eastern district of Kentucky, had in his possession a warrant issued by United States Commissioner W. K. Steele for the arrest of Dock Branham, who was charged with having violated the federal statute relative to the sale of intoxicating liquors. Branham lived at Hellier, about 28 miles from Pikeville. Potter had gone to the railway station in Pikeville to take a train for Elkhorn, some 8 miles distant from Hellier, from which place he expected to travel on horseback to Hellier to make this arrest. Later in the day there was a train directly from Pikeville to Hellier, but Potter testified that he did not want to take this train, because he had made the attempt to arrest Branham by going direct to Hellier on prior occasions, and that information always reached Branham that Potter was on the way before Potter arrived at Hellier: that he was going this roundabout way, and riding from Elkhorn to Hellier, so that no one would be likely to suspect his final destination and advise Branham in advance of his coming. At the station he met the plaintiff in error, John Coleman, a deputy sheriff of Pike county, Ky. Both Coleman and Potter resided in Pikeville, and each knew the official position of the other. Coleman was at the station when Potter arrived. Coleman had been drinking to some extent, and used abusive language to Potter, which Potter resented. evidence to the effect that Coleman fired a revolver at Potter, but that Potter's little daughter, who was accompanying him to the station. knocked Coleman's hand up, so that the bullet went wild and did not strike Potter, and that Coleman then struck Potter on the back of the head with this revolver; that the two men then engaged in a personal conflict, and were finally separated by the bystanders; that Potter then boarded the train, but before it left the station he was persuaded by friends to get off and have a doctor dress the wound on the back of his head, caused by the blow that Coleman had given him with the

pistol; that this necessitated his abandoning the attempt to arrest Branham that day.

This indictment is framed under section 140 of the Criminal Code (Comp. St. § 10310), which section reads as follows:

"Whoever shall knowingly and willfully obstruct, resist, or oppose any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order, or any other legal or judicial writ or process of any court of the United States, or United States commissioner, or shall assault, beat, or wound any officer or other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such writ, rule, order, process, warrant, or other legal or judical writ or process, shall be fined not more than three hundred dollars and imprisoned not more than one year."

It is insisted on the part of the plaintiff in error that, in order to convict Coleman of either of the offenses charged in this indictment, it was necessary for the government to establish by the evidence, beyond a reasonable doubt, each and all of the following propositions:

(1) That a legal process, warrant, writ, rule, or order was issued by

a court of the United States.

(2) That such legal process, warrant, writ, rule, or order, after the same was issued, was in the hands of some officer of the United States for service, who had authority, by the laws of the United States, to serve the same.

(3) That after such legal process, warrant, writ, rule, or order was in the hands of such officer for service, some one knowingly and willfully obstructed, resisted, or opposed him in attempting to serve or execute the same.

It is admitted upon the part of the plaintiff in error that the United States has proven the first two elements, stated by counsel as essential to the commission of either crime, as charged in the first and second counts of the indictment; but it is claimed in his behalf that the evidence does not show that, if the officer was then executing any writ, warrant, or process, the accused knew that fact, and that he could not knowingly and willfully resist, obstruct, or oppose the execution of a warrant, if he did not know of the existence of the warrant or that Potter was then engaged in executing the same.

[1] The evidence is sufficient to establish by the degree of proof required in criminal cases, that the officer was then and there engaged in the execution of a warrant for the arrest of Dock Branham. While the fact that he was not going directly to He''ier, but to another point somewhat distant from that place, is a circumstance that might tend to prove the contrary; nevertheless this is fully explained by the testimony of Potter. His explanation is reasonable, and the jury had a

right to accept it as true.

That Branham was not in the immediate vicinity, at the time the offense is charged to have been committed, is not important. If it were not then and there the purpose of Potter in making this trip to arrest Branham upon this warrant, then the mere fact that he had such a warrant in his possession would furnish no basis for this prosecution. On the other hand, if it were conceded or proven that this officer of the United States was on his way to execute this warrant, that the accused

had full knowledge of that fact, and that with such knowledge he willfully obstructed, resisted, or opposed him in the execution of this writ at any point along the line of travel to the residence or the location of the person named in the warrant, it would be idle to say that such an offense would not come within the purview of this statute. Such a construction would permit persons of evil design to ambush an officer on his way to execute a writ, and thereby knowingly and willfully obstruct, resist, oppose, and even prevent the officer from the performance of his official duties, without being subject to the penalty

imposed by the provisions of this statute.

[2] There is no direct evidence in this record, however, that the accused knowingly and willfully obstructed, resisted, or opposed this officer in the execution of this writ. It is true that the statements made by the accused when Potter reached the railway station show that he had an animosity against all United States officers. also evidence to the effect that either Coleman or some other person in his presence said: "A man couldn't get a drink of whisky for them." This, taken in connection with the fact that Potter was then on his way to arrest a person charged with an offense against the United States statutes relative to the sale of intoxicating liquor, might be considered in connection with other evidence, if any, tending to prove that the accused had knowledge that the officer was then on his way to arrest Branham or some other person charged with a similar offense. But this evidence, standing alone, does not meet the measure of proof required in a criminal prosecution where the burden is upon the government to establish beyond reasonable doubt each and every essential element of the crime charged.

[3] The statute expressly provides that the offense charged in the first count of this indictment must be knowingly and willfully committed by the accused. The burden was upon the government to establish these essential elements by the degree of proof requisite in criminal cases. U. S. v. McDonald, 26 Fed. Cas. 1074-1077; Petti-

bone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419.

[4] These provisions of section 140 of the Criminal Code do not apply to the crime charged in the second count of this indictment. Under the express terms of that section it is sufficient to sustain a verdict of guilty on the second count, if the proof shows that the accused knew at the time he committed this assault and battery upon Potter that Potter was an officer of the United States, provided, however, that Potter was then engaged in serving this warrant, or any other legal or judicial writ or process issued out of any court of the United States or by a United States commissioner.

It is undoubtedly the purpose of this statute not only to prevent any person from knowingly and willfully obstructing, resisting, and opposing an officer in the execution of a writ, but also to protect the person of public officers while they are in the discharge of their official duties. Such officer is not required to disclose to every one or any one he meets that he is then and there engaged in serving such writ or process. On the contrary, whoever assaults and beats him, knowing him to be such officer, does so at his peril, if it should later appear by the evidence

that the officer was, at the time of such assault, beating, or wounding, actually engaged in the service of a writ, warrant, or other judicial process, regardless of whether the accused knew that fact or not. Any other construction of this particular provision of this section of the Criminal Code would make it meaningless and practically impossible of enforcement. In the great majority of cases the government would be unable, as it is in this case, to prove that the accused had knowledge that the officer was in possession of such writ or warrant, or that he was engaged in and about its execution.

For the reasons above stated, the verdict of guilty on the first count must be reversed, and the verdict of guilty upon the second count of

the indictment affirmed.

[5] It appearing that the sentence of the court does not exceed the sentence that may be imposed, under the provision of the statute, on either count of the indictment, the judgment and sentence of the court is therefore affirmed. Abrams v. United States, 250 U. S. 616-619, 40 Sup. Ct. 17, 63 L. Ed. 1173.

Ex parte THIERET.

(Circuit Court of Appeals, Sixth Circuit. November 3, 1920.)

No. 3464.

1. Army and navy \$\infty\$20-President authorized to revoke temporary certificates of exemption.

Under Selective Service Act 1917, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044d), authorizing the President to exclude or discharge from the draft persons engaged in essential industries or having dependents, and to create local district boards and make rules and regulations governing them, and providing for the issuance of certificates of exemption, the President had authority to revoke, as he did by regulations prior to December 15, 1917, all exemptions and certificates theretofore made, since the act itself gave no absolute industrial or dependency exemption.

2. Army and navy \$\infty\$20-Proclamation revoking exemption applies to all not actually drafted.

The President's foreword of November 2, 1917, to the new draft regulations, revoking all exemptions and certificates thereof theretofore issued, was by its terms made applicable to all men subject to draft, except those already inducted into the military service.

3. Habeas corpus \$\infty\$ 16-Person arbitrarily denied deferred classification is

entitled to habeas corpus.

Where a person was denied exemption or deferred classification, to which he was entitled under the Selective Service Act and the President's proclamation, by the district board, unfairly, and by gross abuse of discretion, and without good-faith opportunity for a hearing, be is entitled to relief by habeas corpus, but otherwise he is not.

 Habeas corpus ☐ 16—Record held not to show claim of deferred classification so arbitrarily denied as to warrant relief.

Where petitioner in his draft questionnaire stated he was engaged in necessary industry, but that he did not claim deferred classification on that ground, and he did not file the two affidavits required to support such claim, though there was some evidence that one at least of such affidavits was presented to the district board by his employers after the local board

had recommended denial of deferred classification, the denial of such classification by the district board is not so arbitrary or unreasonable, or such an abuse of discretion, as to warrant relief by habeas corpus.

5. Army and navy \$\infty\$ 20—Industrial exemption must be claimed in new ques-

tionnaire, notwithstanding prior exemption.

The right to deferred classification, because engaged in a necessary industry, must be claimed by petitioner in the answers to the second questionnaire, after former certificates of exemption have been expressly revoked by proclamation of the President, though petitioner held a certificate of such exemption, revoked by the proclamation.

6. Army and navy \$\infty\$ 44(2)—Person ordered to entrain for military duty is

subject to military law.

Under Selective Service Act, § 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044b), declaring all persons drafted into the service to be subject to the laws governing the regular army, and Articles of War, art. 2, making persons lawfully called to duty or for training in the military service subject to military law, a person ordered by the district draft board to entrain for an encampment for induction into the military service is subject to military law, and liable to punishment by a military court for desertion.

7. Army and navy \$\iinspec 44(1)\$—Pending indictment no bar to trial by mili-

tary court.

Under Selective Service Act May 18, 1917, § 6 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044f), making failure or neglect to perform any duty required by that act a misdemeanor, if the person is not subject to military control, a man who had been ordered to entrain for military service, and thereby became subject to military law, can, notwithstanding his indictment for violation of the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044a et seq.), be delivered by the civil authorities to the military court for trial and punishment for desertion.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge. Petition by Frederic Thieret for writ of habeas corpus. From an order denying the writ, petitioner appeals. Affirmed.

Wm. Gordon and John J. Sullivan, both of Cleveland, Ohio, for appellant.

H. L. Eastman, Asst. U. S. Atty., of Cleveland, Ohio (E. S. Wertz, U. S. Atty., of Cleveland, Ohio, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Appellant is a natural-born citizen of the United States. On June 5, 1917, being of draft age, he duly registered under Selective Service Act, May 8, 1917, c. 15 (Comp. St. 1918, Comp. St. 1919 Supp. § 2044a et seq.). On examination he was found physically qualified for military service, and on August 30 was certified by the local board accordingly. On October 19 he was certified by the district board as entitled to conditional exemption because of dependent relatives and as a person necessarily engaged in industry essential to the maintenance of the military establishment, under section 4 of the Selective Service Act. By section 4 of the regulations later promulgated by the President, all exemptions made prior to December

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15, 1917, and all certificates in evidence thereof, were expressly revoked and made null from and after the last-named date. Later appellant filled out, signed, and swore to a questionnaire sent him by virtue of the new regulations, and was by the local board classified as subject to immediate call for military duty, but entitled as a conscientious objector to be assigned to noncombatant service. The district board, on appeal, confirmed this classification. Still later appellant was found, on new examination made under the rules, to be physically qualified, and was so duly notified. Still later he was notified to appear on April 1 for military duty and entrainment. He reported accordingly, received the instructions prescribed by section 161 of the regulations, and was ordered to report on the following day for entrainment to the military encampment. He failed so to report, resigned his employment, disappeared from the city of his residence, and remained away until after the armistice of November 11, 1918, after which he was indicted by a federal grand jury for violation of section 6 of the Selective Service Act in failing to comply with the order of the draft board to present himself for entrainment in the military serv-

While this indictment was pending the United States district attorney, on the request of the adjutant general of the United States army and by direction of the Attorney General, caused appellant to be surrendered to the military authorities of the United States for a trial on a charge of desertion, and appellant was thereupon delivered into the custody of the sheriff of Cuyahoga county, Ohio, for detention pending the arrival of military guard. Appellant thereupon applied to the District Court for a writ of habeas corpus. After a hearing upon the merits the petition was dismissed, and the United States marshal ordered to take appellant into custody for delivery to the military authorities of the United States. This appeal is from the order denying the writ of habeas corpus.

[1] 1. Appellant's contention most strongly urged here is that the two exemption certificates issued to him in October, 1917, were never lawfully revoked or nullified, that they were thus in full force during all the subsequent proceedings to draft appellant into the military service, that he was therefore not legally subject to draft, and so was justified in refusing to obey the order to entrain for military service. The argument in support of this contention is substantially this:

That section 4 of the Selective Service Act of May 18, 1917, gives the district boards exclusive original jurisdiction over claims for industrial exemption, and makes the decisions of such boards "final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision"; that industrial exemptions, being expressly withdrawn from the consideration of the local boards, are excepted from the rules and regulations which by section 4 of the Selective Service Act above cited the President is authorized to prescribe for the local and district boards; and that accordingly, until the Act of May 16, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044m), which expressly authorized

the President to call into service any one not theretofore unconditionally exempted, the President had no power (except on appeal from the district board, which was not taken) to withdraw the exemption in question.¹

We think this contention without merit. Section 4 of the Selective Service Act of 1917 gave no absolute industrial or dependency exemption; it merely authorized the President to "exclude or discharge" from the draft persons engaged in industries essential to the maintenance of the military establishment and those whose status respecting dependents "renders their exclusion or discharge advisable"—no exemption or exclusion to "continue when a cause therefor no longer exists." Such exemption or exclusion was thus merely conditional and temporary, and contemplated consulting, not only individual, but public, interests. The President was also authorized, in his discretion, to create local boards, to appoint the membership of both local and district boards, and to make rules and regulations governing the organization and procedure of both local and district boards, and for appeals and reviews, as well as "all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft." (Italics ours.) Such authority was validly given. Selective Draft Law Cases, 245 U. S. 366, 389, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856; Franke v. Murray (C. C. A. 8) 248 Fed. 865, 867, 868, 160 C. C. A. 623, L. R. A. 1918E, 1015, Ann. Cas. 1918D, 98; Angelus v. Sullivan (C. C. A. 2) 246 Fed. 54, 60, 158 C. C. A. 280.

The act plainly contemplated that the President might change his regulations from time to time, including questions of exclusion and exemption, as the exigencies seemed to him to warrant, and there is thus no merit in the thought that a conditional or temporary exemption, not commanded, but dependent upon the assertion by the President of the authority conferred by the basic act, must continue until that act should be changed. The President had the undoubted right by general regulations to set aside all exemptions granted up to a specific date, as he unequivocally did by section 4 of his regulations referred to, which in express terms declares that—

"All exemptions and discharges made prior to noon on December 1, 1917, and all certificates in evidence thereof, are hereby revoked from and after noon on December 15, 1917, and all such certificates theretofore issued shall have no further validity."

[2] Equally without merit, in our opinion, is the proposition that the President's proclamation showed an intention not to make his new regulations retroactive, so far as they applied to those not already actually drafted. This contention invokes the second and third sentences in the extract from the President's "foreword" (November 2, 1917) to the new regulations referred to, which we print in the mar-

^{&#}x27;It is not clear that appellant's contention in this respect extends to the dependency exemption; but we treat the question as fully as if it did.

gin—the same regulations which contain the express revocation of all previous exemptions and discharges and which established the ques-

tionnaire system.2

2. Appellant further contends that in the new proceedings subsequent to December 15, 1917, he duly presented his claim to exemption by reason of industrial occupation (as he had the right to do), that he was given no fair hearing upon this claim by either the local board or the district board, that the local board had no jurisdiction over the subject-matter, and that the district board made no final order or decision thereon which could be made the basis of an appeal to the President.³ While the local board had no jurisdiction to decide the question of industrial exemption, it was its duty (under section 101, rule 32, of the Selective Service Act) to indorse upon the questionnaire its recommendation as to the merits of such claim, if made.

[3, 4] If appellant has been denied this exemption arbitrarily, unfairly, or by gross abuse of discretion, and without good-faith opportunity for hearing, he is entitled to relief by habeas corpus; otherwise, not. Franke v. Murray, supra, 248 Fed. 865, 869, 160 C. C. A. 623, L. R. A. 1918E, 1015, Ann. Cas. 1918D, 98; Napore v. Rowe (C. C. A. 9) 256 Fed. 832, 834, 168 C. C. A. 178; Arbitman v. Woodside (C. C. A. 4) 258 Fed. 441, 442, 169 C. C. A. 457. In our opinion the record does not bear out appellant's contention in these respects. In his questionnaire he answered in the negative the inquiry as to the existence of dependent relatives of any of the recognized classes. While answering in the affirmative the question whether he was engaged in an industrial enterprise necessary to the maintenance of the military establishment, he answered in the negative the question whether he claimed deferred classification on the ground that he was engaged in such enterprise; and although the printed instructions were explicit that if he intended to claim such discharge or deferred classification he must secure two supporting affidavits (blank forms of which were contained in the questionnaire), he did not present such affidavits therewith.

It is not claimed that any affidavits of this character were ever presented to the local board. There is no definite evidence that affidavits were presented to the district board, aside from the testimony of appellant, the general effect of which seems to be that a claim of indus-

²"There is no change in the essential obligation of men subject to selection. The first draft must stand unaffected by the provisions of the new regulations. They can be given no retroactive effect. The time has come for a more perfect organization of our man power. The selective principle must be carried to its logical conclusion. We must make a complete inventory of the qualifications of all registrants in order to determine, as to each man not already selected for duty with the colors, the place in the military, industrial or agricultural ranks of the nation in which his experience and training can best be made to serve the common good. This project involves an inquiry by the selection boards into the domestic, industrial and educational qualifications of nearly ten million men." (Italics ours.)

³Failure to take an appeal from a final order over which the Board had jurisdiction bars relief by habeas corpus. Ex parte Tinkoff (D. C.) 254 Fed. 912; Id. (C. C. A. 7) 254 Fed. 225, 165 C. C. A. 513; Ex parte Platt (D. C.) 253 Fed. 413.

trial exemption was made by appellant's business superior to the district board after appeal from the local board's adverse recommendation, and that supporting affidavits were later filed with that board, as well as appellant's written request for exemption. Appellant thinks at least one of such affidavits was furnished the district board previous to its denial of the claim of industrial exemption, but apparently one at least, if filed, was submitted long after such disallowance. Plainly the district board was not imperatively bound to consider affidavits presented after the questionnaire had been submitted (and after it had been acted upon by the district board), and especially in view of the answers previously given to the questions stated. The record does not, however, indicate that appellant's claim for exemption or deferred classification was arbitrarily or unfairly rejected. The minute of the local board's action shows a classification of appellant as subject to military duty in noncombatant service—

"because it finds that industrial occupation not supported, and as a religious objector to war is in class 1 noncombatant."

A member of the local board testified that two of appellant's superiors in the industry told him in his office that appellant was not a "pivotal man" in the industry; and it is conceded that the local board granted a stay of the date of appellant's entraining for more than a month for the accommodation of the industry in which appellant was engaged. It clearly appears that appellant deliberately decided not to comply with the final order to entrain, because of his view that his former exemptions still held good. As to the district board: Its minute shows the classification stated:

"Because it finds that grounds in this claim not good for deferred classification. Proves right to noncombatant service."

It did not lose its otherwise final character (giving right of appeal to the President, which was not taken), or forfeit a presumption of good-faith action, by reason of the inclusion in parentheses of the words:

"Industrial claim lacks necessary supporting affidavits."

[5] The suggestion that appellant had the right to assume that his former certificates of industrial exemption made it unnecessary for him to claim the same under the questionnaire is plainly negatived by the reference therein to section 4 of the rules and the express statement that—

"All exemptions and discharges made prior to the date of these rules and regulations and all certificates of evidence thereof are hereby revoked, and all such certificates heretofore issued shall have no further validity."

Careful examination of the record suggests no reason to doubt the correctness of the trial court's conclusion that no abuse of discretion or arbitrary action was shown in denying petitioner's claim for deferred classification on industrial grounds.

⁴Appellant's testimony may mean that his claims for exemption presented to the district board included one for dependency. That, however, is immaterial to the result.

3. The conclusion reached in the first paragraph of this opinion makes it unnecessary to consider whether appellant waived the right to insist on the asserted finality of the exemptions previously granted him—by filling out and filing his questionnaire and therein disclaiming such exemption, by procuring or participating in the extension of the effective date for his entrainment, and in obeying the call to appear

for military duty and entrainment.

[6] 4. In contemplation of law appellant was inducted into the military service of the United States on the 1st day of April, 1918, when he received his preliminary instructions and his order to report for entrainment. Failure to so report subjected appellant to military law. This is so, not only by virtue of section 2 of the Selective Service Act (Comp. St. 1918, 1919 Supp. to Comp. Stat. 1916, § 2044b), which declares that "all persons drafted into the service of the United States * * * shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the regular army," but also by virtue of article 2 of the Articles of War (Comp. St. § 2308a), which makes subject thereto, and thus "subject to military law," not only officers and soldiers belonging to the regular army, as well as volunteers, but also—

"all other persons lawfully called, drafted or ordered into, or to duty or for training in the said service [the military service of the United States] from the dates they are required by the terms of the call, draft or order to obey the same." U. S. Comp. Stat. 1916, § 2308a; Franke v. Murray, supra, 248 Fed. at page 868, 160 C. C. A. 623, L. R. A. 1918E, 1015, Ann. Cas. 1918D, 98.

Appellant was thus subject to summary arrest and delivery to the

military authorities. U. S. Comp. Stat. 1916, §§ 2296, 2297.

[7] 5. The pendency of the indictment under section 6 of the Selective Service Act of May 18, 1917, was no bar to appellant's arrest for trial by the military court. The section in question, so far as pertinent here, merely provides that any person who "shall fail or neglect fully to perform any duty required of him in the execution of this act shall, if not subject to military control [italics ours], be guilty of a misdemeanor," and subject to the punishment prescribed in the section. Appellant had no right to elect trial by the civil courts, nor were the civil officers bound to bring him to trial. They had, to say the least, a right to surrender him to the military authorities, whose jurisdiction was clear.

It results from these views that the judgment of the District Court, which in effect remanded appellant to the custody of the military authorities, must be affirmed.

This conclusion makes it unnecessary to consider the question of appellant's right, under rule 32 of this court (202 Fed. xx, 118 C. C. A. xx), to be admitted to bail, or whether the action of the District Court in causing appellant's surrender to the military authorities subsequent to the order denying the writ of habeas corpus, and pending appeal to this court, was improvident.

IGLESIAS v. BANCO TERRITORIAL Y AGRICOLA DE PUERTO RICO et al.

(Circuit Court of Appeals, First Circuit. November 19, 1920.)

No. 1455.

 Appeal and error \$\sim 87(6)\$—Order denying rehearing on claim against insolvent not appealable.

The overruling of a motion for rehearing on the claim of a creditor of an insolvent corporation to priority *held* within the discretion of the court and not reviewable on appeal.

2. Appeal and error ≈80(3)—Appeal lies only from final decree.

A decree directing payment of the proceeds of a mortgage sale and other funds into the registry of the court to await the determination of priorities of claims based on receiver's certificates *held* not a final decree, and not appealable.

Appeal from the District Court of the United States for the District

of Porto Rico; Hamilton, Judge.

Suit in equity by the Gregg Company, Limited, against the Utuado Sugar Company; Banco Territorial y Agricola de Puerto Rico, trustee, and others. Luis F. Iglesias, intervening petitioner, appeals. Appeal dismissed.

Jorge V. Dominguez, of San Juan, P. R., for appellant.

Henry G. Molina, of San Juan, P. R., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. In July, 1912, the Utuado Sugar Company was put into the hands of a receiver on the application of the Gregg Company, Limited. It owned lands for the cultivation of sugar cane and a factory for the manufacture of raw sugar, including a railway track, cars, and locomotives. October 6, 1911, it mortgaged the greater part of its property to the appellee, the Banco Territorial y Agricola of Porto Rico, as trustee, to secure an issue of bonds for \$200,000.

On June 30, 1913, the receiver appointed in the proceedings petitioned the court for leave to borrow money and to issue therefor receiver's certificates in a sum not exceeding \$50,000, the certificates to "be a first and prior lien upon the entire crop of sugar, or part thereof, which may correspond to the Utuado Sugar Company or to the receiver under the contracts now or hereafter to be in force between it and the 'colonos.'" On the same day an order was entered authorizing the receiver to borrow money for use in the administration of the estate and particularly for the cultivation of crops and the operation of the plant as prayed for, and to issue receiver's certificates therefor; and it was further provided therein that the certificates "shall be a first and prior lien upon all of the sugar which may become the property of the Utuado Sugar Company as the result of grinding canes during the next ensuing crop of 1913-1914," and that "the receiver may make such contract or contracts as he may deem to the best interest of the estate under his charge, for the selling of sugars to be

manufactured during such crop, and such contracts shall be made on the best terms which the said receiver may be able to obtain."

September 5, 1913, the receiver entered into an arrangement with Luis F. Iglesias, the appellant, for a loan of \$30,000, which was evidenced by a notarial deed wherein the order of June 30, 1913, was referred to as constituting the authority of the receiver in the premises. In this deed it was provided that the loan of \$30,000 shall constitute "a first and preferred lien upon all of the sugars which may correspond with the Utuado Sugar Company in the said crop by virtue of the grinding contracts above set forth in this deed, and any other sugars which may be made from other canes of the Utuado Sugar Company or other persons and likewise upon all the properties, rights and actions which may belong to said corporation by reason of said contracts or which said corporation may acquire by virtue of said contracts."

The receiver in the operation of the plant and the manufacture of the 1913-1914 crop was unsuccessful, and in April, 1914, the court, being of the opinion that further grinding of the crop would result in a loss to all parties in interest, ordered the grinding stopped. Out of the proceeds of the crop the receiver paid Iglesias \$17.705.50, leaving

a balance of \$12.294.50.

Tuly 15, 1914, Iglesias filed a petition which was served upon the receiver of the Utuado Sugar Company and the attorneys for certain creditors. In this petition he prayed that he be granted a lien on all the sugar cane then growing or thereafter to be grown, and upon all the property of the Utuado Sugar Company, and that the lien on the latter property be declared to be paramount to any mortgage indebtedness or any operating expense of the receivership. At this time there was pending before the court an application by some or all of the mortgage bondholders and other creditors for a sale of the property and assets of the company, including the mortgaged property, and for a distribution of the proceeds among the bondholders and creditors.

July 22, 1914, the court entered a decree directing a sale of all the property and assets of the company in two separate lots, the first lot to "comprise all of the property included and described in the terms of the mortgage securing the mortgage bonds of the said defendant company," and the second lot "all of the balance of the property and assets of the said defendant company of every kind or nature and wheresoever situated." In the same decree a master was appointed who was directed to pass upon the accounts of the receiver, the claim of Iglesias, and any other accounts against the company and determine their priorities; also to report with reference to the names and

amounts of all the bondholders.

December 7, 1914, the master filed a report in which he found that Iglesias' security had been exhausted, and that he was entitled to no priority for the balance of his claim. Exceptions were taken to the report, which were sustained, the court holding that the claim of Iglesias did not rank with the ordinary debts of the corporation, but was an administration debt and "must be protected as other administration debts," but did not wish to be understood as declaring that it was "one which takes priority of the mortgage debt." The matter was

then referred to a master to determine "(1) how much of the money borrowed from petitioner Iglesias now unpaid was used in the preservation of the property; (2) how much was used for the operation of the central, including advances and cultivation of crop, the two amounts to be reported separately; and (3) how much the crop of 1913–14 would have produced after deducting expenses of preservation of the mill and plant if the grinding had not been stopped," and stating that "for the first a lien on crop and corpus will attach according to the principles above declared; to the second such a lien will be denied, except out of the estimated net crop proceeds, if any, found under (3) the third head."

On March 11, 1916, the master filed a report finding the receiver had paid Iglesias \$17,705.50, leaving a balance due him of \$12,294.50; that besides the \$30,000 borrowed from Iglesias the sum of \$1,604.96 was realized from the sale of molasses and out of these sums \$7,283.60 was expended for the preservation of the property—that is, went into the mill, buildings, and other equipment; that 95 per cent. of these expenses, or \$6,919.42, was paid for with Iglesias' money; and that, as the balance of \$12,294.50 due Iglesias was approximately 40.10 per cent. of the \$30,000 advanced by him, his proportion of the above expense now due him for the preservation of the property was \$2,774.68. He also found that the portion of the money borrowed from Iglesias that was used for the operation of the central and the cultivation of the crop was \$9,519.82.

April 22, 1916, the court entered an order confirming the master's report and making the claim of Iglesias for \$2,774.68 preferred, and stating that it should rank with the expenses of the receivership; but as to the balance of his claim for \$9,519.82 and the order of its payment the court reserved its decision. On August 10, 1916, the court handed down an opinion in which it held that the balance of \$9,519.82 due Iglesias was an administration debt, but "will have to rank in a class by itself after all other receivership claims which have heretofore been allowed. It will stand at the foot of the list, but will rank as a receivership claim. It will necessarily come ahead of all claims antedating the receivership debts, such as the claims of Armstrong and others."

No action appears to have been taken under the decree of July 22, 1914, so far as concerns the sale of the property covered by the mortgage given to secure the bonds. October 5, 1918, the Banco Territorial y Agricola, as trustee for the bondholders, appeared in the receivership proceedings and filed a petition asking leave to foreclose its mortgage. By decree of February 1, 1919, as amended February 10, 1919, the petition of the bank was granted on condition that the proceeds of the sale of the mortgaged property "shall be deposited in this court subject to the respective rights of the said trustee, bondholders and any other persons having an interest therein as such rights may hereafter be determined by this court." In this decree it was further provided that the sale which had taken place of all the property of the Utuado Company not covered by the mortgage to the bank and which had been sold for the sum of \$5,000 should be confirmed. March 14, 1919, a sale of

the mortgaged property was had and the property was sold free of incumbrance for the sum of \$72,500. This sale was confirmed by decree of April 14, 1919. July 18, 1919, the bank, as trustee, filed a petition asking that all the proceeds of the sale of the mortgaged property "be paid to it for distribution to the holders of the mortgage bonds secured by said mortgage." August 4, 1919, Iglesias filed an amended petition in which, after setting out various grounds of complaint, and stating that the sum of \$1,109.88 had been paid on his account leaving a balance due him of \$11,184.62, he prayed in substance that the previous orders of the court of April 22, and August 10, 1916, establishing the rank of the two portions of his claim, be reconsidered and that the full amount of the claim be declared a first and prior lien over the proceeds of the sale of the mortgaged and unmortgaged property of the company. He also prayed that Carlos Cabrera be ordered to pay back into court the sum of \$5,103, which he alleged had been paid to Cabrera on six receiver's certificates that had been improperly procured, and that this sum be applied to the payment of his, Iglesias' claim.

On August 26, 1919, it was decreed: "that the claim of Luis Felipe Iglesias * * having been fully considered at previous terms of this court, and decrees entered thereon, and the court having been shown no good reason to change its conclusions heretofore arrived at, even if it could, refuses to reconsider said matters," and that "the \$72,-500 produced by the sale of the property subject to mortgage after deduction of any priority payment as may hereafter be ordered be retained in the registry until all points as to the bonds are determined." It was further ordered "that Carlos Cabrera return to the registry of this court within 60 days from this date the sum of \$2,668 prematurely collected by him and that this matter be and it hereby is referred to the master hereinafter appointed to determine what part, if any, of the moneys referred to in the receiver's certificates held by Carlos Cabrera were used for the preservation of the properties of the defendant."

It is from the decree of August 26, 1919, that this appeal is taken, and the errors assigned are that the court erred (1) in refusing to reconsider Iglesias' claim; (2) in failing to declare that his loan to the receiver was made with the tacit consent of all concerned, including the bondholders; (3) in failing to declare that the balance of the loan of Iglesias, namely, \$11,184.26, constitutes a first and paramount lien on the corpus of the estate; (4) in declaring that the sum of \$72,500, the proceeds of the mortgaged property was subject exclusively to distribution among the bondholders; (5) in failing to declare that Cabrera's receiver's certificates were improperly obtained; that they represented debts inferior to that of Iglesias and were not entitled to rank prior to his claim; and (6) in failing to order Cabrera to return the payments received on the certificates (\$5,103) to be applied in payment of Iglesias' claim.

A motion to dismiss the appeal has been taken on the grounds: (1) That the decree of August 26, 1919, in so far as it is a refusal to reconsider the previous orders of the court of April 22 and August 26, 1916, establishing the rank of the respective portions of Iglesias' claim is unappealable; and (2) that, so far as the decree relates to the dis-

position to be made of the \$72,500, the proceeds of the sale of the mortgaged property, and the disposition to be made of the fund repre-

sented by Cabrera's certificates, it was not a final decree.

[1] The refusal of the court to grant Iglesias a rehearing as to the status of the respective branches of his claim rested in the discretion of the court and is not the subject of appeal. Roemer v. Bernheim, 132 U. S. 103, 106, 10 Sup. Ct. 12, 33 L. Ed. 277; Willis v. Davis, 184 Fed. 889, 107 C. C. A. 211; Bondholders and Purchasers Iron R. R. v. Toledo, D. & B. R. Co., 62 Fed. 166, 169, 10 C. C. A. 319.

[2] The decree, so far as it relates to the disposition to be made of the \$72,500, the sum realized from the sale of the mortgaged property, and of the fund represented by Cabrera's certificates, shows on its face that it was not final, for it is there expressly stated "that the \$72,500" produced by the sale of the property subject to the mortgage after deduction of any priority payments as may hereafter be ordered be retained in the registry until all points as to the bonds are determined," and as to the fund represented by the certificates "that this matter be and it hereby is referred to the master hereinafter appointed to determine what part, if any, of the moneys referred to in the receiver's certificates held by said Carlos Cabrera were used for the preservation of the properties of the defendant." An appeal to this court can be taken only from a final decree (Caballero et al. v. Succession of Criado y Blas, 250 Fed. 345, 162 C. C. A. 415), and where the decree is both final and complete (Collins v. Miller, 252 U. S. 364, 40 Sup. Ct. 347 64 L. Ed. 616, decided March 29, 1920; Oneida Navigation Corporation v. Job & Co., 252 U. S. 521, 40 Sup. Ct. 357, 64 L. Ed. 697, decided April 19, 1920; Groblewski v. Chmiell Co. [C. C. A.] 264 Fed. 325).

The appeal is dismissed for want of jurisdiction, with costs to the

appellees.

DIRECTOR GENERAL OF RAILROADS v. TEMPLIN.*

(Circuit Court of Appeals, Third Circuit. November 12, 1920.)

No. 2585.

Where plaintiff's intestate

Where plaintiff's intestate, a brakeman on a freight train, jumped from between the cars when the train was slowing for a stop at a station, and was struck and killed by an express train following on an adjoining track, evidence of a custom for express trains to give warning by bell or whistle when approaching the rear of a freight train standing or moving slowly on another track held properly admitted.

2. Master and servant ≈265(10)—Employé presumed to know custom to give warning.

Where a custom to give warning to employes under certain circumstances is proved, an employe is presumed to have known it.

3. Master and servant \$\iiin\$ 288(3)—Brakeman's assumption of risk from omission of customary warning question for jury.

Where a custom was proved for express trains to give warning on approaching from the rear a freight train standing or moving slowly on an adjoining track, whether a brakeman on a freight train moving slowly to

stop at a station, who jumped from between cars in front of a following express, which gave no warning, assumed the risk, *held* a question for the jury.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by Minnie Templin, administratrix of Burd Templin, deceased, against the Director General of Railraods. Judgment for plaintiff, and defendant brings error. Affirmed,

Wm. Clarke Mason, of Philadelphia, Pa., for plaintiff in error. Frank F. Davis, of New York City, for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. This writ of error brings here for review a judgment in favor of the plaintiff below for the death of Burd Templin, who was killed while working as a brakeman on a freight train of the Philadelphia & Reading Railway Company. The facts of the case are briefly these: Preparatory to making a stop, Templin's train was moving slowly on a sidetrack next to the southbound main track in the defendant's yard at Reading, Pennsylvania. While his train was still moving, Templin jumped down from between two box cars into the space between his train and the southbound track, on which an express train was rapidly approaching from the rear. The clearance being insufficient, Templin was struck and killed.

The duty which the plaintiff averred the defendant owed the decedent was that of timely warning; and the negligence she charged was the defendant's failure, contrary to prevailing custom, adequately to warn the decedent of a train approaching from the rear and about

to pass on the main track.

It was admitted that both the employé and employer were engaged in transportation of interstate commerce at the time of the accident. Therefore the Federal Employers' Liability Act (Comp. St. §§ 8657–8665), under which the action was brought, bears only on the court's charge with reference to assumption of risk and contributory negli-

gence, specified as error.

The first question—the one on which all others turn—is, whether the trial court erred in admitting testimony offered to prove a yard practice or custom under which express trains moving on the main track blow a whistle or sound a bell on approaching the rear of a freight train standing or moving slowly on the next sidetrack. We see no valid reason why this testimony should not have been offered and Although the testimony of one of the witnesses was so admitted. weakened on cross-examination that its probative value may have disappeared, there was for that reason no error in admitting it; and in the absence of a motion to strike it out, there was no error in retaining it in the record. Aside from the testimony of this witness there was other testimony as to the custom which was sufficient to sustain the jury's finding that it existed. Robinson v. United States, 13 Wall. 363, 366, 20 L. Ed. 653; Fletcher v. Baltimore, etc., R. Co., 168 U. S. 136, 18 Sup. Ct. 35, 42 L. Ed. 411.

[2] The jury has found a custom of warning. The decedent was presumed to have known it. Erie R. Co. v. Healy (C. C. A.) 266 Fed. 342; Healy v. Erie R. Co., 91 N. J. Law, 325, 102 Atl. 629. On this finding of fact and on this presumption depend the remaining

assignments of error.

[3] The defendant next raised a question of the decedent's assumption of risk and of error in the court's charge in respect thereto, pursuing the question on the theory that express trains moving on the main track did frequently approach, overtake and pass freight trains on the next track without warning; and that the decedent knew it, and, because of this fact and his knowledge of it, the decedent assumed the risks incident to it, citing familiar cases of yard accidents where there existed no custom as to warning and where from the very

nature of yard movements warnings were impracticable.

In raising this question the defendant has disregarded the fact and effect of the custom found, in which is implied, first, the need of warning, and second, the practicability of giving warning. In Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, where no custom of warning was involved, the court held that a vard track employé assumed the risk of the danger of a shifting movement without warning; and in Connelley v. Pennsylvania R. Co., 228 Fed. 322, 142 C. C. A. 614, where likewise no question of custom as to warning was involved, and where practically all the tracks in the yard were main tracks, this court made a similar ruling. The case at bar is readily distinguishable from these two cases on which the defendant mainly relies and from two others recently decided by this court. Hines, Director General, v. Jasko, 266 Fed. 336, and Erie R. Co. v. Healy, 266 Fed. 342. In the first, there being no sufficient proof of custom affecting or defining the duty of the railroad company to warn yard employes of coupling movements, we held that the defendant railroad company had not been shown guilty of negligence in the absence of proof of what warning under the circumstances it should and could have given, and that, in consequence, the yard employé had assumed the risks of such movements on accepting his employment. So also in the latter case we found, in the absence of proof of a custom as to warning, a similar assumption of risk by a yard employé. But in McGovern v. P. & R. Ry. Co., 235 U. S. 389, 401, 35 Sup. Ct. 127, 59 L. Ed. 283, where there was evidence of a custom or practice to warn trackworkers the Supreme Court affirmed the action of the trial court in refusing to hold as a matter of law that the injured workman had assumed the risk of the danger and in submitting the question to the jury.

It is recognized that under the Federal Employers' Liability Act an employé assumes the risks normally and necessarily incident to his employment, and also the extraordinary risks, or risks caused by his master's negligence; yet, he assumes the latter only when they are obvious or fully known by him and are such as would under the circumstances be seen and appreciated by an ordinarily prudent person. Boldt v. Pennslyvania R. Co., 245 U. S. 441, 445, 38 Sup. Ct. 139, 62 L. Ed. 385; Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 101, 34 Sup.

Ct. 229, 58 L. Ed. 521; Seaboard Air Line v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. In encountering in his employment risks of different kinds, the Supreme Court has said:

"The settled rule is, not that it was the duty of an employé to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them." peake & Ohio Ry. Co. v. De Atley, 241 U. S. 310, 315, 36 Sup. Ct. 564, 566 (60 L. Ed. 1016); C., R. I. & P. Ry. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. 275,

In this case we think no one but the jury could say whether Templin, in assuming that his employer would protect him by the customary warning in the circumstances, saw or should have seen the extraordinary danger arising from his employer's negligence in not giving the warning, and whether, accordingly, Templin did or did not assume the risk thereof. Chicago, Rock Island & Pacific Ry. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. 275, 64 L. Ed. 430; Gila Valley Ry. Co. v. Hall, supra; McGovern v. P. & R. Ry. Co., supra.

While the jury on the submission of this question might have found that the decedent had not assumed the risk of the danger which led to his death, yet, the jury might also have found that the decedent in descending from his train at the time and place and under the circumstances failed to take the precaution for his own safety which the law imposed on him and thereby contributed to his injury, partially or wholly, and that, as a result, his administratrix should recover only in part or not at all. Virginian Ry. Co. v. Linkous, 230 Fed. 88, 93, 144 C. C. A. 386.

The remaining assignment of error concerns the court's charge on this aspect of the case. The instruction on the law of contributory negligence specified as error is open to no criticism so far as it went. The defendant's criticism, however, is that the instruction fell short and left the jury with a notion that if they found the defendant guilty of contributory negligence which "reaches the point that it is practically the entire negligence in the case" (that is, as we understand it, if they found that the decedent's negligence was alone the proximate cause of the injury, or, stated in another way, if they found the decedent's death due solely to his own carelessness), they still must find a verdict for the plaintiff. If the excerpt of the court's charge assigned as error is open to this criticism, it is apparent from the rest of the charge that such impression could not have been conveyed to the jury because of the court's very explicit instruction that, before they could render a verdict for the plaintiff, they must find negligence on the part of the defendant, obviously meaning negligence in some

Finding no error in the trial of the case, the judgment below is affirmed.

PIERCE v. NATIONAL BANK OF COMMERCE IN ST. LOUIS.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1920.)

No. 5587.

Courts \$\iff 352\$—Complaint not stating equitable grounds for relief transferred to law side of court.

Under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), the fact that a complainant in equity has an adequate remedy at law does not require dismissal of the suit, but merely transfer to the law side of the court.

Pledges 51—Complaint for accounting and redemption of securities sufficient.

Allegations that complainant was the owner of certain securities subject to defendant's prior lien for a specified debt, that certain payments had been made on such debt, and praying that defendant be required to account for and deliver the securities to complainant after receiving any balance due it on the debt, held to state ground for equitable relief, for an action at law is not the appropriate proceeding to obtain redemption of pledged or mortgaged property.

3. Pledges = 11-Delivery of pledged article unnecessary, when in possession of third party.

The rule that an article pledged must be delivered, to constitute a valid pledge, is subject to the exception that, when the article is in the possession of a third party, it may be effectually pledged without change of possession, provided notice of the pledge is given to the party in possession.

4. Liens 57—Note to claimant, secured by bonds already in pledge to another, created equitable lien on the bonds.

Where bonds are pledged with a bank to secure payment of a loan, a collateral note, subsequently executed by the pledger to complainant, making the pledged bonds a security for a second loan, *held* to create an equitable lien, subject to the bank's rights, although the bonds did not come into complainant's actual possession.

5. Judgment \$\infty\$713(2)\$—Conclusiveness on same cause of action between same parties.

Where a second suit is upon the same cause of action and between the same parties as the first, the former judgment is conclusive as to every issue which was or might have been determined in the first suit.

5. Judgment \$\infty\$713(2)\top-Conclusiveness on same cause of action between same parties.

Where the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the first action operates as an estoppel as to every issue actually litigated in the first action, but is not conclusive as to matters which might have been, but were not, ntigated.

7. Judgment \$\infty948(1)\$—Estoppel by judgment must be pleaded.

Where there is or may be a material issue upon a different cause of action, which may not have been litigated in the former action, the first judgment does not constitute an estoppel from litigating that issue, unless the actual litigation of such issue is pleaded and proved.

8. Judgment \$\infty 585(2)\$—Test of identity of causes of action stated.

In determining the conclusiveness of a judgment, the test of the identity of causes of action is the identity of facts essential to maintain them.

9. Judgment \$\iff 585(4)\$—Matters of defense, which also constitute affirmative causes of action, not rendered res judicata.

While defendant's failure to establish purely defensive facts renders such matters res judicata, yet when the defensive facts also constitute an

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affirmative cause of action against plaintiff, defendant may either interpose them as a defense, or reserve them for an independent or cross action.

 Judgment 585 (4)—Complainant, seeking recovery of pledged bonds, not concluded by judgment against him for converting stock pledged for same debt.

Where complainant sought an accounting and recovery of bonds owned by him subject to defendant's lien thereon for a debt, a judgment secured by defendant against complainant for converting stock, which had been pledged with defendant for the same debt, *held* not to estop complainant from asserting his claims regarding the pledged bonds.

11. Injunction = 135—Temporary injunction within trial court's discretion.

The granting or refusing of a temporary injunction is intrusted to the trial court's judicial discretion.

Rev. St. § 720 (Comp. St. § 1242), providing that proceedings in state court shall not be enjoined, except in bankruptcy proceedings, does not preclude federal courts from enjoining the parties to such suits from enforcing judgments, where the principles of equity demand that such action be taken.

13. Judgment \$\infty 459\$—Refusing temporary injunction against solvent resident bank not abuse of discretion.

Refusing interlocutory injunction restraining a solvent resident bank from enforcing a judgment against complainant was not an abuse of discretion, although complainant claimed that a complete accounting and adjustment would reduce the ultimate amount to which the bank was entitled.

Appeal from the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Suit by Henry Clay Pierce against the National Bank of Commerce in St. Louis. From a decree of dismissal, and an order denying a temporary injunction, complainant appeals. Decree of dismissal reversed, with leave to defendant to answer, and order denying the application for injunction affirmed.

Thomas W. White and Henry S. Priest, both of St. Louis, Mo. (Alton B. Parker, of New York City, and John F. Green, S. W. Fordyce, Jr., and John H. Holliday, all of St. Louis, Mo., on the brief), for appellant.

George L. Edwards, of St. Louis, Mo. (Edward J. White, of St.

Louis, Mo., on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

SANBORN, Circuit Judge. Henry Clay Pierce brought a suit in equity against the National Bank of Commerce in St. Louis for a discovery concerning, and an accounting by it for, \$750,000 par value of the mortgage bonds of the Tennessee Central Railroad Company and \$250,000 par value of the bonds of the Nashville Terminal Company, which had been pledged to the bank to secure the payment to it of three promissory notes of the Tennessee Construction Company, a corporation, aggregating \$700,000, the payment of the principal of

which had been guaranteed by J. C. Van Blarcom, and the payment of interest upon which had been guaranteed by Pierce, for the discovery and accounting by the bank for moneys collected from the bonds of the terminal company and the Van Blarcom estate, for a redemption by Pierce of the \$750,000 of railroad bonds still held by the bank for the \$700,000 debt, and for an injunction until this relief could be had against the collection of a judgment of \$700,000 which the bank had recovered in the circuit court in the city of St. Louis against Pierce for a conversion of 10,000 shares of stock of the Nashville Terminal Company, which had also been pledged to the bank to secure the payment of the \$700,000 debt due it. The complainant applied for an interlocutory injunction, the defendant moved to dismiss the complaint for its failure to state a cause of action, and the court entered a decree that the application for the injunction be denied, and that the complaint be dismissed without prejudice. From this decree the plaintiff has appealed, and this appeal presents two questions:

[1] First. Did the complaint state facts sufficient to constitute a cause of action, either at law or in equity, for if it stated a cause of action at law, this case should have been transferred to the law side of the court, and there proceeded with. The fact that a complainant in equity has an adequate remedy at law is no longer sufficient ground for the dismissal of the suit. Equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv); section 274b, Judicial Code, amendment of March 3, 1915, 38 Stat. 956 (Comp. St. § 1251b); Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C.) 216 Fed. 382, 383; Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C.) 225 Fed. 769, 772; Corsicana National Bank v. Johnson, 218 Fed. 822, 823, 134 C. C. A. 510, 511; Id. 237 Fed. 1016, 150 C. C. A. 665; Id. 251 U. S. 68, 40 Sup. Ct. 82, 64 L. Ed. 141; United States v. Utah Power Co. (D. C.) 208 Fed. 821; A. G. Wineman & Sons v. Reeves et al., 245 Fed. 254, 257, 258, 157 C. C. A. 446, 449, 450. And if the complaint stated a cause of action in equity, the motion to dismiss it should have been denied, and the defendant should have been required to answer.

[2] Second. Did the denial of the application for the injunction constitute a violation of the principles or rules of equity established for the guidance of the trial court in the exercise of its judicial discretion in granting or refusing the injunction or any abuse of that discretion? The answer to the first question is conditioned by the material facts alleged in the complaint, and they are these:

In the year 1902, the construction company, for value, gave to the bank its three promissory notes, aggregating \$700,000, and pledged with it as collateral security for the payment of this debt only, \$750,000 par value of the bonds of the Tennessee Central Railroad Company, and \$250,000 par value of the bonds of the Nashville Terminal Company. J. C. Van Blarcom guaranteed the payment of these notes, and Pierce guaranteed the payment of the interest thereon, and has paid large amounts on this guaranty, concerning which there has been no accounting. On November 17, 1908, the construction company for value gave its promissory note to Pierce for \$600,000, and by the terms of that note pledged to him to secure the payment there-

of the \$750,000 of mortgage bonds of the railroad company and the \$250,000 mortgage bonds of the terminal company, subject, as declared in said note, "to a prior pledge thereof to the National Bank of Commerce in St. Louis as collateral to a loan of \$700,000," and authorized him to sell these securities at public or private sale, with or without notice thereof, and to become the purchaser thereof himself, upon the failure of the construction company to pay the \$600,000 note. That company failed to pay it. In January 1913, Pierce foreclosed upon these bonds, purchased them at the sale on January 3, 1913, and has ever since been the owner thereof, subject to the pledge of them to the bank.

Soon after the pledge of these securities to him in 1908, he notified the bank thereof, and soon after he acquired title to them by his purchase at the sale in 1913, and before the subsequent proceedings mentioned herein, he informed the bank that he had become the absolute owner thereof, subject to the pledge of them to the bank. Since the bank received these notices, it has sold to third parties, without notice to Pierce and without his knowledge, and without notice to the construction company and without any foreclosure of the pledge to it, the \$250,000 par value of the bonds of the terminal company for an unknown amount in excess of \$220,000, and has refused to apply the proceeds thereof to the payment of the \$700,000 debt of the construction company which they were pledged to secure, or to account for the same to Pierce, the owner thereof, subject to the pledge to the bank. The bank still holds the \$750,000 par value of the mortgage bonds of the terminal company as security for the \$700,000 debt of the construction company, and Pierce offers to pay into the court the amount justly due and owing to the bank on that debt, and seeks a decree for a redemption of these bonds and the transfer of them to him upon such payment.

In the year 1908 J. C. Van Blarcom died. Thereafter the bank proved a claim against his estate, founded on his guaranties and indorsements of the notes evidencing the \$700,000 debt to the bank, and received large amounts of money and securities from that estate upon this claim, which in equity and good conscience should be applied to the payment of the \$700,000 debt to the bank; but the bank has refused so to apply it, or to account for it, and the complainant seeks an accounting for and an application of the moneys and securities which the bank has thus obtained from the Van Blarcom estate to the pay-

ment of the \$700,000 debt.

By the promissory note of the construction company to Pierce for \$600,000, dated November 17, 1908, the construction company, in addition to the collateral securities which have been mentioned, also pledged to Pierce 10,000 shares, of the par value of \$1,000,000, of the capital stock of the Nashville Terminal Company, and delivered to him the certificates thereof. In 1911, for the first time, the bank notified Pierce that it claimed that this stock had been pledged to it by the construction company in 1904 to secure the latter's \$700,000 debt to it. Pierce denied the existence of this prior pledge. The bank then sued him in the circuit court for the city of St. Louis for the conver-

sion of this stock. There was a trial. That court found that the bank had the prior pledge of the stock to secure its \$700,000 claim; that Pierce, by refusing to deliver the stock to the bank, had converted it to his own use; that the value of it was \$700,000; and rendered a judgment against Pierce for this amount, which was subsequently affirmed by the Supreme Court of the state of Missouri on January 6, 1920. It was not until after this affirmance of that judgment, and on March 18, 1920, that Pierce first learned that the bank had sold the \$250,000 mortgage bonds of the Nashville Terminal Company without notice to him or the construction company, and without a

foreclosure of its pledge.

The facts which have now been stated are alleged in the plaintiff's complaint. If they are true, and in determining the sufficiency of the complaint they must be so considered, the bank holds as collateral security for the \$700,000 debt of the construction company to it, the \$700,000 judgment against the complainant, the proceeds of the \$250,000 of the mortgage bonds of the terminal company, whose stock was found by the state court to be worth 70 cents on the dollar, \$750,000 of the mortgage bonds of the railroad company, and whatever securities and moneys it collected from the Van Blarcom estate. Mr. Pierce prays an accounting of these securities and an equitable application of them and their proceeds to the payment of the \$700,000 debt of the construction company to the bank, offers to pay the remainder of that debt, if any, and prays that the remainder of the securities of which he is the owner, subject to the pledge to the bank, be adjudged and delivered to him as such owner.

The averments of this complaint on their face bring it far within the jurisdiction of a court of equity to marshal mortgaged or pledged securities and to decree an accounting for and application thereof to the payment of the debt they secure, to adjudge a redemption of pledged or mortgaged securities, to fix the terms upon which such redemption may be made, and to decree and enforce a trust at the suit of one having title or interest in property that is in the possession or control of another. Hubbard v. Tod, 171 U. S. 474, 478, 495, 504, 19 Sup. Ct. 14, 43 L. Ed. 246; Manhattan Trust Co. v. Sioux City & N. R. Co. (C. C.) 65 Fed. 559, 568; Benedict v. Moore (C. C.) 76 Fed. 472; Dibert v. Edw. D'Arcy, 248 Mo. 617, 647, 154 S. W. 1116. All the controversies between the parties suggested by this complaint may be heard and determined in equity in a single suit, all their rights on account of all the alleged collaterals may be adjudged by a single decree, and during the progress of the litigation, as well as at its close, the acts of the parties may be controlled and directed by appropriate orders of the chancellor.

An action at law is not the appropriate proceeding to obtain the redemption of pledged or mortgaged property to which the alleged defendant claims superior right or title, nor to adjudge or enforce a trust, nor to marshal and adjudge the liens and securities alleged in this complaint. Nor could the court in any action at law so conveniently draw to itself and conclusively adjudge all the controversies between the parties to this suit regarding the securities and rights that

ought to be here determined as in this suit in equity, and "the remedy at law which precludes relief in equity must be as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity." Boyce v. Grundy, 3 Pet. 210, 215 (7 L. Ed. 655); Oelrichs v. Spain, 15 Wall. 211, 228, 21 L. Ed. 43; Preteca et al. v. Maxwell Land Grant Co., 50 Fed. 674, 676, 1 C. C. A. 607, 609; Farwell v. Colonial Trust Co., 147 Fed. 480, 482, 78 C. C. A. 22, 24. For these reasons the complaint was not one which required or authorized the transfer of this suit to the law side of the court under equity rule 22, and it should be heard and determined in equity rather than at law.

[3] But counsel for the bank contend that the complainant's alleged title to the \$750,000 of railroad bonds and the \$250,000 of terminal bonds under the collateral contract of pledge in the construction company's note of November 17, 1908, and Pierce's foreclosure thereof, are void, because at the time that contract was made those bonds were in the actual possession of the bank, the first pledgee thereof, and were not delivered to Pierce, and a pledge without a delivery of the thing pledged is ineffectual. In support of their position that the delivery of the property pledged to the pledgee is indispensable to the validity of a pledge they cite two classes of cases: First, those in which at the time of the alleged pledge the subject of the pledge was in the possession or was subsequently surrendered to the pledger; and, second, those in which the property pledged was at the time of the alleged pledge in the actual possession or control of some third party.

Cases of the first class are Casey v. Carvaroc, 96 U. S. 467, 486, 490, 24 L. Ed. 779; Third Nat. Bank v. Buffalo German Ins. Co., 193 U. S. 581, 588, 24 Sup. Ct. 524, 48 L. Ed. 801; Security Warehousing Co. v. Hand, 206 U. S. 415, 421, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789; Nat. Bank of Commerce v. Equitable Trust Co., 227 Fed. 526, 142 C. C. A. 158; Vanstone v. Goodwin, 42 Mo. App. 39, 45; In re Harvey (D. C.) 212 Fed. 340, 341; Atkinson v. Foster, 134 III. 472, 25 N. E. 528, 529, 530; Succession of Lanaux, 46 La. A. 1036, 15 South 708, 714, 25 L. R. A. 577; Cotton v. Arnold, 118 Mo. App. 596, 601, 95 S. W. 280. Cases of the second class cited by counsel for the bank, in which the property which was the subject of the alleged pledge was at the time of the pledge in the possession or control of a third party, are Christian v. Atlantic & N. C. Ry. Co., 133 U. S. 233, 241, 243, 10 Sup. Ct. 260, 33 L. Ed. 589; Boothe v. Loy, 83 Mo. App. 601; Chitwood v. Lanyon Zinc Co., 93 Mo. App. 225, 230; Seymour v. Hendee (C. C. A.) 54 Fed. 563; In re Bacon, 210 Fed. 129, 126 C. C. A. 643.

One of the reasons, and probably the chief reason, for the alleged general rule that a deposit of the thing pledged is an indispensable attribute of a valid pledge, is that such a pledge is indispensable to prevent the possession by the pledgor of the thing pledged from giving to him a false credit, just as the failure to deliver personal property sold causes a false credit to the vendor and avoids the sale. This reason, however, ceases when at the time of the pledge the thing pledged is not in the possession of the pledgor, but is in the pos-

session and control of a third party. On this account, probably, the authorities disclose the fact that in cases of the second class, of which the case at bar is one, an exception to the general rule of the necessity of the delivery of the thing pledged to the pledgee in order to make a valid pledge early arose, and has increased in strength and breadth. until it has now become as general as the rule itself, an exception to the effect that, when the thing pledged was in the possession or control of a third party at the time of the alleged pledge, it might be effectually pledged by the owner of it, or by the owner of an interest in it, without any change of possession or control of it, if notice of the fact of the pledge was given to the party in possession. Thus, as early as 1868 in the case of In re Wiley, 4 Bissell, 171, 29 Fed. Cas. 1237, No. 17,655, the United States District Court held that where Wiley, the owner of a promissory note for \$500, pledged and delivered it to Denny to secure his debt to the latter for \$150, and three days later pledged his equity in the \$500 note to one Davis to secure his debt of \$350 to Davis, the latter pledge was valid, although the \$500 note pledged was not delivered to Davis, and the court said:

"To render a pledge valid, it is a general rule that the thing pledged must be delivered. 2 Kent, Comm. 577, 578; Story, Bailm. § 297. This rule, however, is subject to exception. It is not necessary that the possession of the pledgee should be actual. Stocks, and, it would seem, equitable interests, though incapable of actual delivery, may be pledged. Wilson v. Little, 2 Const. (2 N. Y.) 443; Dykers v. Allen, 7 Hill, 497. And perhaps it may be safely asserted that, in general, when from the circumstances of the case an actual delivery is impossible, the pledge may be good without a delivery."

In the year 1900, in Chattanooga National Bank v. Rome Iron Co. et al. (C. C.) 102 Fed. 755, 758, the Rome Iron Company had pledged a quantity of iron in yard No. 48 of the American Pig Iron Storage Warrant Company to secure the payment of certain warrants which that company had issued. After that pledge was made, and while the iron was in the actual possession and absolute control of the Warrant Company, the Rome Company made its five notes for \$5,100 each to the Chattanooga National Bank, and indorsed on the back of each of them these words:

"The within note is secured by the pledge and deposit of the following securities, to wit: Equity in iron in yard No. 48, Rome, Ga."

—and authorized the bank, in case of default in payment of the notes, to sell the Rome Company's equity in the iron and to appropriate the proceeds thereof to the payment of the notes which the bank held. In that case, as in this, objection was made to the enforcement of the second pledge, on the ground that there was no delivery to the second pledgee of the mere equity in the iron. In answer to this defense the court quoted section 1235 of 3 Pomeroy's Equity Jurisprudence, and Walker v. Brown, 165 U. S. 654, 662, 663, 669, 17 Sup. Ct. 453, 41 L. Ed. 865, overruled the objection, and enforced the equitable lien of the second pledgee.

[4] And here are the rules and principles applicable to and decisive of the question now under consideration in the case in hand: This is a suit in equity. It is brought to enforce the equitable lien on the

\$250,000 mortgage bonds of the terminal company and the \$750,000 mortgage bonds of the railroad company first pledged to the bank, evidenced by the collateral note of the construction company dated November 17, 1908. If the parties to that note intended to create such a lien, and if the intention clearly appears from the note and the facts alleged in the complaint, it is not material whether it fell under the category of a pledge, a mortgage, an assignment, or some other name. Section 1235 of Pomeroy's Equity Jurisprudence, by its approval and adoption by the Supreme Court in Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 457 (41 L. Ed. 865), has now become the law of this country in suits in equity in the federal courts. And it reads in this way:

"The General Doctrine-Requisites of the Contract. The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property. The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, 'Equity regards as done that which ought to be done. In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation."

Tested by this rule, the collateral note of November 17, 1908, was ample to create the equitable lien upon these bonds which the complainant seeks to enforce. It was in writing. It clearly indicated the intention of the construction company to make the \$1,000,000 of bonds, which it specifically described, a security for the payment of the debt of Pierce for \$600,000, described in the note, and it is consequently enforceable, subject to the prior lien of the bank against all parties claiming any interest in these bonds under the construction company, including the bank itself. If further authority is desired for the conclusion here reached, it may be found in Jones on Pledges and Collateral Securities (2d Ed.) §§ 83, 364, 371; First Nat. Bank of Waterloo v. Bacon, 113 App. Div. 612, 98 N. Y. Supp. 717, 719; First Nat. Bank v. Exchange Nat. Bank (Sup.) 153 N. Y. Supp. 818, 820; Zartman v. First Nat. Bank of Waterloo, 216 U. S. 134, 138, 30 Sup. Ct. 368, 54 L. Ed. 418; First Nat. Bank v. Zartman, 189 N. Y. 533, 82 N. E. 1126; Sprague v. Cochran, 144 N. Y. 104, 112, 113, 38 N. E. 1000; Fourth Street Bank v. Yardley, 165 U. S. 634, 644, 650, 653, 17 Sup. Ct. 439, 41 L. Ed. 855; Parlin & Orendorff Imp. Co. v. Moulden, 228 Fed. 111, 112, 113, 142 C. C. A. 517, 518, 519, L. R. A. 1917B, 130; In re Imperial Textile Co. (D. C.) 239 Fed. 775, 777, 778, 779; Nat. Bank of Deposit of the City of New York v. Henry P. Rogers et al., 166 N. Y. 380, 388, 389, 390, 59 N. E. 922; Wilson v. Little, 2 N. Y. 433, 447, 51 Am. Dec. 307.

The more convincing reasons and the weight of authority persuade that: (1) The owner of personal property subject to a prior pledge, under which the pledgee has the actual possession and control of the thing pledged, may lawfully pledge his remaining interest therein without a deposit of the property with the second pledgee, by a contract or conveyance to that effect and notice thereof to the first pledgee, who will then be deemed to hold the property in trust for both pledgees as their interests exist. (2) The owner of personal property may impose an enforceable equitable lien upon it to secure some debt or obligation by a written contract or conveyance, which identifies the property and (3) The construction sufficiently evidences his intention so to do. company, by the collateral note of November 17, 1908, and notice thereof to the bank, fastened an enforceable equitable lien upon the \$250,000 mortgage bonds of the terminal company and the \$750,000 mortgage bonds of the railroad company in controversy, subject to the prior lien of the bank under the pledge to it, to secure the debt of the construction company to Pierce for \$600,000.

Counsel challenge the complaint on another ground: They contend that the complainant is estopped from maintaining its suit in equity for a discovery and accounting regarding the \$1,000,000 of bonds pledged to the bank and to Pierce, or regarding the dividends it received from the Van Blarcom estate, because he did not plead or prove his claims therefor in the action in the state court by the bank against him for his conversion of the 10,000 shares of stock of the terminal company, which resulted in the \$700,000 judgment against him. But the rules of

law by which this position must be tried are:

[5] First. Where the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question and issue which was or might have been presented and determined in the first suit. Harrison v. Remington Paper Co., 140 Fed. 385, 400, 72 C. C. A. 405, 420, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Id. 199 U. S. 607, 26 Sup. Ct. 747, 50 L. Ed. 331; Southern Pacific Ry. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; Linton v. National Life Ins. Co., 104

Fed. 584, 587, 44 C. C. A. 54, 57.

[6] Second. When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action; but it is not conclusive relative to other matters which might have been, but were not, litigated or decided. Harrison v. Remington Paper Co., 140 Fed. 385, 400, 72 C. C. A. 405, 420, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Id., 199 U. S. 607, 26 Sup. Ct. 747, 50 L. Ed. 331; Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Nesbitt v. Riverside Independent District, 144 U. S. 610, 618, 12 Sup. Ct. 746, 36 L. Ed. 562; Grider v. Groff, 202 Fed. 685, 687, 121 C. C. A. 95; Board of Com'rs v. Platt, 79 Fed. 567, 25 C. C. A, 87; Linton v. National Life

Ins. Co., 104 Fed. 584, 587, 44 C. C. A. 54; Board of Com'rs Lake

County v. Sutliff, 97 Fed. 270, 274, 38 C. C. A. 167, 171.

[7] Third. Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action which may not have been raised, litigated, or decided in the former action, the judgment therein does not constitute an estoppel from litigating that issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the facts that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former action. Harrison v. Remington Paper Co., 140 Fed. 385, 400, 72 C. C. A. 405, 420, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Russell v. Place, 94 U. S. 606, 608, 24 L. Ed. 214; Ætna Life Ins. Co. v. Board of Com'rs, 117 Fed. 82, 88, 54 C. C. A. 468, 474; Cromwell v. County of Sac, 94 U. S. 351, 359, 24 L. Ed. 195; Nesbitt v. Independent District, 144 U. S. 610, 619, 12 Sup. Ct. 746, 36 L. Ed. 562; Belleville & St. L. Ry. Co. v. Leathe, 84 Fed. 103, 105, 28 C. C. A. 279, 281.

[8] Fourth. The test of the identity of the causes of action is the identity of the facts essential to maintain them. Harrison v. Remington Paper Co., 140 Fed. 385, 400, 72 C. C. A. 405, 420, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Union Central Life Insurance Co. v. Drake,

214 Fed. 536, 545, 131 C. C. A. 82, 91.

[9] Fifth. While the failure of a defendant to allege and prove facts purely defensive to an issue on trial between him and the plaintiff renders such matters res adjudicata after judgment, and estops him from again presenting them (1 Van Fleet on Former Adjudication, § 198), yet, when defensive facts also constitute an affirmative cause of action against the plaintiff, the defendant has the option to interpose them as a defense, or to reserve them for an independent or cross action. If he refrains from presenting them as a defense, the judgment in the action against him does not bar nor adjudicate his affirmative cause of action upon them, and he is free subsequently to maintain it. Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252. 257, 260, 30 Sup. Ct. 78, 54 L. Ed. 179; Brown v. First Nat. Bank of Newton, Kan., 132 Fed. 450, 452, 66 C. C. A. 293, 295; Id., 196 U. S. 641, 25 Sup. Ct. 796, 49 L. Ed. 631; Watkins v. American Nat. Bank of Denver, 134 Fed. 36, 40, 67 C. C. A. 110, 114; Northwestern Port Huron Co. v. Babcock, 223 Fed. 479, 481, 482, 485, 486, 139 C. C. A. 27, 29, 30, 33, 34.

[10] Let us measure the alleged estoppel of the plaintiff to maintain this suit by these rules. Counsel cite, to sustain that estoppel, Miller v. Belvey Oil Co., 248 Fed. 83, 160 C. C. A. 223, and Allen v. City of Davenport, 132 Fed. 209, 220, 65 C. C. A. 641, 659. But the decisions and opinions in those cases are inapplicable to this case, because in those cases the first and second suits were between the same parties and upon the same causes of action, respectively, and were governed by the first of the above rules, while the suits in this case are upon different causes of action, and the first rule is inapplicable to them. There is no identity in the facts necessary to the maintenance or defense of the causes of action against Pierce for conversion of the

10,000 shares of Terminal stock, and the facts determinative of Pierce's cause of action against the bank for an accounting and recovery of the proceeds of the \$250,000 of the mortgaged bonds of the terminal company, or for a redemption of the \$750,000 of the bonds of the railroad company, or for an equitable application of the dividends from the Van Blarcom estate. The facts necessary to the maintenance of the former suit were the pledge of 10,000 shares of Terminal stock to the bank before they were pledged to Pierce on November 17, 1908, the appropriation of them or their proceeds to his own use by Pierce. and the value of the stock. None of those facts is indispensable to the maintenance of the suit in hand for a discovery of and accounting by the bank for the bonds and dividends here in question. The subjects and objects of the two suits, the facts indispensable to their maintenance or defense, and the relief sought therein are not only not identical, but are so radically different that neither could be maintained upon the facts which might sustain the other. This case, therefore, falls under the second rule, and the complainant is estopped from maintaining no position which was not actually litigated and determined in the action in the state court.

Counsel cite, however, Beloit v. Morgan, 7 Wall. 619, 621, 622, 19 L. Ed. 205, in which Morgan had sued the town of Beloit and obtained a judgment on some of the coupons upon some of a certain issue of bonds, after a trial of the issue as to the validity of the bonds made by the answer of the town. Thereafter the town brought a suit in equity against Morgan, and claimed therein that all the bonds of that issue were invalid, for the same reasons alleged in its answer in the first suit, and prayed that Morgan might be enjoined from maintaining any action upon any of them, and that those he held might be surrendered and adjudged void. The court held that the town was estopped from maintaining the suit by the former judgment. Counsel also cite Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256, wherein Gardner bought a vessel of Buckbee and gave him two notes for the purchase price. Buckbee sued on one of them. Gardner defended on he ground that the sale was fraudulent and there was no consideration for the note. The issue was tried, and Buckbee recovered a judg-He then sued Gardner on the second note, and Buckbee defended on the same ground of fraud in the sale and want of consideration he presented in the first action, and the court held he was estopped by the judgment in the first action.

The decisions in these cases rest upon the facts that the two suits in each case were between the same parties upon different causes of action, and the issues in the second suits had been actually litigated and determined in the first suits. They fall under the declaration of the second rule, that in such cases the judgment in the first suit is conclusive as to every point and question actually litigated. But the complaint in this case does not disclose, nor has the bank pleaded or proved, that any of the points, questions, or issues determinative of the equitable right of the complainant to the accounting by the bank for the bonds or dividends, or to the return of the \$750,000 of, the bonds of the railroad company was actually litigated or adjudged in the

action in the state court, and it is governed by that part of the second rule which declares that the judgment in the first action is not conclusive as to other matters than those actually litigated and decided, which might have been, but were not, litigated or decided in the first suit. For these reasons, and for others, such as the fact that the complainant did not learn of the sale of the \$250,000 of the Terminal bonds by the bank until after the judgment in the state action had been entered in the trial court, and that the fact relative to the pledges and liens in question in this suit may not have constituted a defense to the action against Pierce for the conversion of the Terminal stock at the time that issue was pending in the trial court, the conclusion is unavoidable that the complainant is not estopped by the judgment in that action from maintaining this suit and securing in this court such relief as, after pleadings and proofs, the merits of the case may demand.

[11-13] A single question remains: Was the complainant's application for an interlocutory injunction to prevent the bank from collecting the judgment of \$700,000, which it had obtained in the state court, until the claims of the plaintiff in this suit could be heard and determined, improvidently denied? The law intrusts the grant or refusal of temporary injunctions to the judicial discretion, guided by the principles and rules of equity, not of the appellate, but of the trial, court. Its decision of this question, therefore, is presumptively right, and it ought not to be reversed or modified, unless it appears that it has disregarded some of the rules or principles of equity established for its guidance or has seriously abused its discretion. Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 941, 942, 52 C. C. A. 559; Stokes v. Williams, 226 Fed. 148, 156, 141 C. C. A. 146, 154. To sustain the denial of the injunction counsel for the bank invoke section 720 of the Revised Statutes (Comp. St. § 1242), which provides that—

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

But this section does not deprive the federal courts, sitting in equity in cases involving any controversies between the citizens of different states, of which such courts have jurisdiction, and which have been adjudged by the state courts, of the power or relieve them of the duty to enjoin the parties to such suits from enforcing judgments of the state courts in their favor where, on account of fraud, mistake, accident, or any other ground of equity jurisprudence, and on account of the threat of imminent and irreparable injury, the rules and principles of equity demand that the parties shall not proceed to enforce such state judgments. Marshall v. Holmes, 141 U. S. 589, 596, 599, 12 Sup. Ct. 62, 35 L. Ed. 870; Simon v. Southern Railway, 236 U. S. 115, 124, 129, 35 Sup. Ct. 255, 59 L. Ed. 492; National Surety Co. v. State Bank, 120 Fed. 593, 600, 602, 56 C. C. A. 657, 61 L. R. A. 394; Schultz v. Highland Gold Mines Co. (C. C.) 158 Fed. 337, 340.

The question here, therefore, is not the jurisdiction or power of the court below to enjoin the bank from proceeding to enforce or collect its judgment, but whether or not the court's exercise of that power

was just and wise. By his complaint the plaintiff presented a case which upon its face entitled him to receive from the bank by credit on the construction company's note or by payment to him the proceeds, probably amounting to \$220,000, of the \$250,000 of Terminal bonds and the value of the \$750,000 of bonds of the railroad company, and perhaps a credit or payment on account of the dividends from the Van Blarcom estate—a matter which is purposely left without discussion or determination until after the facts relative thereto are proved. On the other hand, the bank presented an affidavit of its president to the effect that it claimed the right to apply the proceeds of the \$250,000 of the Terminal bonds to the payment of debts of the construction company to it, other than that evidenced by its \$700,000 debt, and that upon the payment of its judgment against the plaintiff it was willing to surrender to the plaintiff the \$750,000 of the bonds of the railroad company.

The plaintiff alleged in his complaint that, if the bank had credited the proceeds of the \$1,000,000 of the bonds on the \$700,000 debt of the construction company those proceeds would have paid that debt, and there would be nothing to pay on the judgment against him, which is a mere collateral security for the payment of the \$700,000 debt, and his counsel persuasively argue that the bank ought not to be permitted to collect the judgment against him until the issues concerning the bonds and dividends are adjudged, and the proper credits on account of them are made. But when the court below denied the application for the injunction the bank after extended litigation had recovered an unassailable judgment against the plaintiff that he was indebted to it, and that he ought then to pay to it, \$700,000 on account of his conversion of the 10,000 shares of Terminal stock. The fact that the plaintiff had disputed and unliquidated claims for many hundred thousands of dollars against the bank, founded on its alleged fraudulent misappropriation of the pledged securities, was not sufficient to warrant an injunction against the collection of this judgment. To warrant such an injunction it was essential that the plaintiff should make the additional fact that the failure to issue the injunction would entail upon him irreparable loss and injury apparent to the court. He alleged that such irreparable loss and injury would result, but that was insufficient. It was indispensable to his right to the injunction that he should by averment or proof present such facts to the court that it could see from them that such injury was at least probable.

The record fails to disclose facts indicating such probable injury. It is true that in the absence of the injunction the plaintiff must pay the judgment against him before his claims to the accounting for the \$1,000,000 of bonds and the Van Blarcom dividends can be adjudicated. But that fact does not entail an irreparable loss or injury upon him, because the bank is solvent and at the end of the litigation will pay, with interest and costs, the amount which the court shall adjudge it to owe. It is no ground for an injunction against the enforcement of a judgment that the defendant has unadjudicated claims for more than the face of the judgment against a solvent plaintiff, who is a resident and is within the jurisdiction of the court; and that is the case

that this record presents. A thoughtful review of the law and the facts fails to disclose a disregard by the court below of any equitable principle or rule, or any abuse of discretion, in its action in denying the

application for the injunction.

In a short memorandum, which the court below filed, it declared that it was of the opinion that upon the face of the complaint in this case certain equities were averred which might upon full hearing entitle the complainant to some relief, and it dismissed the complaint without prejudice, and denied the application for the injunction. The result reached by this court, though different in form, is the same in effect as that approved by the court below.

Let the decree of dismissal of the complaint be reversed, let the defendant answer, if so advised, and let the order denying the application

for injunction be affirmed, without costs to either party.

SPICER v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Fifth Circuit. November 26, 1920.)
No. 3576.

Insurance \$\iff 48\$—Joint policy, payable to survivor, not collectible by deceased's representatives.

Where a husband murdered his wife, an insurance policy on the joint lives of the husband and wife, payable to the survivor on the death of either, cannot be collected by the wife's representatives, although the husband's conviction for the murder precluded him from recovering on the policy.

In Error to the District Court of the United States for the Middle

District of Alabama; Henry D. Clayton, Judge.

Action by Carl E. Spicer, administrator of the estate of Nobie N. Spicer, deceased, against the New York Life Insurance Company. Judgment for defendant (263 Fed. 764), and plaintiff brings error. Affirmed.

D. M. Powell, of Greenville, Ala. (Powell & Hamilton, of Greenville, Ala., on the brief), for plaintiff in error.

B. P. Crum and Leon Weil, both of Montgomery, Ala., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action by the plaintiff in error, suing as the administrator of the estate of Nobie N. Spicer, deceased, on a policy of life insurance dated December 23, 1912, to take effect after its delivery, upon the payment of the first annual premium, as of December 9, 1912, in favor of Samuel C. Spicer, Jr., and Nobie N. Spicer, then husband and wife, whereby the defendant in error agreed—

"to pay \$10,000 at the home office of the company in the city and state of New York to the survivor of the insured beneficiary, with right of revocation, upon receipt at said home office of due proof of the death, first occurring during the continuance of this contract, of either Samuel C. Spicer, Jr., or Nobie N. Spicer."

It was disclosed by pleadings and admissions that the husband murdered the wife by shooting her on February 25, 1913, her death so caused occurring on April 2, 1913; that the husband was duly indicted, tried, and convicted of the crime, and was sentenced therefor to imprisonment in the penitentiary of the state of Alabama for the term of his natural life; that on appeal to the Supreme Court of Alabama from the judgment of conviction it was duly affirmed (198 Ala. 13, 73 South. 396); and that the husband was serving the sentence imposed upon him. The policy contained the following provision:

"Change of Beneficiary.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, if there be no existing assignment of the policy made as herein provided, may, while the policy is in force, designate a new beneficiary, with or without reserving right of revocation, by filing written notice thereof at the home office of the company accompanied by the policy for suitable indorsement thereon. Such change shall take effect when indorsed on the policy by the company and not before. If any beneficiary shall die before this policy shall become a claim, the interest of such beneficiary shall vest in the insured."

It was not disclosed that, after the policy went into effect, any change of it in any respect was made or attempted to be made. The claim asserted by the suit is that, the surviving insured, as a result of the crime of which he has been convicted, having been deprived of the right to recover on the policy, the right to recover the stipulated sum is vested in the personal representative of his murdered wife. What is relied on as error is the action of the court in ruling against that claim.

The policy was on the joint lives of the husband and wife, payable to the survivor on the death of either. Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251. The liability imposed on the insurer by the policy is purely contractual. That instrument is the measure of the rights of everybody under it. It furnishes no support for a recovery against the insurer by one in whose behalf or favor the insurer has promised to pay nothing in the event of the death of one of the insured, leaving the other surviving. Northwestern Life Insurance Co. v. McCue, 223 U. S. 234, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57. In the absence of any change of beneficiary, made in pursuance of the provision on that subject contained in the policy, the sole obligation imposed by it on the insurer in the event of the death, first occurring during the continuance of the contract of one of the two insured, is to pay to the survivor the sum stated, upon receipt at the place stated of due proof of such death. There is no promise to pay anything to the estate, or to the personal representative, of that one of the two insured whose death first occurs during the continuance of the contract.

The acceptance of the policy evidences the consent of each of the insured that the occurrence, while the policy is in force, of his or her death, the other insured surviving, shall have the effect of entitling

the survivor, and no one else, to the sum payable under the policy. The terms of the policy give to the death of one of the two insured the effect of making the survivor the sole beneficiary. The claim asserted by the suit cannot be sustained without deciding that the insurer is subject to a liability which the terms of its policy do not show it has consented to incur. The fact that the policy contained a provision giving "the insured"—not one of them—the right to designate a new beneficiary is not a material circumstance in the instant case, as that right was not attempted to be exercised.

It was contended in argument that the claim asserted by the suit is supported by the decision in the case of Cleaver v. Mutual Reserve Fund Life Association, 1 Q. B. Law Reports (1902) 147. The facts of that case and the law applicable to it clearly distinguish it from the instant one. That was a suit by the executors of James Maybrick on a life insurance policy issued to him in favor of his wife. Florence E. Maybrick. It was decided that the executors were entitled to recover on the policy, notwithstanding the fact that the death of the insured was caused by the felonious act of the wife. It is clearly disclosed by the opinions rendered in the case that under the law governing the policy the right to maintain an action on it was in the deceased insured's personal representative, not in the person named as beneficiary. The opinions also show that the court decided that, the trust created by the policy in favor of the insured's wife having become incapable of being performed by reason of her crime, an English statute, which was referred to, had the effect of making the insurance money part of the estate of the insured, and recoverable by his legal representative.

That decision furnishes no support for the proposition that the insurance money payable under a life policy in the event of the death of the insured is recoverable by one to whom in such event the terms of the policy give no right of recovery. The just stated proposition is supported by the decision of the Supreme Court of Oklahoma in the case of Equitable Life Assurance Society v. Weightman, 61 Okl. 106, 160 Pac. 629, L. R. A. 1917B, 1210. The theory relied on by that court to sustain its decision is indicated by the following headnote:

"Where no alternative beneficiary is designated in a contract of life insurance, and the designated beneficiary becomes barred * * * by reason of the fact that she has murdered the assured, in the absence of a statute which provides an alternative beneficiary, by operation of law a trust arises in favor of the estate of the assured, by virtue of which the representative of the assured is entitled to recover the insurance fund."

Of the opinion rendered in that case no more need be said than that it has not convinced us that the rule stated in the quoted headnote is a part of the law governing the policy which is in question in the instant case. So far as we are advised, the law of Alabama, which determines the rights arising from the policy sued on, does not make the insurer in such a policy liable in any contingency to pay anything to the personal representative of that one of the two insured whose death first occurs during the continuance of the policy, by the terms of which in that event the insurance money is payable to the survivor

alone. That law does not give to the making of such a contract the effect of imposing on a party to it a liability not shown by the written

instrument evidencing it to have been incurred by such party.

Reference was made in argument to decisions to the effect that, in the case of the murder of the insured by the beneficiary named in a certificate of a mutual benefit society, the amount payable under such certificate in the event of the insured's death is recoverable by his personal representative, or by the person or persons who, under the rules or the law governing the society, are entitled to such amount in case of the death, or ineligibility to take, of the beneficiary named in such certificate. Schmidt v. Northern Life Association, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; Supreme Lodge Knights and Ladies of Honor v. Menkhausen, 209 III. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. Rep. 239; Sharpless v. Grand Lodge A. O. U. W., 135 Minn. 35, 159 N. W. 1086, L. R. A. 1917B, 670. The difference between a certificate of a benefit society and an ordinary life insurance policy is such (Royal Arcanum v. Behrend, 247 U. S. 394, 38 Sup. Ct. 522, 62 L. Ed. 1182, 1 A. L. R. 966), as to deprive the just cited decisions of influence in the consideration of the question presented in the instant case. In determining who, if not the beneficiary named, is entitled to the sum payable under a benefit certificate on the death of the insured, the rules of the society and the law governing it generally have controlling effect. The terms of an ordinary life insurance policy determine the purely contractual rights arising out of it, unless a statute provides otherwise.

In the case of New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997, it was decided that a result of an assignment by the insured in a life policy of his whole interest to one who was convicted of murdering the insured, and was legally hung for the crime, was that the assignee's representative would alone have a valid claim under the policy, if it were not void in its inception, and that error was committed by the court in refusing to admit testimony that the assignee was instrumental in procuring the issuance of the policy with the purpose of cheating and defrauding the company, and that he caused the death of the insured by felonious means. An unrevoked designation of a sole beneficiary in a life insurance policy itself is not less effective than an assignment of his whole interest by the insured. The unrevoked designation in the policy sued on of the survivor of the two persons jointly insured as the sole beneficiary in the event of the death of the other insured while the policy was in force stands in the way of the personal representative of the deceased insured having any valid claim to the insurance money sought

to be recovered.

We think that the foregoing considerations require the conclusion that the court did not err in ruling against the claim asserted by the suit. The judgment is affirmed.

TRAPNELL v. HINES, Director General of Railroads.

(Circuit Court of Appeals, Third Circuit. November 12, 1920.)

No. 2589.

1. Carriers 280(1)—Degree of care toward passengers stated.

A railroad must exercise every care for the safety of a passenger which a reasonable person would exercise under the circumstances.

Carriers 282—Duty toward person boarding train, but who is not a passenger, is to exercise ordinary care.

A person boarding a moving train, who is not a passenger, is merely a stranger or trespasser, and the railroad owes him no duty to care for his safety, except, on discovering him in a position of peril, to exercise ordinary care to save him from injury.

Carriers \$\infty\$=247(1)—Essentials required in creating relation of "passenger."

The relation of carrier and passenger commences when a person, with a bona fide intention to take passage with the carrier's express or implied consent, assumes a situation to avail himself of the transportation facilities, and it is essential that the person present himself at a proper time and place, and that the carrier have actual or constructive notice of his intention to board the train.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

4. Carriers \$\iff 247(3)\$—Person attempting to board moving train not a passenger.

A person attempting to board a moving train on the side opposite the platform, and without knowledge of defendant railroad's employes, was not a passenger, and defendant was not liable for injuries sustained by him in falling from the steps of the car.

In Error to the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Action by Joseph Trapnell against Walker D. Hines, Director General of Railroads. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Frank M. Hardenbrock and Charles M. Egan, both of Jersey City,

N. J., for plaintiff in error.

Parker, Emery & Van Riper, of Newark, N. J. (Chauncey G. Parker and John M. Ernery, both of Newark, N. J., of counsel), for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. The station of the Erie Railroad Company at Glen Ridge, New Jersey, stood on the right-hand side of Benson Avenue and on the farther side of the tracks in relation to the direction in which Trapnell was approaching it. When a block or more from the station, at the foot of the hill on the avenue, Trapnell heard the crossing-bell signalling the approach of the train he proposed to take. On nearing the station, he saw the train pulling out. Thereupon, he ran to the middle of the street-crossing on the side opposite that of the station and boarded or attempted to board the train then moving at a speed variously estimated. Having a pack-

age in his right hand, he took hold the step-rail or grab-iron with his left hand, put his right foot on the first step, then his left foot on the second step, and was in the act of raising his right foot to the third step when the train gave a lurch which caused him to be thrown to the ground and to sustain the injury of which he complains in this action.

The plaintiff sued as a passenger. In his complaint he charged the defendant carrier with the duty so to operate his train as to avoid injury to his passengers, and alleged as a breach of that duty, that, after he had boarded the slowly moving train in safety, the defendant, negligently omitting to allow him reasonable time in which to secure a seat within the car, recklessly and negligently caused the train suddenly and violently to pitch and lurch forward

"at a time when the engineer in charge of the said train knew that passengers boarding said train had not been given reasonable time to procure seats within the body of the car."

The defenses were lack of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff both at common law and by force of a statute of New Jersey. Section 55, General Railroad Law, page 4245. Under this statute any person injured "by jumping on * * * a car while in motion" is deemed to have contributed to his injury and is barred from recovery.

The issue of contributory negligence was sharply controverted by the plaintiff, first, on the theory that his injury was not sustained when boarding the train, but after he had boarded the train in safety; and second, on the inapplicability of the New Jersey law under his interpretation that it relates only to instances where a person jumped. not where a person stepped, on a moving train, within the definitions of the two words, the former denoting a bodily movement with both feet off the ground and the latter a movement with but one foot off the ground. The plaintiff further defended the countercharge of contributory negligence because of the unconstitutionality of the cited statute in that the legislature exceeded its powers and invaded the province of the judiciary in prescribing what shall be conclusive evidence of contributory negligence. United States v. Klein, 13 Wall. 128, 20 L. Ed. 519; 8 Cyc. 820, 821, 926, cases cited. The court entered judgment of non-suit on two grounds; because of contributory negligence established by force of the New Jersey statute,—the constitutionality of which was inferentially sustained; and the lack of proof of negligence on the part of the defendant. This writ brings the judgment here for review.

[1, 2] We lay aside the questions of interpretation and constitutionality of the New Jersey Act and go directly to the question of the defendant's negligence. On the assumption—most favorable to the plaintiff—that the lurch of the train was the proximate cause of his injury, we inquire, first, what duty did the defendant owe the plaintiff? The duty which the defendant owed the plaintiff depended upon their relation one to the other at the time of the injury. If the plaintiff was a passenger on a train of the defendant carrier the defendant owed him the duty to exercise for his safety every degree of care,

diligence and skill which a reasonable man would use under the circumstances. MacFeat v. P., W. & B. R. R. Co., 5 Pennewill (Del.) 52, 67, 68, 62 Atl. 898; Id., 6 Pennewill (Del.) 513, 69 Atl. 744; Warner v. B. & O. R. R. Co., 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; D., L. & W. R. R. Co. v. Price, 221 Fed. (C. C. A. 3d) 848, 137 C. C. A. 406. If the plaintiff was not a passenger, he was a stranger or trespasser, and the defendant owed him no duty except on discovering him in a position of peril to exercise ordinary care to save him from injury. Kentucky Highlands R. R. Co. v. Creal, 166 Ky. 469, 179 S. W. 417, L. R. A. 1916B, 830, Ann. Cas. 1917C, 1205. As the plaintiff brought this action as a passenger and declared on a breach of the defendant's corresponding duty, the next question is, whether there was evidence, which, if submitted to a jury, would sus-

tain a finding that he was a passenger.

[3] The relation of carrier and passenger commences when a person with a bona fide intention to take passage, with the consent of the carrier, express or implied, assumes a situation to avail himself of the facilities of transportation which the carrier offers. Pere Marquette R. R. Co. v. Strange, 171 Ind. 160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A. (N. S.) 1042, 1046. The essentials of this relation are that the person intending to become a passenger must present himself at a proper time, and in a proper manner, and at some place under the control of the carrier, so that the carrier may have opportunity to exercise the high degree of care which the law exacts from it in the passenger's behalf. 4 R. C. L. 1031, 1032, and cases. To this end it is essential that the carrier have knowledge of the fact that the person intends to board the train; knowledge in this case being either actual or such as is charged to it by reason of the acts and conduct of the person and by such facts and circumstances as would reasonably inform and notify the carrier of the person's intention to board its train. MacFeat v. P., W. & B. R. R. Co., supra.

[4] Conscious of the care which the law exacts for the protection of passengers, the defendant carrier in this instance afforded the plaintiff a station platform from which to board the train, time in which to board the train, and the protection of the customary train attendants. The plaintiff did not avail himself of these instrumentalities of safety but boarded the train on the wrong side after the train had started; that is, on a side at which the carrier had made no preparation to receive passengers and at a time when the carrier had, by starting the train, withdrawn his invitation to passengers. There is no evidence that any of the trainmen knew and no circumstance charging any of them with knowledge of the plaintiff's attempt to board the train, or of the fact that later he had gotten on the steps of the car, except that a man (who might have been a trainman) was standing on the platform, and who in an instant realized the plaintiff's danger and tried to save him from falling. As the plaintiff in thus boarding the train did not put himself in the care of the carrier and did not bring his presence to the carrier's knowledge, he was not a passenger in contemplation of law. Spannagle v. Chicago & Alton R. R. Co., 31 Ill. App. 460; Southern Railway Co. v. Smith, 86 Fed. 292, 30 C. C. A. 58, 40 L.

R. A. 746; Kentucky Highlands R. R. Co. v. Creal, 166 Ky. 469, 179 S. W. 417, L. R. A. 1916B, 830, Ann. Cas. 1917C, 1205.

Failing to establish the relation and corresponding duty on which alone his right to recovery was based, the plaintiff failed to prove negligence on the part of the defendant. The trial court therefore committed no error in entering judgment of non-suit.

Affirmed.

KOZIMKO v. HINES, Director General of Railroads.

(Circuit Court of Appeals, Third Circuit. November 12, 1920.)

No. 2587.

Commerce 27(5)—Crane for unloading coal cars not engaged in "interstate commerce," under Employers' Liability Act.

A crane used for unloading coal cars, so as to create a coal reserve to be used in both interstate and intrastate commerce in case of a threatened strike, was not engaged in "interstate commerce," and a person killed while on his way to work upon such crane could not recover under the federal Employers' Liability Act (Comp. St. §§ 8657-8665).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

In Error to the District Court of the United States for the District

of New Jersey; Charles F. Lynch, Judge.

Action by Joseph Kozimko, administrator of Joseph Pekalska, deceased, against Walker D. Hines, Director General of Railroads. Judgment for defendant, and plaintiff brings error. Affirmed.

Frank M. Hardenbrook and Charles M. Egan, both of Jersey City,

N. J., for plaintiff in error.

William A. Barkalow, of New York City (Charles E. Miller and George Holmes, both of New York City, of counsel), for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. Of the several issues here involved the one on which recovery primarily depends is whether the plaintiff's decedent was at the time of his injury employed in interstate commerce within the meaning of the Federal Employers' Liability Act. Act of April 22, 1908, 35 Stat. 65, c. 149, amended by Act of April 5, 1910 (Comp. St. §§ 8657–8665), printed in full in Second Employers' Liability Cases, 223 U. S. 6, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

The stipulated facts are these:

For two weeks prior to the accident the decedent had been employed at night in keeping up fires used in operating a crane located at Port Johnson, Bayonne, New Jersey. For the same period, the crane had been used in the daytime exclusively to unload coal from cars to the ground "for use by the Director General in operating the Central Railroad of New Jersey."

The coal, having been transported from outside the State of New Jersey, had, prior to being unloaded, "reached its destination * * * in the storage yard" of the railroad company. "This coal was to be used to accumulate a reserve supply of coal in view of the then threatened coal strike, and was to be used, in the event of the normal supply being cut off, for any purpose that coal was needed in the operation of said railroad."

It being possible that some of the coal thus stored might be used for coaling engines engaged in interstate commerce, the parties stipulated further that "the nearest coaling station to said storage pile was about one and one-half miles distant from the place where the said crane was being operated and said coal unloaded," and that "the said coaling station was used to coal freight engines used indiscriminately in interstate and intrastate commerce."

The place where the accident happened was about seven miles from the place where the decedent worked. In going to the station to take a train for the place of his employment, the decedent, instead of going on the public streets for a distance of several blocks, walked toward the station along the railroad tracks. While doing so, he was struck by an engine moved in a negligent manner, it is alleged, and was killed.

On this showing the District Court found that the decedent was not at the time employed in interstate commerce, and accordingly entered judgment of non-suit. The plaintiff sued out this writ of error.

We lay aside the question whether the act of the decedent in going upon the tracks on the way to his night's work was a necessary incident of his work and therefore partook of its character, Nor. Car. R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662; and inquire directly whether the crane was used in interstate commerce, for upon the use of the crane with respect to commerce depends in any event the character of the decedent's employment at the time of his death.

On the stipulated fact that the coal had reached its destination prior to being unloaded, the learned trial judge held that it had lost its character of interstate commerce, and that in consequence the crane, when sometime afterward it handled the coal, was not an instrumentality of commerce of that kind, resting his decision on C., B. & Q. R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, and Lehigh Valley R. R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070. In these cases—both injured employés being members of switching crews—the Supreme Court held that the several acts of switching coal cars from storage tracks to coal sheds where later the coal was to be unloaded and placed in bins or chutes for supplying locomotives engaged in interstate and intrastate traffic were not interstate movements; and that employés engaged in such movements, like employés engaged by a carrier in mining coal in the carrier's colliery destined for use in interstate commerce, D., L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, were employed in work so remotely related to interstate commerce as not to be a part of it within the meaning of the Act.

The error which the plaintiff charges against the trial judge is in applying the rule of the Harrington and Barlow Cases to the facts in

this case, which, he maintains, are essentially different.

Conceding that the coal in this case had lost its status of interstate commerce on arriving at its destination (as in the two cases last referred to), the plaintiff contends, nevertheless, that by the next step, namely, unloading the coal and holding it in reserve, thereby bringing it nearer its future use, the coal acquired anew the character of interstate commerce and the crane by which it was unloaded became at the same time an instrumentality of commerce of the same character, relying on Erie R. R. Co. v. Collins, 259 Fed. 172, 170 C. C. A. 240 (C. C. A. 2d), affirmed by the Supreme Court at 253 U. S. 77, 40 Sup. Ct. 450, 64 L. Ed.-790.

The Collins Case concerned an injury to an employé while working upon an engine used to pump water to a watertank which supplied locomotives engaged in commerce of both kinds. Because of the direct relation of the pump to interstate commerce—a closer relation than that of shifting coal cars to coal sheds, as in the Barlow and Harrington Cases—the court held the pump to be an instrumentality of interstate commerce.

While in the case at bar the unloading of the coal on the ground was one step nearer its use in commerce than was taken in the Harrington and Barlow Cases where the coal was not unloaded, yet the case at bar, involving more movements from car to commerce, falls short the very step taken in the Collins Case which brought the instrumentality of use near enough to the commerce in which it was employed to partake of its character.

The decision in the Collins Case is justified on the ground that the water pumped into the tank would ultimately and inevitably enter into commerce of both kinds and that the pump which forcel the water in aid of such commerce was therefore so closely related to interstate commerce as to be a part of it. The pump had, like a roadbed, become permanently devoted to commerce among the states. Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54; Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. But the coal in the case at bar, though unloaded from cars, had not been consigned to commerce. It had not been placed in bins or chutes from which it would serve commerce of either kind. It had been placed on the ground and stored, "to be used for any purpose," chiefly to meet the exigencies of a threatened strike. Its use in commerce was neither immediate nor certain. Its use in interstate commerce depended upon a double contingency—first, a strike; and second, the need therein of reserve coal; one, or the other, or both of which events might never happen. As the character of instrumentalities of commerce depends upon their "employment at the time, not upon remote probabilities or upon accidental later events," M. & St. L. R. R. Co. v. Winters, supra, we cannot regard the storing of coal against the two contingencies we have named as being so certainly and so closely related to the interstate commerce that might follow "as to be practically a part of it." Therefore we find no error in the rulings of the trial court that the crane used in unloading and storing coal was not at the time of the decedent's injury an instrumentality of interstate commerce, and that the decedent when killed was not employed in commerce of that character. Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; Shanks v. D., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; Erie R. R. Co. v. Van Buskirk, 228 Fed. (C. C. A. 3d) 489, 143 C. C. A. 71.

The judgment below is affirmed.

WALKER GRAIN CO. v. GREGG GRAIN CO. et al.

(Circuit Court of Appeals, Fifth Circuit. November 10, 1920.)

No. 5551.

 Bankruptcy \$\infty\$ 95—Scope of issues in involuntary proceedings submitted to jury stated.

A trial by jury upon a petition for involuntary bankruptcy is confined to the issues of insolvency and whether acts of bankruptcy were committed.

2. Bankruptcy 5-95—Jury trial in involuntary proceedings governed by common-law principles.

A jury trial upon a petition for involuntary bankruptcy is governed by common-law principles, including right of court to direct a verdict.

3. Bankruptcy € 91(2)—Insolvency held established as matter of law.

Evidence regarding an alleged bankrupt's assets, consisting principally of disputed claims against railroads and others, and liabilities, composed largely of petitioning creditors' claims for breach of contract to accept corn tendered it, held to establish insolvency as matter of law.

4. Bankruptcy 467—Directed verdict on requested peremptory instructions

unassailable, if supported by evidence.

Where an alleged bankrupt and its petitioning creditors requested peremptory instructions on the issue whether acts of bankruptcy had been committed, a directed verdict on this issue is unassailable, unless there was no sufficient evidence to support it.

In Error to the District Court of the United States for the Northern

District of Texas; James Clifton Wilson, Judge.

Petition in involuntary bankruptcy. Proceeding by the Gregg Grain Company and others against the Walker Grain Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. H. Slay, U. M. Simon, and Mike E. Smith, all of Ft. Worth,

Tex., for plaintiff in error.

H. C. Ray, Stanley Boykin, and S. B. Cantey, all of Ft. Worth, Tex. (Capps, Cantey, Hanger & Short, of Ft. Worth, Tex., and Orestes Mitchell, of St. Joseph, Mo., on the brief), for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges,

KING, Circuit Judge. This case has heretofore been before this court on a petition to superintend and revise the action of the Dis-

trict Court in appointing a receiver. The order appointing such receiver was held to be fully warranted. 260 Fed. 1022, 171 C. C. A. 669.

It originated on August 16, 1918, by the filing of a petition by the defendants in error against the Walker Grain Company, seeking to have it adjudged a bankrupt. In its answer thereto the respondent demanded a trial by jury on the questions of insolvency and the commission of acts of bankruptcy. This case was so tried on November 10, 1919.

At the conclusion of the evidence the petitioning creditors moved the court to peremptorily instruct the jury to find that the respondent while insolvent committed the acts of bankruptcy charged. The respondent moved the court to peremptorily instruct the jury to find all the issues in the case in its favor, except as to the corn actually shipped and as to the insolvency of respondent. The court found that the undisputed evidence showed that the respondent, within four months next preceding the filing of the petition herein, had committed acts of bankruptcy while insolvent, and was insolvent at the time of the filing of the said petition, and instructed the jury to find the respondent to be a bankrupt on the 16th day of August, 1918.

[1] The error complained of is that the court should not have withdrawn the issues of insolvency and of the commission of the acts of bankruptcy from the jury. If the court did not err in so doing, the other errors assigned become immaterial. A trial by jury at this stage in bankruptcy proceedings is confined to two issues, namely, insolvency and the commission of the acts of bankruptcy. Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200.

[2] The incidents of jury trial at common law, including the right of the judge to direct a verdict, as in other jury cases, attend such

jury trials in bankruptcy.

"The trial before a jury is conducted and subject to the immemorial rules surrounding a trial at common law. The right to introduce evidence by way of deposition is unquestioned, and the method of taking evidence is further suggested by the equity rules. The judge can take the case from the jury by directing a verdict, if no question of fact develops, or he can set the verdict aside. If each party asks the court to direct a verdict in his favor, it is equivalent to a request for a finding of facts, and if the court directs the verdict, both parties are concluded on such findings." Collier on Bankruptcy (1917) pp. 490, 491.

If the evidence conclusively showed that the respondent was insolvent, and if there was evidence of the commission of the acts of bankruptcy charged, the instruction of the court was authorized.

[3] In this case the petitioning creditors' claims originated in contracts made for the future delivery of corn. These contracts were admitted to have been made. A part of this corn was shipped, and rejected by respondent. The claims on this score amounted to \$21,479.74. These were the claims which the respondent reserved from its request for peremptory instructions.

The remainder of the claims of petitioners was for the difference between the contract price and the market price of so much of the corn contracted to be taken which was not shipped, and as to which petitioners canceled the contracts, because of respondent's refusal to give shipping directions. These claims amounted to \$76,227.00. There was no dispute as to the facts regarding these claims. The only defense was that the petitioners had waived by certain communications the time of delivery, and that therefore they were not in a position to cancel said contracts. It was not contended that, if the contracts were properly canceled, the amounts claimed by petitioners were not correct.

The court properly held under the undisputed facts that the cancellations were proper, and the items on the claims for the canceled contracts should be considered as debts in determining the question of insolvency. Indeed, under the requests of both parties for peremptory instructions, the question of the validity of the petitioners' claims, except as to the corn actually delivered, was submitted for decision by the court, so far as it was involved in the issues of the case, and its finding was fully sustained by the evidence. The undisputed evidence shows debts other than these of petitioning creditors, which respondent admits to be due, aggregating \$43,170.17. Therefore, excluding from computation the claims as to the corn actually shipped, the indebtedness from the admitted debts and the claims of petitioners on the canceled contracts of the bankrupt was \$119,397.17.

As to the assets claimed by the respondent, the bulk thereof consisted of claims against certain railroad companies, many of them two years old, and disputed; an item of \$32,700 real estate, which the evidence shows was held adversely to the respondent under a foreclosure sale under liens superior to its claim; and claims aggregating over \$48,000 against petitioning creditors, alleged to be due because of a refusal to deliver the corn on demands for it made by respondent on July 8, 1918, under the contracts which the court properly held had been previously canceled under the uncontradicted facts. Deducting the items of the claims against petitioners and the \$32,700 for real estate, and the face value of the remaining assets was much less than the debts.

The remaining assets were choses in action, many of which were claims due for a considerable time and disputed. No proof was offered as to the value of these other assets. J. L. Walker, president of respondent, admitted that the company had no money in hand; indeed, in testifying as to the withdrawal of money from the bank on July 19, 1918, he denied that any money was withdrawn from the account of the respondent, and said the company was "broke," while denying that it was insolvent.

In endeavoring to effect an adjustment with one of the creditors of the respondent in April, 1918, said Walker, its president, urged as a ground for accepting the settlement offered that the Walker Grain Company was insolvent. Walker never denied making this statement. The evidence showed beyond dispute that the respondent was insolvent.

[4] As to the acts of bankruptcy, the requests of the defendant and petitioning creditors for peremptory instruction on this issue, as above shown, make the direction of the court thereon unassailable

unless there is no sufficient evidence to support it. Sena v. American Turquoise Co., 220 U. S. 497, 31 Sup. Ct. 488, 55 L. Ed. 559; Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654. Not only is this not the case, but there is undisputed evidence of the commission of more than one of the acts of bankruptcy charged.

The action of the court in directing a verdict was fully justified under the evidence, and the judgment of the District Court is affirmed.

GATEWAY PRODUCE CO. v. FARRIER BROS.

(Circuit Court of Appeals, Fifth Circuit. November 23, 1920.)

No. 3590.

 Sales \$\infty\$ 88—Jury question regarding effective date of instrument.
 Evidence that the parties agreed a written contract for the sale of peaches should not be effective, unless defendant seller was able to secure the peaches from a third party, which he was unable to do, etc., held to make a jury question whether the instrument sued on became effective as a contract.

effective until a certain event occurred, the instrument is not binding as a contract prior to the occurrence of such event, although in form a complete contract, and possession is exchanged under it.

Evidence = 444(2) — Effective date of contract, dependent on future event,

may be proved by parol.

That parties who signed a written instrument agreed it should not become effective as a contract prior to the occurrence of a future event may be proved by parol.

In error to the District Court of the United States for the Eastern District of Texas; W. Lee Estes, Judge.

Action by the Gateway Produce Company against Farrier Bros. Judgment for defendants, and plaintiff brings error. Affirmed.

J. Q. Mahaffey, of Texarkana, Tex., for plaintiff in error. A. L. Burford, of Texarkana, Tex., and Joseph Milton Burford, of Mt. Pleasant, Tex., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action by the plaintiff in error, Gateway Produce Company, to recover damages for the alleged breach by the defendants in error, Farrier Bros., of an alleged contract evidenced by a written instrument of which the following is a copy:

"Omaha, Texas, 5-30-1918."

"In consideration of \$1.00 in hand paid. This contract between Gateway Produce Co., of Texarkana, Ark., and Farrier Bros., of Omaha, Tex. Farrier Bros. agree to sell and deliver to Gateway Produce Co. 35 cars of No. 1 Elberta peaches of No. 1 quality, inspected by state inspector, and loaded on cars at Mt. Vernon, Tex. Price to be paid by Gateway Produce Co. to Farrier Bros. is \$1.35 per bushel cash on track. A forfeit of \$2,500 from

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each of said Farrier Bros., and Gateway Produce Co., made payable to M. & P. Bank of Texarkana, Ark., in order that said Gateway Produce Co. may take said peaches and said Farrier Bros. may deliver said peaches during the season 1918.

[Signed] Farrier Bros.,

"H. M. Farrier.
"Gateway Prod. Co.,
"By J. A. Robison."

The respective parties are herein referred to as the plaintiff and the defendants. The defendants put in issue the alleged making of the contract sued on, and filed pleas to the effect that, if the alleged contract was made, it was abrogated and canceled by the parties thereto, and that the instrument sued on was signed by the respective parties in duplicate; one of the copies being handed to the plaintiff's representative, with the understanding and agreement that it was not to be effective if the plaintiff did not buy the peaches called for from one C. S. Martin, who resided at Mt. Vernon, Tex., and that, if such purchase was made from Martin, the representatives of the plaintiff and of the defendants and said Martin were to go together to Texarkana, where a sale contract was to be made by Martin, and the plaintiff and the defendants were to make the deposit called for by the instrument.

In the trial evidence was adduced tending to prove the following: Early in the afternoon of May 30, 1918, J. A. Robison, an officer of the plaintiff company, went to the place of business of the defendants at Omaha, Tex., and made it known to H. M. Farrier, one of the defendants, that the plaintiff wanted to buy some peaches. Farrier stated that he did not have any peaches, but that his firm was the sales agent for the Mt. Vernon peaches; that on the day before one Martin had telephoned to him from Mt. Vernon, offering 35 cars of peaches, at \$1.25 per bushel; and that possibly he (Farrier) could get those peaches for the plaintiff at 10 cents a bushel profit. After Robison had assented to that suggestion, Farrier called Mr. Martin over the telephone, and the latter stated that he had not sold the peaches, but had that day offered them to another person; that Farrier could get them if they were not taken by the other person, to whom they had been offered; and that he (Martin) was going down on that afternoon's train to Texarkana, and suggested that Farrier go to Texarkana on the same train and close the matter up.

Thereupon Farrier and Robison agreed on the terms of sale of the peaches the former expected to get from Martin, and that they (Farrier and Robison) would go to Texarkana on the same train on which Martin was going. Upon Robison suggesting that it would be so late when they got to Texarkana that he (Robison) probably could not get a stenographer there, the instrument sued on was dictated, typewritten in duplicate, and signed, and one of the copies was handed to Robison, with the understanding and agreement between him and Farrier that the contract which the instrument was to evidence was not to be effective until Farrier got Martin's contract for the sale of the peaches and the forfeit was put up in the bank of Texarkana. Immediately after this occurred, Robison left Omaha to go to Naples, a place 4½ miles from Omaha, and a railroad station between Omaha and

Texarkana.

When Farrier went to take the train for Texarkana, Martin, who was on that train, called him to a car window and told him that just before he (Martin) got on the train at Mt. Vernon he received a telegram of acceptance from the person to whom he had offered the peaches he had for sale, and that consequently Farrier could not get the peaches about which they had talked over the telephone. Thereupon Farrier returned to his place of business, and by telephone communicated with Robison at Naples, telling him of Martin's sale of the peaches, that therefore he (Farrier) would not be on the train, and requesting Robison to return by mail the contract that had been prepared, or destroy it, to which request Robison replied by saying, "I will."

There was evidence in conflict with material parts of that above set out. There was no controversy about the facts that the peaches called for by the instrument sued on were not furnished by the defendants to the plaintiff, and that the defendants did not get a contract

from Martin for the sale of the latter's peaches.

Exceptions were reserved to rulings on objections to evidence, and to the part of the court's charge to the jury which was to the effect that they should return a verdict in favor of the defendants, if they found from the evidence that at the time the instrument sued on was signed and a copy of it was given to the plaintiff it was not intended by the parties then to be a contract, and was not to become effective or to be a contract until Martin had made a contract for a sale of his peaches to the defendants. The court by its charge plainly instructed the jury to the effect that under a phase of the evidence adduced it was permissible for them to find that the instrument sued on was executed and delivered as a contract, and that if they so found they should return a verdict in favor of the plaintiff.

[1-3] The above set out phase of the evidence fully justified the court in submitting to the jury the question whether the instrument sued on did or did not become effective as a contract. Where a written instrument, though in form it is a complete contract, and though possession of it is given or exchanged by the parties who sign it, is, when it is signed and possession of it is given, by agreement of the parties made to depend, as to its going into operation, on an event thereafter to occur, it is not effective or binding as a contract prior to the occurrence of such event, and the fact that the parties who signed a written instrument so agreed may be proved by parol evidence. Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563; Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; 3 Jones, Commentaries on Evidence, § 471. The rulings of the court which are complained of were in conformity with the above-stated well-settled law. In our opinion there is no merit in any assignment of error which is insisted on.

The judgment is affirmed.

SHERMAN v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 20, 1920.)

No. 3528.

Customs duties = 134—Burden of proving wrongful importation on government.

Under Rev. St. § 3082 (Comp. St. § 5785), prohibiting the receiving of goods known to have been wrongfully imported, and making the defendant's unexplained possession of such goods sufficient to authorize conviction, no presumption that the goods were imported contrary to law arises from the defendant's possession thereof, and the government has burden of proving this fact.

 Customs duties ☐ 134—Conviction for receiving wrongfully imported goods not sustained by evidence of defendant's possession.

In a prosecution under Rev. St. § 3082 (Comp. St. § 5785), prohibiting receiving goods known to have been wrongfully imported, and making defendant's unexplained possession sufficient evidence to authorize conviction, the fact that alleged Mexican intoxicating liquor was found in defendant's possession, and he admitted its ownership, held insufficient to show that the liquor was wrongfully imported during the war with Germany.

Criminal law 552 (3)—Circumstantial evidence must exclude every reasonable hypothesis, except accused's guilt.

In a criminal prosecution, where the evidence is purely circumstantial, the proof must exclude every reasonable hypothesis, except accused's guilt.

In Error to the District Court of the United States for the Del Rio Division of the Western District of Texas; Du Val West, Judge.

Charles G. Sherman was convicted of having unlawfully received and concealed imported intoxicating liquors, and brings error. Reversed.

David E. Hume, of Eagle Pass, Tex., for plaintiff in error. Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The plaintiff in error, Charles G. Sherman, was indicted in the United States District Court for the Western District of Texas, Del Rio Division, for having unlawfully received and concealed 13 bottles of tequila—

"the same being intoxicating distilled spirits, which had been theretofore, but subsequently to September 10, 1917, and during the continuance of the then existing war between the United States and Germany, and before the termination of the period of demobilization, imported into the United States contrary to law, in that the importation of the said spirits was absolutely forbidden during the said period by the laws of the United States of America; the said Charles G. Sherman then and there knowing the same to have been imported contrary to law."

The defendant was convicted and sentenced to six months' imprisonment in the county jail at Val Verde county, Tex.

The defendant introduced no evidence, but at the conclusion of the

evidence for the United States moved the court to instruct the jury to return a verdict of not guilty upon the following grounds:

(a) Because there was no proof introduced to sustain the allegations of the indictment that tequila was intoxicating distilled spirits.

(b) There was no proof of what tequila was.

(c) There was no proof that said tequila had been imported subsequent to September 10, 1917, or during the continuance of the war between the United States and Germany, and before the termination of the period of demobilization, as alleged in the indictment.

(d) There was no proof that such tequila had been imported contrary to

law.

The error assigned in this court is that the trial court erred in refusing to direct a verdict of not guilty at the close of all the evidence, upon

motion of the defendant, for the several reasons above stated.

The entire evidence in the case was to the effect that on October 5, 1919, defendant's house was searched and 13 bottles of tequila were found therein in a baby buggy covered with a quilt and a pillow. The bottles were labeled, and the labels bore a picture and Mexican stamp. Defendant came in while the search was being conducted, and stated that the tequila was his. He did not state where he got it, or how long he had had it. The only other testimony was that of the customs officers, who testified to the effect that they tasted and smelt the contents of these bottles, and that they knew it to be tequila, which was manufactured in Mexico. One of these officers, on cross-examination, stated that he could not say when the tequila was taken to the place searched.

The statute under which this defendant was indicted provides:

Whoever shall knowingly import into the United States, or whoever shall receive and conceal merchandise, after importation, knowing same to have been imported contrary to law, shall be punished, etc. "Whenever, on trial for a violation of this section, the defendant is shown * * * to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury." Rev. St. § 3082 (Comp. St. § 5785).

The only illegality claimed to exist, in regard to the importation of the tequila in question, is that the same was imported after September 10, 1917, during existence of a state of war between the United States and Germany, and before the period of demobilization. This is the sole charge in the indictment. It was testified by the officers in this case that prior to said 10th of September, 1917, such tequila could be admitted into the United States on payment of duty. There was no evidence in this case as to how long this tequila had been in the United States. For aught that appears, it may have been imported prior to September 10, 1917, and may have passed through the hands of a number of persons in the United States before it came into the possession of the defendant Sherman.

[1] The presumption which is raised by the foregoing statute is simply that, where possession of goods which have been proved to have been imported contrary to law is shown, the burden of explaining such possession is placed upon the defendant. But the statute does not raise any presumption that the goods were imported contrary to law.

The burden of proving this fact beyond a reasonable doubt rests upon the Government. United States v. Lot of Jewelry, 13 Blatchf. 60, Fed. Cas. No. 15,626.

[2, 3] We are unable to find in this case any evidence as to when these goods were imported. The indictment expressly charges that they were illegally imported, because imported after September 10, 1917, during existence of a state of war between the United States and Germany, and before the completion of demobilization, when the importation of the said spirits was absolutely forbidden during the said period by the laws of the United States. The only fact pointing to criminality is that these goods were found in the defendant's possession in a baby buggy covered with a pillow and quilt. The case is purely one of circumstantial evidence, and the rule in such cases is that the proof shall exclude every other reasonable hypothesis, except the guilt of the accused. Wright v. United States, 227 Fed. 855, 142 C. C. A. 379; Garst v. United States, 180 Fed. 339, 103 C. C. A. 469; Vernon v. United States, 146 Fed. 121, 76 C. C. A. 547.

The circumstances above detailed do not indicate when these goods were imported. They may have been imported prior to September 10, 1917, and they may have passed through several hands before they were received by the defendant in this case. The alleged concealment, such as it was, may have been due to reasons other than the fact that these goods had been imported after September 10, 1917, at a time when absolutely forbidden by law. It would be establishing a dangerous precedent to hold that the proof in the case is sufficient to support a verdict of guilty of receiving merchandise illegally imported, as charged in the indictment.

As the judgment must be reversed, because of the refusal of the court to instruct the jury to find the defendant not guilty, because of want of proof that the tequila had been imported subsequent to September 10, 1917, it is unnecessary to pass upon the other questions made in the record.

Judgment reversed.

THE FERM.

LINDERUP v. JACKSON et al.

(Circuit Court of Appeals, Fifth Circuit. November 16, 1920.) No. 3457.

 Salvage 51—Finding, supported by sufficient oral evidence, will not be disturbed.

Where there is sufficient oral evidence to warrant a finding awarding salvage for towing a disabled vessel to port, the finding will not be disturbed by the Circuit Court of Appeals.

2. Salvage \$\iiists 34\$—Salvage award for towing disabled vessel not excessive.

That a vessel was unable to move under her own power, that the flooding of her engines and disabled steering apparatus made her handling peculiarly difficult, etc., held to sustain a salvage award of \$10,000 for towing to safety a vessel whose value, including her cargo, exceeded \$277,000.

Appeal from the District Court of the United States for the South-

ern District of Alabama; Robert T. Ervin, Judge.

Libels by Marshall T. Jackson and others against the steamship Ferm; Rolf W. Linderup, claimant. From a decree for libelants (258 Fed. 716), claimant appeals. Affirmed.

Palmer Pillans, of Mobile, Ala., for appellant.

Gregory L. Smith and Elliott G. Rickarby, both of Mobile, Ala., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The steamship Ferm, laden with yellow pine lumber, above and below deck, left Ship Island, Miss., on October 22, 1915, bound for Norwalk, Conn. On October 23d she began to leak, and during the afternoon of that day the water rose, despite the use of the ship's pumps, so that the fires in the furnaces were put out. This interfered with the operation of the pumps and the steering gear, which were operated by steam. There was one smaller pump operated by hand, and an arrangement for steering without the use of the steam; but this arrangement for hand steerage got out of order, and the wheel was hard over and jammed. There was a heavy sea on, and the Ferm fell into the trough and wallowed. She was at that time about 60 miles from land. She continued wallowing during the 24th, and until the afternoon of the 25th. By this time the weather had moderated.

About 4:30 p. m. of October 25th, a motor schooner, the Louise Pol came alongside and agreed to tow the Ferm. She continued so doing until the afternoon of the 26th, about 1:30 p. m. When the fires went out on the 23d, the Ferm had taken about 3½ feet of water. When the Louise Pol ceased towing on the afternoon of the 26th, she had taken between 7 and 7½ feet of water. When the Louise Pol commenced towing the Ferm, she was about 27 miles offshore in about 26 fathoms of water, and the schooner towed her to a point about 5 miles off Petit Bois Island and 8½ miles off of Horn Island bar in 9 fathoms of water. Here the Ferm anchored; the weather being moderate and the anchorage good.

Before the Louise Pol hailed the Ferm she had spoken a steamer equipped with wireless, and had her send out a message to the United States authorities, asking them to send a tug to her assistance. She also sent out a boat and crew to communicate with the nearest naval station and ask for like assistance. Her cargo was government prop-

erty for the Shipping Board.

By some means the naval authorities learned of her plight, and on the morning of the 26th, by direction of the officers in charge of the naval patrol boat at Pensacola, the tug Echo, W. C. Clark, captain, came out in search of the Ferm, and sighted her about 4:30 p. m., just as the Louise Pol was leaving her. After some conversation the Echo began towing the Ferm, for the purpose of taking her into Mobile. She towed her with a manilla cable attached to a bridle made of a wire cable belonging to the Ferm. The weather began to get stormy, and about 1:30 a. m. on October 27th a part of the wire

bridle parted, which caused a slackening, and a sudden jerk when the slack was taken up, which broke the manilla tow rope. By that

time it had grown quite rough and a heavy sea was on.

By about 20 minutes of skillful seamanship another towline was passed from the tug to the steamer, but in about 20 minutes this second rope parted. The Echo then directed the Ferm to anchor, and after seeing this successfully done, and the anchor holding, the Echo went inside the Mobile bar, lying at the wharf at Ft. Morgan from about 4:30 a. m. Sunday morning, October 27th, to early Monday morning, October 28th. About 6 a. m. of that date the Echo, accompanied by the Claude, a smaller tug, went out to the Ferm and brought her in, delivering her at the wharf at Mobile on Monday evening (28th) about 7 p. m. The services of the Claude were necessary.

The jammed condition of the wheel of the Ferm caused her to sheer to such an extent that the Claude had to take a line over her stern and act as a rudder to the Ferm to keep her in the channel until she came into smooth water inside the bar. Then the Claude lashed to the port side, the Echo being on the starboard side of the Ferm, and brought her to the dock at Mobile. The tugs were owned by the Mobile Towing & Wrecking Company. Libels have been filed by the crews of the Echo and the Claude, and by the owner of said tugs, claiming large sums as salvage, in the United States District

Court at Mobile, Ala.

The court has allowed \$10,000 as salvage, apportioned 80.43 per cent. to the Ferm, and 19.57 per cent. to the cargo, which, with interest and cost, as stated in the decree of August 26, 1919, was finally adjudged— the sum of \$8,310.97 against the Ferm and \$2,022.20 against the cargo. The claimant of the cargo has acquiesced in the decree against it, and the appeal is prosecuted alone from the findings against the vessel. The point insisted on is that the allowance made is too large, because the court was in error in finding that the Ferm ran great risk of entire loss, if any considerable delay occurred in relieving her.

- [1] The court below, which heard the evidence, found on conflicting testimony that the Ferm was in a dangerous situation, from which she was rescued by the efforts of these tugs; that her machinery was placed in the stern, and that, unless rescued, she in all probability eventually would have sunk by the stern and have capsized. The testimony for the libelants was delivered orally before the court, who saw these witnesses and could better appraise the comparative weight to be given to their testimony as against the testimony of the claimant, which was chiefly in the form of depositions. There was quite sufficient evidence to warrant the finding of the court on this point. In such a condition of the testimony the finding of the District Court will not be disturbed by the Court of Appeals. The Samson, 217 Fed. 344, 347, 133 C. C. A. 260; Philadelphia & Gulf S. S. Co. v. McCauldin 202 Fed. 735, 121 C. C. A. 197; Philadelphia B. & W. R. Co. v. Southern Transportation Co., 205 Fed. 732, 124 C. C. A. 26.
- [2] It was quite evident from the testimony, and is not disputed, that the Ferm was wholly unable to move under her own power and

was permanently and completely disabled. She could never have reached a port without being taken in by some other vessel or vessels. The flooding of her engines and the disabled condition of her steering

apparatus made her handling peculiarly difficult.

Had she not been taken into port by her salvors, or others rendering like service, she would have been a total loss. The aggregate value of the vessel, her cargo, and freight was \$277,268. The owners of the cargo have acquiesced in the decree, and after notice have not joined in the appeal. Under all the facts, this court does not find any such excess in the amount awarded to the owner of the Echo and the Claude, and their crews, against the vessel, as would warrant a reversal of the decree complained of. The Fair Oaks (D. C.) 205 Fed. 192; The Craster Hall, 213 Fed. 436, 130 C. C. A. 72.

The decree of the District Court is affirmed.

ELWOOD GRAIN CO. v. WHITFIELD GROCERY CO.

(Circuit Court of Appeals, Fifth Circuit. October 11, 1920.) No. 3579.

Sales \$\iff 340\$—Seller could not sue for price, where contract limited him to action for damages determined by resale.

Where a contract for sale of corn to be shipped to the buyer expressly provided that, if the buyer failed to pay a draft for the price attached to the bill of lading, he would pay the difference between the contract price and the price realized for the grain, together with all expenses incurred in disposing of it, and the buyer refused to pay the draft and did not obtain the corn, his liability held to be that fixed by the contract, and the petition in an action by the seller for the contract price, which did not show what disposition was made of the corn, held not to state a cause of action.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Action at law by the Elwood Grain Company against the Whitfield Grocery Company. Judgment for defendant, and plaintiff brings error. Affirmed.

A. L. Miller and M. D. Jones, both of Macon, Ga., for plaintiff in error

Wallace Miller, of Macon, Ga., and Joseph E. Pottle and John T. Allen, both of Milledgeville, Ga., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action by the plaintiff in error, Elwood Grain Company, a corporation engaged in the grain business at St. Joseph, Mo. (herein referred to as the plaintiff), against the defendant in error, Whitfield Grocery Company, a corporation doing business at Milledgeville, Ga. (herein referred to as the defendant), to recover the agreed price of two lots of corn, claimed to be due under two similar written contracts for the sale of such corn by the

former to the latter. Copies of the contracts were made exhibits to the petition. The following is a copy of one of the contracts:

"Office of Elwood Grain Company, Corby-Forsee Building.
"Contract for Sale Corn. No. 9859.

"This is our contract with you and is our record of this transaction. We reserve the right to cancel it forthwith upon telegraphic notice to you, if this contract is not signed and returned immediately by you. Unless especially agreed otherwise, this is subject to the rules and regulations of the St. Joseph, Mo., Board of Trade. We will not be bound by any brokers' stipulations or agreements or representations not in accord with this contract.

"St. Joseph, Mo., 2/24, 1918. "Milledgeville Milling Co., Milledgeville, Ga.—Dear Sir:—We hereby confirm sale to you, per Webb, of 2-Cap cars of 3 W. Corn, basis 310½ cost and freight, Milledgeville. Official weights and official grades to govern settlement. For shipment 30 days.

"Special Conditions: United States Food Administration License No. G-15879.

"Demand draft when attached to bill of lading to be paid by you. In the event you fail to do so, you hereby promise and agree to pay us the difference between the contract price and the price realized for the grain, together with any and all expenses incurred in disposing of said grain.

"This contract is in every respect subject to interpretation under the laws of the state of Missouri. This contract is contingent upon strikes, delays,

floods, accidents, and other occurrences beyond our control.

"This constitutes our contract and supersedes all prior negotiations between us on this subject; but if the above is not complete accordance with your understanding of our contract, wire us immediately, since failure to notify us of error is an acceptance of this contract. 'Elwood Grain Company,

"Per H. C. Shaw.

"Accepted by M. M. Co.

"Please return this sheet, signed, for our file."

The petition averred the shipment of the corn as called for by the contracts, the routing of it to Milledgeville as requested by the defendant, that bills of lading taken for it were indorsed in blank by the plaintiff, which attached thereto drafts on the defendant for the contract price of the corn, that the drafts with bills of lading attached were forwarded through the plaintiff's bank in St. Joseph to a bank at Milledgeville, and that, when the drafts were presented to the defendant for payment by the bank at Milledgeville, the defendant refused to pay them. The petition contained no averment as to what became of the corn after the refusal of the defendant to pay the drafts for the price of it. The court sustained a general demurrer to the petition and dismissed it.

The provision of the contracts covering the event of the defendant's failure to pay demand drafts accompanying bills of lading for the corn makes it plain that it was contemplated that the plaintiff was to retain control of the corn until such drafts were paid, and that in the event of the defendant's failure to pay such a draft the corn covered by the bill of lading accompanying such draft was to be subject to be disposed of by the plaintiff, and that what the defendant obligated itself to pay in that event was, not the agreed price of the corn, but the difference between the contract price and the price realized by the plaintiff for the corn, together with any and all expense incurred in disposing of it. That provision distinctly negatives the conclusion that the defendant obligated itself to pay the contract price of corn which it did not get, but which remained under the control and subject to the disposition of the plaintiff, though the defendant's failure to get such corn was due to its own fault in failing to pay a draft for the amount of the agreed price of it. When a contract specifically fixes the liability to be incurred by a party in a contingency expressly provided for, there is no room for holding that the happening of that contingency resulted in imposing a substantially different liability, though in the absence of such provision the law would impose on the party in default a liability different from the one expressly provided for.

The petition does not contain averments showing that the plaintiff is entitled to recover anything because of the alleged breach by the defendant of its undertaking to pay the drafts drawn on it in pursuance of the contracts. The contrary not being disclosed by the averments of the petition, it may be presumed that, following the defendant's refusal to pay the drafts, the plaintiff disposed of the corn and realized therefrom enough to pay the contract price and all expenses incurred in disposing of the grain. The petition does not show that the plaintiff did not itself dispose of the corn, nor that it realized less for it than it would have received if the defendant had paid the

drafts when they were presented.

The conclusion is that the court did not err in the ruling complained of. The judgment is affirmed.

LOCKHART v. TRI-STATE LOAN & TRUST CO.

(Circuit Court of Appeals, Fifth Circuit. November 16, 1920.) No. 3478.

1. Appeal and error \$\infty\$997(3)—Directed verdict, on motions by both par-

ties, conclusive if supported by any evidence.

Where both parties move for a directed verdict, a judgment based thereon will not be disturbed, if there is evidence to support it, and a conflict in evidence becomes immaterial.

2. Adverse possession 5-19—Fencing for pasture constitutes.

The fencing of land for pasturage purposes by a lessee for more than five years constitutes adverse possession under Texas law.

In Error to the District Court of the United States for the Northern District of Texas; James Clifton Wilson, Judge.

Action at law by the Tri-State Loan & Trust Company against G. E. Lockhart. Judgment for plaintiff and defendant brings error. Affirmed.

Bruce E. Oliver, of Abilene, Tex., and Ocie Speer, of Ft. Worth, Tex. (J. F. Cunningham, of Abilene, Tex., on the brief), for plaintiff in error.

Percy Spencer, of Lubbock, Tex., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Defendant in error recovered judgment against plaintiff in error in a suit in trespass to try title to a 640-acre tract of land. In addition to relying upon a record title, the petition contains this special allegation:

"That the plaintiff and those under whom it claims, and whose estate it has, have had and held peaceable and adverse possession of said tract of land, cultivating, using, and enjoying the same, and paying all taxes thereon, and claiming under deeds duly registered, for more than five years prior to the institution of this suit."

Upon the issue of record title it was shown without contradiction and by the evidence of both parties that in 1880 the state of Texas issued a patent to one F. W. Colby, and that Colby conveyed, by deed dated September 30, 1880, to one Ambrose Alexander, who is the common source of title. The next deed relied upon by defendant in error is from T. C. Reade and wife to one Martin Bilger, dated October 21, 1882, and filed for record January 29, 1883. Bilger conveyed to J. B. White August 9, 1887, and the deed was filed for record September 5, 1887. Defendant in error is the grantee of the heirs of J. B. White. The patent was filed for record on the same date as the deed from Reade to Bilger. Defendant in error also proved payment of taxes from 1885 to 1910, either by itself or by its predecessors in title. This, in brief, is the record title relied upon at the trial by defendant in error.

It thus appears that the chain of title of defendant in error fails to disclose a conveyance out of Ambrose Alexander. It is a fair inference from the testimony that defendant in error first discovered that there was a missing link in its chain of title in October or November, 1916, when it sent its agent from Indiana to Texas, and he procured an abstract of title and employed an attorney to cure the defect. Defendant in error owned no other land in the county where the land in controversy lies. Its agent met the plaintiff in error, who lived in the county where the land lies, upon his visit to Texas, at which time the agent's connection with defendant in error, as well as with its land in that county, was mentioned by him to plaintiff in error.

Plaintiff in error filed in evidence a certified copy of the will of Ambrose Alexander, dated January 11, 1913, by which he devised and bequeathed to his niece, Angelina Clemons, all of his estate, real and personal, except a small bequest of personalty; but there was no specific devise of the land in controversy. Plaintiff in error further filed in evidence a deed from the devisee, Angelina Clemons, to himself, dated April 14, 1917. He admitted that he paid only \$125 for the deed, and that the land was worth at least \$5,000; in other words, plaintiff in error was speculating upon the defect in the title of defendant in error.

The allegation of adverse possession was supported by proof of a lease dated in 1889 for a term of five years, and an additional lease for a period of three years, effective upon expiration of the first-mentioned lease, and there was competent evidence in that connection that the land in controversy, along with other lands, was inclosed by a fence and used by the lessees as a cattle pasture for more than five years.

At the close of the evidence, each party moved for a directed verdict, and the court granted the motion of defendant in error. Plaintiff in error did not submit any special requests to charge, either before or after the peremptory instruction, but only noted an exception to the charge of the court in favor of defendant in error. The assignments of error are aimed only at the directed verdict.

[1] Where each of the parties moves that the court direct a verdict, a judgment based thereon will not be disturbed, if there be evidence to support it. A conflict in evidence becomes immaterial. Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; Sena v. American Turquoise Co., 220 U. S. 497, 31 Sup. Ct. 488, 55 L. Ed.

559.

[2] Whether there was evidence to support the verdict is the only question in the case. Upon the issue of adverse possession, there was evidence that the tract of land was leased and within the cattle pasture more than the statutory period of five years. Such use of land, inclosed or fenced for pasturage purposes, constitutes possession. Taliaferro v. Butler, 77 Tex. 578, 14 S. W. 191; Church v. Waggoner, 78 Tex. 200, 14 S. W. 581; Randolph v. Lewis, 163 S. W. 647; Moran v. Moseley, 164 S. W. 1093.

Inasmuch as the judgment can be upheld upon the issue of adverse possession, it becomes unnecessary to decide whether the evidence was sufficient, as contended by defendant in error, upon the other issue of record title, aided by the presumption of deed from Alex-

ander to Reade.

The judgment is affirmed.

WHITE-WILSON-DREW CO. v. LYON-RATCLIFF CO. et al. '

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)

No. 2755.

Corporations \$\iff 310(4)\$—Directors not liable for declaring dividends, when corporation insolvent, unless actually knowing of insolvency; "assenting thereto."

Even if Corporation Act Ill. \$ 19, providing that if dividends are paid when a corporation is insolvent, or dividends are paid which would render it insolvent, or which would diminish the amount of its capital stock, all directors "assenting thereto" shall be liable for the corporation's debts then existing and later contracted while they continue in office, is not a penal statute, the liability imposed is like that of a surety, stricti juris; so that a bill under the statute against directors, not showing that they knew that the indebtedness created was in excess of the capital stock, was properly dismissed, such knowledge being a condition precedent to recovery, for the words "assenting thereto" mean a conscious approval of facts actually known, as distinguished from mere neglect to ascertain facts.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the White-Wilson-Drew Company against the Lyon-Rat-

cliff Company and others. From a decree of dismissal, plaintiff appeals. Affirmed.

Julius Moses and Walter Bachrach, both of Chicago, Ill., for appellant.

C. R. Latham, of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

PAGE, Circuit Judge. White-Wilson-Drew Company, a Tennessee corporation, a creditor of Lyon-Ratcliff Company, an Illinois corporation, filed suit in the United States District Court for the Eastern Division of the Northern District of Illinois, on the equity side, on its own behalf and on behalf of all other creditors, to hold Directors John M. Berry, Calvin H. Hill, J. Fred Butler, Horace Clark, E. W. Ratcliff, and James A. Lyon liable for assenting to the payment of dividends by Lyon-Ratcliff Company, which it is alleged diminished its assets below the amount of the capital stock, and for assenting to the payment of dividends when the corporation was insolvent. The bill as finally amended was dismissed for want of equity upon its face.

This action was brought under section 19 of the Corporation Act of Illinois (Hurd's Rev. St. 1917, c. 32, § 19), which reads as follows:

"If the directors or other officers or agents of any stock corporation shall declare and pay any dividend when such corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, all directors, officers or agents assenting thereto shall be jointly and severally liable for all the debts of such corporation then existing, and for all that shall thereafter be contracted, while they shall respectively continue in office."

The above section has not been construed in Illinois. Sections 16 and 18 of the same act have been repeatedly and variously construed by the courts of Illinois; but in 1917 section 18 was held to be a penal statute. Vestal Co. v. Robertson, 277 Ill. 425, 430, 115 N. E. 629. Illinois courts have held that the construction of section 16 was applicable to section 18. Loverin v. McLaughlin, 46 Ill. App. 373 (379); Ryerson v. Shaw et al., 201 Ill. App. 445 (448). The similarity between all these sections is apparent.

Section 16: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation, assenting thereto, shall be personally and individually liable for such excess, to the creditors of such corporation."

Section 18: "If any person or persons being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act, before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation."

Appellant says that the bill was dismissed because it was not shown that the directors actually knew that the indebtedness created was in excess of the capital stock, and it was held by the District Court that such knowledge was a condition precedent to recovery. The correctness of that ruling presents the sole question here.

Even if section 19 is held not to be a penal statute, it must at least be said that the liability imposed is like that of a surety, stricti juris. Woolverton v. Taylor, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521. The liability imposed under section 19 is much more extreme and severe than that imposed under section 16. In Lewis v. Montgomery, 145 Ill. 30 (47), 33 N. E. 880, in construing section 16, it is said:

"The words employed * * * should not be extended by construction, so as to embrace cases not clearly within the terms of the statute."

In that case in the Appellate Court (Lewis v. Montgomery, 48 Ill. App. 286), it is said:

"It may be fairly inferred from the evidence that the appellees were negligent in the discharge of their duties as directors; * * * that, by the exercise of proper diligence, they might have known, at all times, what was the state of affairs. * * * It is not sufficient that he neglects to do that which would lead him to knowledge."

The court cited Patterson v. Stewart, 41 Minn. 93, 43 N. W. 76, 16 Am. St. Rep. 706. We are of opinion that the words "assenting thereto" mean a conscious approval of facts actually known.

Decree affirmed.

ROWAN v. RANDOLPH, U. S. Marshal for Eastern District of Wisconsin.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1920.)

No. 2890.

Bail \$\infty\$=42-Accused cannot be denied bail, because of previous absconding, after release on bail.

The provision of Rev. St. § 1015 (Comp. St. § 1679), that bail shall be admitted upon all arrests, where the offense is not punishable by death, is mandatory, especially in view of the permissive language in section 1016 (section 1680), relating to bail in capital cases, so that the District Court had no discretion to refuse bail to one indicted for using the mails in furtherance of a scheme to defraud, though accused had been twice before arrested, and had absconded after being released on bail; the remedy being to fix an amount of bail sufficient to prevent absconding, by analogy to the authority of section 1019 (section 1683), which provides for increase of bail when proof is made that accused is about to abscond.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Habeas corpus proceeding by Charles H. Rowan against Samuel W. Randolph, United States Marshal for the Eastern District of Wisconsin, to procure his release on bail. From an order quashing the writ, and remanding petitioner to custody, petitioner appeals. Reversed and remanded.

See, also, 268 Fed. 529.

Raymond J. Cannon and A. W. Richter, both of Milwaukee, Wis., for appellant.

H. A. Sawyer, of Milwaukee, Wis., for appellee.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. Appellant is under indictment for having used the mails in furtherance of a scheme to defraud, and is in the custody of appellee as marshal. On his application to be admitted to bail the District Judge refused to enlarge him. Thereupon he filed in the District Court his petition for a writ of habeas corpus, and the writ was issued. In appellee's return to the writ he showed that appellant had once before been arrested under the same indictment, had been admitted to bail, and then had fled to Canada; that Canada had seized him and had deported him as an undesirable alien; that on his return to this country he had been arrested, and is now in the custody of appellee; and that some years ago he had been arrested under a federal indictment at Detroit, had given bail, and had fled from that jurisdiction and forfeited his bail. pellant's demurrer to this return was overruled, the writ was quashed, and appellant was remanded to the custody of appellee. This appeal is brought to question the correctness of that ruling.

In our judgment the inescapable answer is found in the commands of Congress. Section 1015 of the Revised Statutes (Comp. St. § 1679), directs that bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death. Under section 1016 (section 1680) bail may be admitted upon all arrests in criminal cases where the punishment may be death, but in such cases it shall be taken only by the Supreme Court or by a Circuit Court, or by a justice of the Supreme Court, a Circuit Judge, or a judge of a District Court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law. And in section 1019 (section 1683) it is provided that when proof is made that a person previously admitted to bail is about to abscond, and that his bail is insufficient, the judge shall require such person to give better security, or, for default thereof, cause him to be committed to prison.

Taking these sections together, we find the intent of the lawmakers to declare that a person under indictment for a noncapital offense shall not be imprisoned prior to his trial if he is willing and able to give bail. The word "shall" in section 1015 is mandatory. This is apparent not only from the word itself, but from the contrast with the permissive word "may" in section 1016. To abscond and forfeit one's bail is not included in the list of federal crimes. Even if it were, a person could not be punished therefor by imprisonment in advance of his indictment, trial, and sentence for that offense. If he were indicted for absconding and forfeiting bail, he would be absolutely entitled to be set at large pending his trial upon furnishing bail, unless the punishment for such absconding was death.

Refusal to admit appellant to bail means that the District Court has adjudged a forfeiture of appellant's otherwise clear right under

section 1015 solely by reason of finding that there is such a high degree of probability that appellant will again abscond that he should now be held without bail. It seems to us utterly immaterial on what character of evidence the trial court should base a finding that there is a high degree of probability that a defendant in a noncapital case will abscond. The question is what is the duty of the trial court when any showing is made that would justify such a finding of probability. And the answer is found in section 1019. It then becomes the duty of the judge to exercise his sound discretion under the law in fixing the amount of the bail. That is as far as his discretion goes. Taking all of the circumstances into consideration the trial court should fix the bail at such an amount as would be reasonably likely to assure the presence of the defendant when the case is called for trial.

The order is reversed, and the cause remanded for further proceedings in consonance with this opinion.

ROWAN v. RANDOLPH, U. S. Marshal for Eastern District of Wisconsin.

(Circuit Court of Appeals, Seventh Circuit. November 1, 1920.)

No. 2898.

Bail 573-Court has no discretion to refuse cash bail.

The bail authorized by Rev. St. § 1014 (Comp. St. § 1674), is not limited to the common-law bail, and it is not within the discretion of the trial court to refuse a deposit by accused in cash of the amount of bail required, and to require the giving of a bail with security.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Habeas corpus proceeding by Charles H. Rowan against Samuel W. Randolph, United States Marshal for the Eastern District of Wisconsin, to secure the discharge of petitioner from custody on a cash bail. Petition for writ denied, and petitioner appeals. Reversed and remanded.

See, also, 268 Fed. 527.

Raymond J. Cannon and A. W. Richter, both of Milwaukee, Wis., for appellant.

H. A. Sawyer, of Milwaukee, Wis., for appellee.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

PAGE, Circuit Judge. The parties here are the same as in No. 2890, 268 Fed. 527, in which the opinion of this court was filed on October 7, 1920, wherein it was held that appellant was entitled to be admitted to bail, and that it was the duty of the court to use his sound discretion, under the law and in light of the facts, in fixing the amount of the bail.

Upon a new application to fix bail, the District Court ordered that petitioner here be discharged from custody upon filing recognizance,

with sufficient surety, in the sum of \$50,000. Thereupon petitioner tendered to the court \$50,000 in cash, but no surety, and demanded to be released thereon. His petition for writ of habeas corpus to enforce that

demand was denied, and this is an appeal therefrom.

The sole question here is as to whether or not it is within the judicial discretion of the District Judge to refuse to accept the cash bail. The penalty of the bond is payable in money, and in all such cases money is the best possible security. It is evident from a reading of section 1014, Revised Statutes of the United States (Comp. St. § 1674), that it was not within the mind of Congress to limit the bail solely to the old common law form. In discussing section 1014, the Supreme Court of the United States, in Leary v. United States, 224 U. S. 567, 32 Sup. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029, said:

"It is said that the bail contemplated by the Revised Statutes (section 1014) is common-law bail, and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the mundium, although a trace of the old relation remains in the right to arrest. Rev. St. § 1018. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for \$40,000, that sum was the measure of the interest on anybody's part, and it did not matter to the government what person ultimately felt the loss so long as it had the obligation it was content to take. The law of New York recognizes the validity of contracts like the one alleged, and without considering whether the law of New York controls we are content to say merely that the New York decisions strike us as founded in good sense. Maloney v. Nelson, 144 N. Y. 182, 189; s. c., 158 N. Y. 351, 355."

We are of opinion that in those cases where the penalty of the bond is payable in money, and money to the amount thereof is tendered as security, together with a recognizance, they should be accepted, and it is not within the discretion of the court to reject them.

The order is reversed, and the cause remanded for further proceed-

ings in consonance with this opinion.

ESTELLE et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 20, 1920.)

No. 3556.

Post office \$\iiii 49\$—Conviction of using mails to defraud supported by evidence.

Evidence that a defendant knew of the preparation by his partner of a false and fraudulent claim for money on behalf of the firm and the mailing of such claim with a letter to the person charged, held to support a conviction for using the mails to defraud, under Criminal Code, § 215 (Comp. St. § 10385).

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Criminal prosecution by the United States against J. L. Estelle and H. A. Dixon. Judgment of conviction, and defendants bring error. Affirmed.

William Ervin Terrell, of Waco, Tex., for plaintiffs in error. Hugh R. Robertson, U. S. Atty., of San Antonio, Tex. Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The indictment in this case charged that J. L. Estelle and H. A. Dixon (herein called the defendants) deposited or caused to be deposited a letter in the mail for the purpose of executing a scheme to defraud devised by them, in violation of section 215 of the Criminal Code (Comp. St. § 10385). Averments of the indictment showed that at and prior to the time of the commission of the alleged offense the defendants were engaged in business as undertakers in the city of Waco, Tex., doing business in the name of Estelle-Dixon Undertaking Company; that prior to the alleged mailing of a letter they received at their undertaking establishment, to be prepared for burial, the body of an old unknown negro, who had been killed while on the St. Louis Southwestern Railway Company's bridge across the Brazos river at Waco; and that they had said body buried in the potter's field near Waco, where paupers are buried without charge for grave space, without the body being embalmed, and without it being prepared for burial, otherwise than by placing it in a cheap pine box, the body when buried being clothed only with the clothing worn by the deceased before his death. The alleged scheme to defraud consisted in devising the making and sending to the claim department of the railway company mentioned a bill or claim for services rendered and material and labor used in the preparation for burial and in the burial of said body, which bill or claim was false and fraudulent, in that it was to, and did, include, among other items, a charge of \$25 for embalming said body, a charge of \$15 for a burial robe, a charge of \$150 for a casket, and a charge of \$10 for grave space, none of which things were done or furnished.

The defendant Dixon died after the suing out of the writ of error to review the judgment of conviction of both defendants. The principal contention made in behalf of Estelle is that there was no evidence tending to prove that he was a party to the fraudulent scheme charged, and that the court erred in refusing a request that a verdict in his favor be directed. Estelle was a witness in his own behalf. He admitted that he knew at the time of the preparation by his partner, Dixon, of the bill or claim containing the false items mentioned, and of the mailing of that bill or claim and the letter accompanying it. Those admissions, and other admissions by the witness as to his conduct when the circumstances of the burial were being investigated, considered in connection with other evidence adduced, furnished support for a finding that Estelle, with knowledge of the fraudulent scheme, acquiesced in it and in the use of the mails in furtherance of it. The court did not err in refusing the request that a verdict in favor of Estelle be directed.

A witness testified as to the dictating by Dixon of the letter which was mailed with the bill or claim mentioned, and that that letter was left by the witness on a desk in defendants' undertaking establishment. Over Estelle's objection that witness was permitted to answer a ques-

tion as to the custom of Estelle about reading letters dictated by Dixon and left on that desk. If the overruling of that objection was error, the error is not one which would warrant a reversal of the judgment, as Estelle admitted that he knew, at the time, of the preparation and contents of the letter dictated by Dixon, and of the mailing of it.

The record does not show the commission of any reversible error.

The judgment is affirmed.

BURROW, JONES & DYER SHOE CO. v. WALLACE.

(Circuit Court of Appeals, Fifth Circuit. November 16, 1920.) No. 3575.

Bankruptey \$\iff 396(5)\$—Homestead exempt, though used in part for business purposes.

A two-story building owned and duly claimed several years before as a homestead by bankrupt, a married woman, who with her husband occupied the second floor and one room below as a residence, held exempt under the Law of Alabama, although the larger part of the lower story was adapted and leased for business purposes.

Petition to Superintend and Revise from the District Court of the United States for the Southern District of Alabama; George W. Jack, Judge.

In the matter of Mollie Wallace, bankrupt. Petition by the Burrow, Jones & Dyer Shoe Company to revise an order of the District Court.

Affirmed.

Daniel B. Cobbs, of Mobile, Ala., for petitioner.

Frank S. Stone, of Bay Minette, Ala., for respondent.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The petitioner, a creditor of the bankrupt, complains of the action of the court in overruling exceptions to an order of the referee which allowed to the bankrupt as her homestead a house and the lot upon which it is located, which the bankrupt had duly claimed as her homestead several years before the institution of the bankruptcy proceeding. In behalf of the petitioner it is contended that the adaptation to and use of a portion of the building for business purposes had the effect of preventing the bankrupt from successfully claiming the property as an exempt homestead.

The building, which is in a village of about 200 inhabitants, is a two-story one, containing two rooms in the first or ground story, and four rooms in the second story. The front first-story room, which is about 25 feet wide by 50 feet long, is adapted to, and has been used for, business purposes only—at one time as a general merchandise store, at another time as a grocery store, and at another time as a drug store; the occupants being renters. From the time the building was constructed, the bankrupt, who is a married woman, has resided in the second story, except when she was for a few days at a time with her husband on a farm which he cultivated, and has used as a kitchen the rear first-story room, which is about 14 by 15 feet, and is connected

with the upper floor by a stairway. During part of that time renters have occupied one or more of the second-story rooms; during such time the bankrupt using the remainder of the second floor and the rear first-story room for residence purposes.

By the Alabama law the homestead of every resident of the state, with the improvements and appurtenances, not exceeding in value a stated sum, may be claimed and set aside as exempt from levy and sale under process for the collection of debts, and, after the homestead shall have been claimed in the manner prescribed, the act of the owner in leaving it temporarily or in leasing it does not operate as an abandonment. Code of Alabama 1907, §§ 4160, 4192. The mere fact that part of the premises on which the owner resides is adapted to and is used for business purposes does not stand in the way of the property being considered as his homestead, unless the use of a part as a place of habitation is incidental or secondary to the business use of the remainder. Marx v. Threet, 131 Ala. 340, 30 South. 831; Levy & Co. v. Alexander, 95 Ala. 101, 10 South. 394.

The evidence in the instant case was such as to warrant the conclusions that the bankrupt's use of part of the building for the purposes of residence was not at all incidental or secondary to the business use to which the larger of the two first-story rooms was devoted, that a principal use of the building was by the bankrupt for homestead purposes, and that the property was used by the bankrupt as much for homestead purposes as it was used by her tenants for business purposes. The referee and the court successively concluded that the property was so occupied and used by the bankrupt as to entitle her to claim it as her homestead. We are not of opinion that on the evidence adduced we are required to reach, or would be warranted in reaching, a conclusion at variance with the one reached by both the referee and the trial court.

The petition is denied.

STRATTON v. ERMIS.

(Circuit Court of Appeals, Fifth Circuit. November 10, 1920.)

No. 3479.

1. Bankruptcy €=396(5)—Crops on homestead exempt.

Under the law of Texas that unsevered crops on land embraced in a rural homestead, exempt under the state Constitution, are included in the exemption, such crops do not pass to the trustee in bankruptcy of the owner of the homestead, under Bankruptcy Act, § 70a (Comp. St. § 9654).

 Bankruptcy \$\infty\$ 396(1)—Property not subject to be taken under process is "exempt."

Property not subject to be taken under process for enforcement of a demand is "exempt," within the meaning of Bankruptcy Act, § 70a (Comp. St. § 9654), under which exempt property of a bankrupt is excluded from the operation of the provision vesting the trustee with title.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Exempt.]

Petition to Superintend and Revise an order of the District Court of the United States for the Western District of Texas; Duval West, Judge.

In the matter of J. P. Ermis, bankrupt. Petition by S. E. Stratton,

trustee, to revise order of District Court. Petition denied.

J. Walter Cocke, of Waco, Tex., and M. G. Cox, of Cameron, Tex., for petitioner.

W. A. Morrison, of Cameron, Tex., for respondent.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The petitioner challenges the correctness of the court's ruling that the practically matured, but ungathered, cotton crop, which was on land embraced in the bankrupt's exempt homestead at the time his voluntary petition was filed on August 27,

1919, was included as part of such exemption.

[1] By express exception exempt property of a bankrupt is excluded from the operation of the provision giving to the appointment and qualification of a trustee of the estate of the bankrupt the effect of vesting such trustee with the title of the bankrupt to property. Bankruptey Act, § 70a (Comp. St. § 9654). The rights of a bankrupt to property as exempt are those given by the state statutes, as construed by the courts of the state. Smalley v. Langenour, 196 U. S. 93, 25 Sup. Ct. 216, 49 L. Ed. 400; Eaton v. Boston Trust Co., 240 U. S. 427,

36 Sup. Ct. 391, 60 L. Ed. 723, Ann. Cas. 1918D, 90.

[2] Controlling Texas decisions are to the effect that unsevered crops on land embraced in a rural homestead, which is made exempt by the Constitution of Texas (article 16), are included in such exemption. Alexander v. Holt, 59 Tex. 205; Coates v. Caldwell, 71 Tex. 19, 8 S. W. 922, 10 Am. St. Rep. 725; Pate v. Vardeman (Tex. Civ. App.) 141 S. W. 317. The opinions rendered in the just cited cases show that the exclusion of such unsevered crops from the exemption is considered to be incompatible with the exclusive use and beneficial enjoyment of the land itself to which the exemption entitles the owner. Above-cited Texas decisions, and others referred to in argument, evidence the existence of a settled rule that unsevered crops on homestead land are not subject to be taken under process for the enforcement of a demand to the satisfaction of which the land itself could not be subjected. Property not subject to be so taken is exempt within the meaning of section 70a of the Bankruptcy Act. Smalley v. Langenour, suppra.

The court did not err in making the ruling complained of. The peti-

tion is denied.

GULF, C. & S. F. RY. CO. v. CLEMENT GRAIN CO., et al. (Circuit Court of Appeals, Fifth Circuit. November 16, 1920.)

No. 3580.

Appeal and error \$\infty\$=265(1)—Exceptions necessary to review finding of court. Where an action at law is tried to the court without a jury, pursuant to Rev. St. § 649 (Comp. St. § 1587), a general finding by the court is not reviewable, in the absence of exception to a ruling made in the progress of the trial.

In Error to the District Court of the United States for the Western

District of Texas; Duval West, Judge.

Action at law by the Gulf, Colorado & Santa Fé Railway Company against the Clement Grain Company and B. E. Clement. Judgment for defendants, and plaintiff brings error. Affirmed.

Nat Harris, of Waco, Tex. (Allan D. Sanford, of Waco, Tex., and O. B. Wigley, Terry, Cavin & Mills and G. B. Ross, all of Galveston, Tex., on the brief), for plaintiff in error.

J. W. Cocke, of Waco, Tex. (Davis & Cocke, of Waco, Tex., on the

brief), for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiff in error railway company sued defendants in error to recover certain switching charges. There was a general denial and certain affirmative pleas. A jury was waived by written stipulation, and the court found for defendants in error.

The finding of the court in a trial without a jury may be either general or special, and has the same effect as a verdict. R. S. § 649 (Comp. St. § 1587); U. S. v. U. S. Fidelity Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696. In this instance the finding was general. No

special finding was asked; and none was made.

A finding, whether general or special, cannot be reviewed on writ of error, in the absence of exception to a ruling made in the progress of the trial. R. S. § 700 (Comp. St. § 1668); St. Louis v. Western Union Telegraph Co., 166 U. S. 388, 17 Sup. Ct. 608, 41 L. Ed. 1044; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113. No exception was taken to any ruling of the court.

The judgment is therefore affirmed.

CLARKE v. ASMUS BOYSEN MINING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1920.) No. 5356.

Equity 295—Supplemental petition for damages subsequent to accounting

In a suit to establish a trust in land, in which there was an accounting, plaintiff can, after final decree and appeal therefrom, file a supplemental petition for damages for the deprivation of his property which accrued subsequent to the accounting, though he could not file such petition for damages which he could have claimed on the accounting.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

On petition for rehearing, and application for modification of the decree. Decree modified, and rehearing denied.

For former opinion, see 264 Fed. 492.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

PER CURIAM. The petition for rehearing and the application for modification of the decree heretofore ordered are denied, except that the opinion handed down in this case and the decree ordered therein are modified in the respects following, and in those only, to wit:

That the decree of the trial court, denying leave to file the second supplemental petition, be reversed, for the sole purpose of permitting appellant an opportunity to recover any damages arising from deprivation of the property involved, which damages, if any, have arisen since the closing date of the accounting heretofore rendered, and that the amount, if any, of such damages, be considered in striking the balance provided for in the order of this court upon this appeal.

MEURER STEEL BARREL CO., Inc., v. CLEVELAND STEEL BARREL CO., and three other cases.

(Circuit Court of Appeals, Sixth Circuit. November 12, 1920.)

Nos. 3400-3403.

1. Patents \$=324(1)—Appeal from decree on supplemental bill not dismissed

Defendants in barrel patent infringement suit, after allowance of temporary injunction against them, began manufacturing and selling a new type of barrel; plaintiff filed supplemental petition, claiming infringe-ment by the new type; final decree, entered June 17, 1919, adjudged that plaintiff's patent was valid and infringed by the original type of barrel, and not infringed by the new type, and ordered an accounting as respects the original type; defendants appealed from the decree finding validity and infringement by the original type; on August 30, 1919, plaintiff appealed from the decree finding noninfringement by the new type, and defendant moved to dismiss plaintiff's appeal as being, not from a final decree, from which an appeal might be taken more than 30 days after entry, but from a decree which was interlocutory, because awarding an accounting. Held that, the cause of action set out in the supplemental bill being separate and distinct from the original cause of action, plaintiff's appeal from the portion of the decree dealing therewith could be treated as if it were from a separate decree in a separate suit, and, such portion of the decree being final, plaintiff's appeal therefrom would be an appeal from a final decree, notwithstanding the interlocutory nature of that portion of the decree dealing with the original petition.

2. Patents \$\infty\$328_891,895, for barrel head joint, held valid and infringed; also not infringed by substituted type.

The Young patent, No. 891,895, held valid in so far as it relates to method of attaching chime to the barrel head joint and infringed by defendant's original type of barrel, but not infringed by their substituted type of barrel, manufactured by them after injunction as to original type; for, as the Young patent has little novelty, while it is entitled to protection as to its specific construction, it is not entitled to any broad range of equivalents.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suits by the Meurer Steel Barrel Company, Incorporated, against the Cleveland Steel Barrel Company and against the Ohio Corrugating Company, respectively. From the decrees, plaintiff and defendants appeal, and defendants move to dismiss plaintiff's appeals. Motions to dismiss overruled, and decrees affirmed.

Robt. S. Blair, of New York City, and Delos G. Haynes, of St. Louis, Mo. (Emery, Varney, Blair & Hoguet, of New York City, Brockett & Hyde, of Cleveland, Ohio, and Thomas J. Johnston and Manvel Whittemore, both of New York City, on the brief), for plaintiff.

Edward Rector, of Chicago, Ill. (George B. Pitts and Walter L.

Flory, both of Cleveland, Ohio, on the brief), for defendants.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. These cases were heard and submitted together. The Meurer Steel Barrel Company, Incorporated, commenced an action in the District Court against the Cleveland Steel Barrel Company, and a separate action against the Ohio Corrugating Company, for infringement of letters patent, No. 891,895, dated June 30, 1908, granted to Frank E. Young, and assigned to the plaintiff. The barrel manufactured by the Cleveland Steel Barrel Company and the barrel manufactured by the Ohio Corrugating Company, which are claimed to be infringements of this patent, are substantially identical, and the records in each of these respective cases are substantially alike,

so that they present but a single question.

[1] A preliminary injunction was allowed. Shortly after the allowance of this temporary injunction, each of the defendants began the manufacture and sale of a new type of barrel, which new barrels manufactured by each of these defendants are also alike. The plaintiff thereupon sought to punish the defendants for contempt of court in making and selling this new type of barrel. The court refused to punish for contempt, but suggested that the question as to whether the new type of barrel is identical with the old type, and an infringement of plaintiff's patent, should be determined in a civil action, and further suggested that, to that end, the plaintiff file a supplemental petition in each case, which was done accordingly. Upon final hearing a decree was entered upon the original petition, finding the Young patent, No. 891,895, valid and infringed by each of the defendants in the manufacture and sale of its so-called original type of barrel, and awarding an accounting as to the original petition, and further found upon the supplemental bills that the new type of construction did not infringe the plaintiff's patent, and dismissed the supplemental bill in each case.

The defendant appealed from the decree of the District Court finding the patent in suit valid and infringed by the original type of barrel, and the plaintiff appealed from the decree of the court finding its patent not infringed by the new type and dismissing its supplemental bills. Each of the defendant appellees in the appeals taken by plaintiff below, being causes Nos. 3400 and 3401, filed a motion to dismiss these appeals, for the reason that the decree sought to be appealed from is

not a final order or decree from which an appeal may be taken more than 30 days after entry; but on the contrary an inseparable part of the interlocutory decree awarding an accounting upon the original petition. It appears from this transcript that this decree was entered June 17, 1919, and that plaintiff's petition for appeal in each case was filed August 30, 1919. It is contended on the part of the appellant in each case: First, that no question of jurisdiction is involved, because these cases are before this court on defendants' appeals, and that therefore the court may and will consider any issue presented by the record which can be conveniently disposed of at this time; second, that the decrees from which these appeals were taken are final.

The original infringement, going on when the bill was filed, and the claimed infringement of plaintiff's patent by the new type of barrel, being manufactured and sold by each of these defendants after the temporary injunction had been allowed in the original action, constitute separate and distinct causes of action, and upon the latter cause of action the plaintiff was entitled to bring a separate suit to enjoin this infringement and for assessment of damages. Acting, however, upon the suggestion of the court, it filed supplemental bills in the original action.

If, instead of a supplemental bill being filed, a separate action had been commenced, and in such action the decree of the court were identical with the decree entered by the court upon the supplemental bill, there would be no question as to its finality. Clearly it is not so interwoven or connected with the claims of the original petition as to be incapable of separation therefrom, or prevent it being treated the same

as if separate decrees were entered in separate suits.

The complete separability, as a practical proposition, of the issues raised by plaintiff's appeal from those raised by defendant's appeal, appears by the fact that no disposition of the latter can by any possibility require a reversal in the former. The question of infringement by the new type would be equally unaffected, whether the patent is held by this court valid or invalid, and whether or not the first type is held to infringe, and the second type could not be considered on the accounting, whatever the result of defendant's appeal might be. The two appeals ought, in the interest of orderly administration, to be heard together, unless jurisdiction so to do is wholly lacking. We think this is not the case, under the peculiar situation before us. The case is not in its practical aspect the same as if the appeals were from a decree holding certain claims valid and others invalid.

It is clear from the peculiar facts and circumstances of these particular cases that the dismissal of plaintiff's appeal would operate to defeat, instead of to accomplish the purpose and intent of, the statute preventing an appeal of a cause by piecemeal. For the reasons above

stated, the motions to dismiss these appeals will be overruled.

[2] The question of the validity of the Young patent has been the subject of judicial investigation at least twice before the present suits were brought, and in both instances this patent was held valid. In the case of Meurer Steel Barrel Co. v. National Enameling & Stamping Co., 242 Fed. 273, the District Court discussed at length the advance of the Young invention over the prior art. The opinion in that case

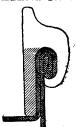
was read and considered by the District Court, Northern District of Ohio, Eastern Division, in the case of Meurer Steel Barrel Co., Inc., v. Draper Manufacturing Co., 260 Fed. 410, and that court reached the same conclusion. In these cases the same court discussed in detail the decisions in Meurer Steel Barrel Co. v. National Enameling & Stamping Co. and in Meurer Steel Barrel Co., Inc., v. Draper Manufacturing Co., supra, and again reached the same conclusion as to the validity of the Young patent, and further held that defendants' original construction did infringe, and that the new type described in the supplemental

bill did not infringe the Young patent. In view of the fact that in the opinion in the case of Meurer Steel Barrel Co. v. National Enameling & Stamping Co. and in the opinion in the case of Meurer Steel Barrel Co. v. Draper Mfg. Co., supra, the prior art is fully reviewed and the distinguishing features of the Young invention fully discussed, it is wholly unnecessary to burden this opinion with a restatement of these facts. It is sufficient to say that this court concurs in the conclusion reached by both of these courts in these several cases as to the validity of the Young patent. It is apparent, however, that there is practically very little novelty in this invention over the prior art. It is not claimed that there is anything new in the seam uniting the barrel and the head or in a chime ring. Whatever of invention there is in the Young device consists in the method of attaching the chime ring to this joint or seam, and the distinguishing feature of that method consists in the fact that the outer flange of the chime ring is bent under the interlocking joint or seam formed by folding the metals of the barrel end and head together. It follows, therefore, that while Young is entitled to protection as to this specific construction, he is not entitled to any broad range of equivalents.

While this joint seam in defendants' original type of construction differs materially from the joint or seam of the patent in suit, nevertheless it does form a shoulder on the outer side of the barrel under which shoulder the chime ring is clamped, not so far as in the Young invention, but far enough to perform an identical function, all of which

will more fully appear by the following illustrations:





CLEVELAND BARREL (Defendants')



It is therefore apparent that the defendants' original type is, to the extent above specified, an infringement of the patent in suit.

In defendants' new type, the manner of attaching this chime ring to

the interlocking joint is wholly different from the method employed in its old construction, or in the patent in suit, and is substantially the same as in Reynolds, 621,540, which consists of a recess or depression on the inner side of the flange, into which the chime ring is fitted, and which holds it in place. This flange ring extends over the top and the

DEFENDANTS'
"NEW" BARREL



outside of the interlocking joint, but its outer end is not fastened or folded under the shoulder on the outside, produced by the interlocking seam, which, as heretofore stated, is the sole advance of Young over the prior art. This new construction is shown in the following cut:

This chime ring is held in place by this recess or shoulder on the inner side of the flange, and pressure on the upper and outer surface, as in Reynolds, which feature of construction Young particularly sought to avoid, as appears in lines 28 to 35, inclusive, of Young's specifications. It is clear, therefore, that the defendants' new type of construction is not an infringement of the Young patent.

For the reasons above stated, the decrees of the District Court, both on the original and the supplemental bills, are affirmed.

W. BICKFORD CO. v. MERRILL.

(Circuit Court of Appeals, First Circuit. November 18, 1920.)

No. 1476.

- 1. Patents \$\insigma 167(1)\$—Claims construed in light of specification.

 A claim must be construed in the light of the specification.
- 2. Patents 229—Process patent not infringed, if part of process is omitted.

 A process patent is not infringed, where any one of the series of acts which constitute the process is omitted, unless some equivalent act is substituted for the one omitted.
- 3. Patents 328-1,231,183, for method of making moccasins, not infringed.

 The Merrill patent, No. 1,231,183, for method of constructing moccasin shoes, held not infringed.

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit in equity by Harry E. Merrill against the W. Bickford Company. Decree for complainant, and defendant appeals. Reversed. For opinion below, see 260 Fed. 207.

Frank A. Morey, of Lewiston, Me., for appellant.

Solomon W. Bates, of Portland, Me. (Robert Treat Whitehouse, of Portland, Me., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is a patent infringement case. The defenses are invalidity and noninfringement. The decision below

was for the plaintiff on both issues. The defendant appealed.

The patent, No. 1,231,183, was issued to Harry E. Merrill, on June 26, 1917, on an application filed December 15, 1915. It is entitled "Method of Constructing Moccasin Shoes." The District Court held it valid and found an infringement of claim 1, which is as follows:

"The method of constructing moccasin shoes which comprises, first, securing a vamp to a sole, inserting a last, shaping the vamp to the last before an upper is attached, and subsequently attaching the upper to the vamp to complete the moccasin."

The District Court also found that the other four claims merely presented the same process more in detail.

[1] This claim must, of course, be construed in the light of the speci-

fications. Walker, Patents (5th Ed.) § 186, and cases cited.

[2] "No process patent is infringed, where any one of the series of acts which constitute the process is omitted by the supposed infringer, unless some equivalent act is substituted for the one omitted." Id. § 338.

[3] The plaintiff's specification sets forth that the "invention relates to a novel method of making moccasin shoes"; that in making the common type of moccasin the sole and vamp are formed of a single piece of flexible leather, puckered by hand and drawn over the last, thus involving relatively large pieces of leather, because of the gathering and puckering where the vamp is sewed to the upper. Such construction is stated to be uneconomical, because of the waste of odd pieces of the large piece of leather from which the bottom and vamp member is made, and because of the necessity of using the highest grade of material for both sole and vamp, because of the wear which must be withstood by the sole.

The plaintiff's alleged invention is stated to relate to a novel method of constructing moccasin shoes, whereby such disadvantages are largely overcome or minimized, and the moccasin also made with a small

amount of time and labor.

The accompanying drawings show that the plaintiff's moccasin consists of only four main parts: (1) The sole; (2) a single narrow strip of leather, called in the specification a vamp; (3) the tip or covering for the top of the foot, attached to the vamp; (4) the ankle covering. which may be made of several parts, sewed together in the usual fashion for shoes.

The method of construction is described as follows: A single narlow strip is attached by stitching or otherwise to the sole, so that the end seam of this narrow strip comes in the middle of the instep. When a two-piece vamp is used, both seams should be near the middle of the moccasin. Attention is directed to the fact that the vamp is a narrow strip, and that, by attaching it to the sole in the manner indicated, the vamp is caused to turn up substantially at a right angle with the sole, and that thus there is no appreciable puckering and gathering of the vamp as occurred in the old method of making moccasins. It is also

stated that an outer sole may be attached to the first sole by stitching or nailing.

Emphasis is laid on the fact that, as the vamp and sole are of separate pieces of leather, and as the vamp is subjected to much less wear than the sole, it may be made of a poorer quality of stock; also that the vamp may be secured to the sole, either on the under side or on the upper side of the sole, and that, if secured on the under side, an outer sole should be attached; also that the arrangement of the seam near the middle of the moccasin eliminates the heel seam, thus, as is alleged,

distinguishing it from moccasins of the former type.

It is obvious that the foot covering thus described is not, accurately speaking, a moccasin at all. Webster's Dictionary defines a moccasin as "a shoe made of deer skin or other soft leather, the sole and upper part being one piece." The essence of the definition is that the sole and most of the upper part are one piece. It is obviously a shoe, the output of a period or of conditions in which knowledge or facilities, or both, for attaching the sole to the upper, so as to be practically waterproof, were lacking. When, as in the case of the plaintiff's foot covering, the upper is of two distinct parts, the result is a shoe. The fact that it may look somewhat like a moccasin, with an additional outer sole attached, does not make it a moccasin. It is nothing but a shoe made out of pieces of leather, cut with full regard to economy, both as to the use of high-grade stock only where there is most wear, and as to preventing waste in large and unavailable scraps.

It is also obvious that a shoe made under the plaintiff's patent is not wearable, unless made with a double sole to protect the edge of the vamp and the seam from speedy destruction, if the vamp is sewed on the lower side of the sole, or unless, if sewed on the upper side of the sole, a filler be put in the shoe to prevent the seam from hurting the foot of the wearer. Otherwise stated, claim 1, fairly construed, does

not cover a process of making a complete, practicable shoe.

In the view we take of this case, it is unnecessary to determine whether a shoe, thus made, involves any invention; for, assuming that the court below was correct in holding the patent valid, we are constrained to the view that defendant's shoe is made by a different pro-

cess, and that there is no infringement.

The vamp of the defendant's shoe is not a long narrow strip, like the plaintiff's; it is a horseshoe-shaped piece of leather. In the inside of this horseshoe-shaped vamp is sewed by zigzag stitches another piece of leather, which comes under the ball of the foot and operates as a filler. The vamp, when attached to the inner sole or filler, is nearly flat, so that when it is brought up around the last, the puckering effect that the plaintiff claims he avoids by the use of his narrow straight strip is not eliminated—at any rate to any substantial degree. When the defendant's shoe is lasted, the vamp has to be brought over the toe of the last and sewed to the leather constituting the tip or covering of the top of the foot, substantially in the same way as was required in making the old moccasin. Moreover, the defendant's vamp does not, like the plaintiff's vamp, extend all the way around the sole; it extends on both sides only to the instep. The rear part of the de-

fendant's shoe on both sides and around the ankle is made like other shoes in common use for many years. Back of the filler stitched zigzag within the horseshoe-shaped vamp is another supplementary filler, shown in one of the exhibits as made of wood, and covered by a piece of canvas nailed down. It is obvious that in the defendant's shoe the piece of leather stitched zigzag to the vamp—whether that piece of leather be called a sole or called a filler—does not perform the office of a true sole; outside of it and secured to the vamp are one or more soles, which are attached after the lasting takes place; whereas the plaintiff's vamp, consisting of one or at most two practically straight pieces of leather, is attached directly to the real sole before the lasting.

Taking the construction of the shoes and the processes of manufacture together, the defendant's shoe is radically different, both in method of construction and in result accomplished. Both plaintiff and defendant are manufacturing comparatively cheap and economically made shoes. Neither shoe is a moccasin, and the two products re-

semble each other only in minor aspects.

The result is that—assuming without intimating any opinion thereon that plaintiff's patent involves real invention—the defendant has been

guilty of no infringement.

The decree of the District Court is reversed, and the case is remanded to that court, with direction to dismiss the bill, with costs, and the appellant recovers its costs of appeal.

CRANE & BREED MFG. CO. v. ELGIN SILVER PLATE CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920.)

No. 2765.

Patents 328—46,108, for burial casket handle design, not infringed.
 Design patent No. 46,108, for burial casket handle, held not infringed.

2. Patents = 252—Test of similarity of design stated.

If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one, supposing it to be the other, the first one patented is infringed by the other.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Crane & Breed Manufacturing Company against the Elgin Silver Plate Company. From decree of dismissal, plaintiff appeals. Affirmed.

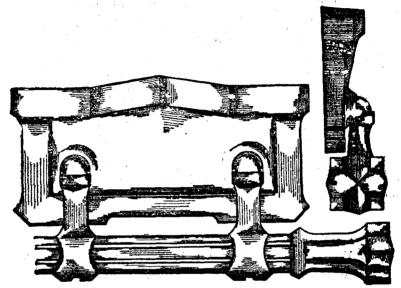
A. F. Herbsleb, of Cincinnati, Ohio, for appellant. Francis W. Parker, of Chicago, Ill., for appellee.

Before BAKER and PAGE, Circuit Judges, and FITZHENRY, District Judge.

PAGE, Circuit Judge. [1] Plaintiff appellant brought suit in the District Court of the United States for the Northern District of Illinois, as the owner and for infringement of design patent No. 46,108, for burial casket handle, dated July 21, 1914, issued on assignment from Charles Blesch, and this is an appeal to reverse the decree dismissing the bill of complaint for want of equity.

It is claimed that plaintiff appellant's design:

FIGURE 1.



—is infringed by defendant appellee's design (unpatented):

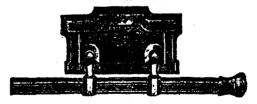


Figure 1 represents the design shown in the patent, which does not describe the design.

[2] It is admitted in argument that the plate and handle bar are old. Plaintiff appellant's rights, if any, are confined to the particular design shown. Applying the test adopted in Gorham Co. v. White, 14 Wall. 511, 20 L. Ed. 731:

"That if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other"

—it seems perfectly apparent that there can be no infringement. Confining the vision of the eye strictly to the designs, there is no point of resemblance between the two, except that each plate presents a broad. undecorated surface. The distinctive feature of defendant appellee's plate is a flat panel, surrounded by an undecorated border, the top and bottom lines of which are parallel, and the end lines are also parallel. In plaintiff appellant's plate there is a panel that is not flat, but has a vertical ridge in the center, very marked at the top, but growing less as it nears the bottom. The top border lines are broken, and come to a point in the center, and in front of the balance of the plate (see end view of plate, Figure 1). There are other marked differences. There is nothing in the record that shows that any one was deceived. The difference in price would account for increased sales of the later handle. It is almost impossible to imagine that plaintiff appellant's plate could be mistaken for the flat, unarched surface, with parallel lines, shown in the defendant appellee's device. Even though the rule laid down in Ashley v. Weeks-Numan Co., 220 Fed. 902, is correct, viz. it is not proper to place the two side by side, to determine whether or not there are certain differences, but that a correct test is whether the ordinary observer, giving such attention as a purchaser usually gives, would purchase the one believing it to be the other, it is difficult to see how a purchaser who had ever seen the two separately, and had any accurate mental picture of what each looked like, could mistake one for the other.

We are of opinion that there was no deceptive likeness between the two handles, and that there is no infringement. We do not pass upon the question of patentability of the design.

The decree is affirmed.

BEECROFT & BLACKMAN, Inc., v. ROONEY et al.

(District Court, S. D. New York. October 20, 1920.)

No. E16-240.

1. Patents = 129—Estoppel to deny that patentee was first inventor.

Defendants, who made no objection when advised by complainant that he intended obtaining a patent for an invention which they had discussed together, under which they should have a shop right so long as he remained in their employ, but acquiesced and for some years manufactured the patented device, *held* estopped to deny that complainant was the first inventor.

2. Patents \$\iiint_{328}\$\infty\$-1,244,944, for cabinet stand for talking machines, valid and infringed.

The Beecroft patent, No. 1,244,944, for a cabinet box stand for talking machines, *held* valid and infringed.

3. Patents = 187-Shop right not established.

Defendants *held* not to have any permanent shop right to manufacture under a patent obtained by an employee, where they were notified by him, before making any considerable expenditure for such manufacture, that the shop right would be limited to the term of his employment.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 268 F. -35

In Equity. Suit by Beecroft & Blackman, Incorporated, against Laurence J. Rooney, doing business as Laurence J. Rooney Company, and the Long Furniture Company. Decree for complainant.

W. H. Crichton Clarke and George B. De Luca, both of New York City, for plaintiff.

James H. Griffin, of New York City, and E. G. Siggers, of Washington, D. C., for defendants.

LEARNED HAND, District Judge. This is a suit upon a patent granted to Clement Beecroft on October 30, 1917, for a cabinet box stand for talking machines. He is assignor to the plaintiff, which is a corporation, of which he is a member, and the infringement of the patent by the defendant is conceded. Four defenses are raised: First, that Beecroft is not the first inventor; second, that the patent is invalid; third, that the defendant has an implied shop right; and, fourth, an express shop right.

Before going into the defenses, it is necessary to make some statement of the character of the patent itself, and in order to do that the most intelligent way is to describe the prior art. It appears that the Victor Talking Machine Company, which every one knows is a very large manufacturer and seller of these talking machines, had two kinds of models: First, what I may call a table machine; and, second, a floor machine. The table machine consists of a square box which contained the mechanism for rotating the plate, the dial, and tone arm, and which is only about a foot or 18 inches in height. This is a good deal cheaper than the larger machine, which was intended to stand on the floor, and had a closed cabinet belowing the talking machine proper. Within this cabinet it was customary to keep the records and books of records, as every one knows.

It was early discovered by shrewd manufacturers and salesmen that they could undercut the larger Victor machine by a cheaper stand or cabinet, separate from the talking machine proper, and so arranged that the table machine might be placed upon the stand and held firmly in position. The base of the original table machines had a straight-edged molding on four sides, which the top of the cabinet could be made exactly to fit, so that the two would give the appearance of the larger machine. Thus the stands were made with a molding around the edges, into which the straight molded edges of the table machine fitted, insuring not only absolute alignment, but no displacement when the machine was wound up.

It was in this stage of the art that the plaintiff's patent appeared. He seems to have first suggested to the defendant the idea of manufacturing these stands, though there in no invention in that, and no one claims it. Some time in January or February of 1915 the Victor Company (which had become quite alive to the practice that had grown up in the trade), with a good deal of ingenuity, I think, devised a table machine which they thought would prevent its further continuance. Instead of having the base of the table machine a straight-edged molding, which could be made to fit solidly on top of the stand and give the appearance of a single piece, like their floor machines, they

made the base with four legs and a scroll running along the side. The consequence was that, if any one placed the table machine upon a stand, such as the defendant was manufacturing, it would appear at a glance that it was not the floor machine, but that it was a poor makeshift. Obviously the market of the defendant for their sepa-

rate cabinets was very much injured.

This caused a good deal of concern to the defendants, and apparently to other manufacturers, who were doing the same thing as they. For some time it was impossible to see the new table machine which was called by the Victor Company No. 9, but eventually, on the 28th of February, A. C. Long, who is the general manager of the defendant, with the plaintiff, if I may call him so, Beecroft, did see one of these new model Victor No. 9 table machines in New York. Long at that time measured very carefully the external dimensions of the base of this machine, and as well as he could make a sketch of the scroll which connected the two. He had a model made in the shop, as nearly as he could from these measurements and the drawings. Through the month of March, 1913, it is quite clear from the correspondence that Naill, the sales manager of the defendant, was concerning himself with, and was writing to Beecroft about, the most effective way to meet this last move of the Victor Company. He made several suggestions, and Beecroft made several suggestions.

Beecroft's suggestions seemed at that stage to have been rather ineffective, and would not have turned out to be practicable. On March 27th Naill asked Beecroft to come to the residence of the defendant, which is in Hanover, Pa., for the purpose of an interview concerning this matter, and it is unquestionable that he came there on the 29th of March, which was a Monday. He had an interview, I have no doubt, although that is in dispute. I say I have no doubt, because of the contemporaneous entries made in his diary at that time, The fact that this is denied in no sense is any imputation on the witnesses who deny it, for any such matter, now being at a distance of

over five years, may have escaped their recollection.

What took place at that interview determines the issue of priority, and it is as well, therefore, at this point, to describe what the invention was. In order to cover the legs and scroll of the new No. 9, the patent discloses a molding rising from the top of the stand to the level of a bead at the bottom of the skirt or waist of the table machine. Since the legs and scroll flare outwardly, the molding must be bent inward to meet the bead at the bottom of the waist, else there will be an unclosed gap of about one-quarter of an inch, which would betray the fact that the machine was not single. But to bend inwards all four moldings was to make it impossible to set the table machine on the top of the cover. Hence the patent disclosed one removable molding and directed that the machine should be slipped in place; the removed molding being then reset.

This invention Beecroft says that he disclosed fully at the interview of March 29th, using a borrowed machine then there. This is sharply disputed by Long and Naill, and must, taken alone, be doubtful. I really do not believe that there was any borrowed machine

present, and I think that probably the model made by Long was present, as he says it was. Be that as it may, certainly Naill and Beecroft were in Baltimore the next day looking for a machine, and Naill that night wrote a letter to Long, which pretty effectually disposes of Beecroft's claim. He there shows a device very similar to the patent, but with the moldings straight, so that the machine can be lifted in and out. The resulting interstice between the bead of the waist and the bead of the molding he complains of as a defect, which it was. I find that letter compelling proof that Naill could not have heard or understood Beecroft, if Beecroft disclosed the complete invention on the day before, and I must own that it is impossible to suppose that he did not understand it. If the case stopped here, I should, I think, be obliged to hold that the defendant had carried even the burden of proof beyond a reasonable doubt.

[1] However, in view of the later conduct of the parties, I do not find it necessary to make any finding whatever on that issue, because I think that, even though the fact be as the defendant asserts, they are estopped to assert it. The result is that I do not mean to uphold the patent in general, but I do against this defendant. The facts on

which the estoppel depends are as follows:

Beecroft was again in Hanover on April 10th, and on April 12th he wrote to Naill, saying that he proposed to take out a patent upon this idea, which he had suggested, and that he would entertain negotiations for an exclusive license to the defendant. Naill answered without any dissent, and Beecroft proceeded to retain a lawyer. Again on May 21st Beecroft wrote Naill, saying that it must be understood that the defendant should have a shop right under his patent, when issued, for so long as he continued in its employ. Naill again acquiesced by not objecting. Beecroft went on, filed his application, and paid whatever expenses this occasioned. He continued to serve the defendant upon the understanding created as I have said. Finally, on October 16, 1917, just on the eve of the patent's issue, he again repeated his claim, and Naill again did not protest. Thereupon he paid his fee and got his patent.

All this makes it justly obligatory on the defendant, whatever the facts, not now to raise the issue of Beecroft's first invention. Indeed, it is strong evidence on the issue itself, strong enough at the hearing to have put me in some doubt. On reflection, I feel Naill's letter of March 30th to be more conclusive than I then did; but the result is the same, so far as these parties are concerned. The defendant certainly never meant to dispute Beecroft's claim until some time after suit was brought. When the relations between them broke, and when Beecroft was threatening suit, they raised no such question, but relied upon their shop right. Indeed, they maintained this position, even after suit brought, and it was probably only after their attorneys advised them that they sought to dispute his rights. Certainly it was then too late. Beecroft had too long relied on their inaction, and had done too much on the faith of their assent, to let the whole issue be now unravelled as they propose. Hence, without deciding the issue of first invention at all, I decline to allow it to be interposed

in this suit. Others may urge it, if it becomes relevant later. Even this defendant may dispute the validity of the patent for lack of invention, but that it was their discovery, and not Beecroft's, for what it may be worth, that I think they clearly are concluded against dis-

puting.

[2] The next question is as to the validity of the patent; i. e., whether or not it is for an invention at all. It is quite true that it seems a very simple solution at first blush, and it is not without significance that the examiner originally declined to allow it under a patent to a man named Vaughn for a tray in a baby's chair. I do not think that the mechanical ingenuity involved in the patent requires any invention, and, judged from the point of view of the examiner alone, I should entirely agree with him that, if there was any invention, it was disclosed in Vaughn. I think any shrewd, live artisan would know how to put the machine with the spreading legs inside the four moldings. But that is not the whole story, because the real question is whether it took any invention outside of the capacity of the ordinary artisan to take the new model 9 of the Victor Company, and to fit it into a new stand in such a way as to retain the appearance of a unified structure.

I think, on the whole case, that the patent must prevail. In the first place, it is of some significance to my mind that the Victor Company, which is a shrewd, aggressive organization, devised this machine for the very purpose of preventing exactly what Beecroft accomplished. They thought they had made a machine which would effectively protect them in maintaining their hold on the market for the floor machines, which have been greatly interfered with by the trade practice which had grown up. That is the first bit of evidence.

The second is that there was another effort, by a firm known as Solters, to do the same thing, and they failed. They attempted to make the top moldings of the stand or cabinet such that it would fit the scroll work on the bottom of the new model, and they could not accomplish it because there was an undercut curve on both sides of

the legs, which prevented a neat fit.

Again, Naill in his letter to Beecroft of the 27th of March said that it was a "mighty hard job"; and there is Naill's letter of March 30th, in which he made another ineffective effort, just as Beecroft had done earlier. In other words, we have a situation in the art in which people were trying to meet a difficulty which the Victor Company had deliberately devised, to be, I suppose, as baffling as possible. In the face of all this, it does not seem to me that I ought to say it was a work which any journeyman could devise.

[3] The second two defenses I will take up together. The question really is whether the defendants have a shop right. Now, I understand the rule of shop right to be this: That where an employee makes an invention, and allows his employer to develop it with his own resources, and to market it, and establish a trade in it, he cannot, after he leaves the employer, prevent him from going on, and so compel him to lose all the investment that he has put in, and the trade he has established, unless at the outset he gives him some warning. The

rule is entirely equitable; the books put in the form of an estoppel. Gill v. U. S., 160 U. S. 426, 430, 16 Sup. Ct. 322, 40 L. Ed. 480; Lane & Bodley Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049.

The question, therefore, is how early Beecroft gave the defendants to understand that they were not to have a shop right, and what their attitude was in the face of any declarations of his on that score. The plaintiff urges that the letter of April 12, 1915, was a sufficient notice that Beecroft did not mean to allow them to have any shop right. I think that letter must probably be read as referring only to an exclusive license, and that, strictly speaking, it may not be taken as a dissent from their shop right, though possibly Beecroft thought that it covered that as well. Certainly it showed that at the very beginning he was raising a question as to their manufacture. However that may be, on May 21st, which was about six weeks later, he wrote a letter which showed very clearly that he meant to limit any shop right to the term of his continued employment with them, and unless they had at that time acquired a complete shop right, no act of theirs thereafter could bestow it upon them, for it was a very clear warning.

What had they done before May 21st? They had made moldings; they had completed some of their stock, though the amounts are not very great. Mr. Siggers shows me in a book, in one instance some 13 moldings, and in another some 4 moldings; but the moldings are not very numerous. The exact amount that they had invested up to that time does not appear. They had not, I think, actually marketed any, or if they had, they were very few. They went on after the 21st of May, without any dissent from Beecroft's assertion that their shop rights were to be limited to the term of his employment, and they went on after October 16, 1917, without any such dissent, allowing him to act upon a very natural inference arising from their apparent consent. As the whole matter is equitable, it seems to me very clear that their time to protest was at the time when they got the first clear notice. I think their inaction and their failure to prove

case out of the ordinary rule.

I therefore feel that the evidence justifies overruling the defenses of the defendants, and plaintiff may take a decree, but without costs.

that there was any substantial investment before May 21st takes the

SHAPIRO & ARONSON, Inc., v. FRANKLIN BRASS FOUNDRY et al.

(District Court, E. D. Pennsylvania. October 25, 1920.)

No. 2003.

Patents €-328-52,969, for design for chandelier arm, valid and infringed.

The Rosenberg design patent, No. 52,969, for a design for a chandelier arm, held valid and infringed.

In Equity. Suit by Shapiro & Aronson, Incorporated, against the Franklin Brass Foundry and A. Slotko, doing business as the Famous Chandelier Company. Decree for complainant.

Dodson & Roe, of New York City, and J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for plaintiff.

Julius C. Levi and Hector T. Fenton, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. Letters patent No. 52,969 were issued February 4, 1919, for a design of the arm of a chandelier. The defendant made use of the very thing which was patented. In consequence no question of infringement arises. In further consequence, the sole issue presented is that of validity. Every article of manufacture intended for use presents, or may present, artistic as well as utility features. The obvious motive for the enactment of the law authorizing the grant of patents such as that held by the plaintiff, is to encourage, and by the promise of a monopoly as a commercial reward to stimulate, efforts to produce results in manufacture which appeal to the artistic sense. One of the conditions of the grant of the monopoly is that the design shall be "new, original and ornamental." What may be called the ordinary patent is granted for what is "new and useful." In determining whether an article of manufacture possesses patentable novelty and utility, we have for our guidance fairly definite standards. The rule of admeasurement is fairly well known and definite. In passing upon the originality and beauty of a design, we are driven to the measure which "the elastic chord of feeling" gives us. The test of utility, to which we are often referred, is of very little practical aid to us. It is, of course, true enough that, if a design possesses artistic merit, it is ex vi termini attractive, and because of this will be in demand.

Aside from the difficulty always present of making sure whether commercial success is due to the merits of the commodity or to the arts of the salesman, we have, in every controverted case, the sure result that the design is patentable. This is for the reason that, unless the design makes the article attractive, so as to be in demand, no one would be tempted to trespass upon the rights of the patentee, and no patentee would go to the expense and trouble of defending a monopoly which was not worth defending. The right to monopolize the sale of something which could not be sold would be a monopoly of nothing. It follows, almost as of course, that the only cases presenting them-

selves for decision are cases in which the element of more or less commercial success appears. The test of the appeal made to the artistic sense is intelligible enough, but too variable to be of value. The question, then, is one of taste, the absence of standards of which is voiced for us in the phrase de gustibus non disputandum. More or less unsatisfactory as these tests are, they are all we have to enable us to determine whether a design is "new, original and ornamental."

The doctrine is invoked by the capable counsel for defendant that a design must possess something more than artistic merit, in that it must also be both "new" and "original." These words, although conveying something of the same meaning, are not synonymous. A design may be new in the novelty sense, as a specific design, and yet possess nothing of what is termed originality. The thought intended does not lend itself readily to expression. We get the essence of it in many phrases in common use, such as will readily occur to any one. Originality, among other things, is the converse of the commonplace and of the stereotyped. The essence of the thought is of something originated—of something created. A design may be new, without being original, in this sense. After all, however, originality can be perceived or sensed only by being felt, in much the same way that the artistic appeals to us.

Applying these tests, and starting with the prima facie right implied by the grant of the patent, we feel constrained to make the finding of validity in favor of the plaintiff. This finding is confirmed by the attitude of the defendant. Although the novelty and originality of this design is denied by the defendant, the real defense is based upon the averment that the use of the patented design was abandoned as soon as the defendant learned of the rights claimed by the plaintiff,

and that the extent of the use was in itself negligible.

The position is taken that an injunction could have no other than an advertising value, and that a decree for an accounting would be wholly futile. This brings into view the question of a compliance with R. S. § 4900 (U. S. Comp. St. § 9446). The Act of February 4, 1887 (Comp. St. §§ 9476–9477), imposes a penalty of \$250 for the unauthorized use of a design. This is in the nature of minimum damages, as it is further provided that, if the profit received from the unauthorized use exceeded \$250, the defendant is answerable for the excess. It has been held that the \$250 by way of special damages cannot be recovered without a compliance with R. S. § 4900. Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426.

This deprives the patentee of all claim for damages, unless constructive or actual notice of the patented right was given. No constructive notice was given, but actual notice was received on a date which the testimony does not disclose. This finding is made, notwith-standing the absence of proof that definite notice of the number or date of the letters patent was given, because the defendant accepted the notice as notice both of the patent right and that the defendant was infringing, and claims to have acted upon this notice by desisting from the infringement. Whether the defendant did thereafter in-

fringe, and the extent of the infringement as measured in profits

received, is a finding best deferred until an accounting is made.

The finding now made is therefore confined to the features of the validity of the letters patent, infringement by the defendant—the right of the plaintiff to a writ of injunction, and to an accounting for profits, with the right to recover for actual damages, or the minimum damages of \$250, and for any profits in excess thereof, if it shall afterwards be found that the defendant continued to infringe after notice of the plaintiff's rights. The right of the plaintiff to recover any damages, either actual or the special damages allowed by the act of 1887, is dependent upon the finding hereafter to be made of whether the defendant continued the infringement after notice. The plaintiff, however, is entitled to an accounting for actual profits, independently of any such finding; this court having held that R. S. § 4900, denies the recovery of damages, but not profits. Churchward v. Bethlehem (D. C.) 262 Fed. R. 438.

We appreciate at its full value all which has been so strongly urged upon us in respect to the duty of a chancellor to withhold a decree which would be futile in its operation, or result in nothing other than harassment to the defendant. If it should develop to be the true state of affairs that the defendant was guilty of infringement only in one isolated act, and that he wholly desisted after notice of the plaintiff's rights, there would surely be no real occasion to issue either a writ of injunction or to require an accounting. Acceptance of the unsupported statement of the defendant, however, would be fraught with

danger.

This cause being on the equity side of the court, we have control over the costs. If plaintiff goes into an accounting, and there develops that there is nothing of which an accounting can be made, the disposition of the costs of the inquiry will be within the control of the court. All danger of an improper advertising use of the decree can easily be taken care of in the decree which is made.

A decree embodying these findings and incorporating the thought that no advertising use shall be made of the decree may be submitted.

SAYRE et al. v. BREWSTER, Internal Revenue Collector.

(District Court, N. D. New York. October 30, 1920.)

Pleading \$\infty\$=214(5)—Demurrer admits allegations of fact, but not conclusions.

A demurrer to the complaint admits all allegations of fact, but does not admit conclusions.

2. Internal revenue S-State transfer tax is deductible from the estate in determining federal tax.

The New York transfer tax, which was approved and allowed by the Surrogate's Court and paid by the executors, is a charge against the estate allowed by the laws of the jurisdiction under which it is being administered within Act Sept. 8, 1916, tit. 2, § 203 (Comp. St. § 6336½d), which should be deducted from the amount of the estate before the United States tax was computed.

3. Pleading \$\infty\$=204(2)—Demurrer to whole complaint overruled, if any cause of action is stated.

Where a complaint sought to recover from the collector of internal revenue as a whole the amount of the estate tax paid under protest, a demurrer to the complaint for failure to state a cause of action must be overruled, if plaintiff was entitled to recover a part of the sum paid.

Action by James Sayre and another, as executors of the last will and testament of Theodore S. Sayre, deceased, against Neal Brewster, as Collector of Internal Revenue for the Twenty-First District of the State of New York, demanding judgment in the sum of \$19,657.49, with interest on \$17,999.71 of said sum from February 23, 1917, and interest on \$5.12 of said sum from April 4, 1917, and interest on \$1,542.66 of said sum from January 30, 1918. On demurrer to the complaint. Demurrer overruled.

Theodore L. Cross, of Utica, N. Y. (H. T. Newcomb, of New York City, of counsel), for plaintiffs.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for defendant.

RAY, District Judge. The defendant demurs to the complaint on the ground that "the complaint fails to state facts sufficient to constitute a cause of action." The complaint alleges the appointment and qualification of the plaintiffs as executors of the last will and testament of Theodore S. Sayre, deceased, which death occurred December 7, 1916, and contains the usual allegations as to the residence of the deceased and that he left a will. The will, which was duly probated, contains the following provisions:

"First. I order my executors hereinafter named to pay all my just debts and my funeral expenses, also any taxes which may legally be imposed upon the legacies and devises hereby made, it being my will that said legacies and devises be paid in full without rebate or deductions."

"Fifteenth. I give, devise and bequeath all the rest, residue and remainder of my property, real and personal, and of every name and nature, and where-soever situated, in equal shares to my nephew and nieces (children of my deceased brother Charles), namely, James Sayre, George S. Sayre, Caroline A. Sayre, Anna L. Sayre, Amelia V. R. Sayre, and Leonora Sayre Platner."

The deceased was survived by his residuary legatees named in the will, whose names are set forth in the complaint, and it is alleged that these persons were adjudged to be the residuary legatees by a decree of the Surrogate's Court of Oneida county, the court having jurisdiction of such matter. In such surrogate's decree each of such residuary legatees was decreed to be entitled to receive one-sixth of the residuary estate of said decedent. The complaint then alleges that there was assessed against the estate of said decedent by the surrogate of said county of Oneida, by an order made January 26, 1917, a transfer tax due and payable to the state of New York in the sum of \$34,582.25, which tax, less a discount of \$1,729.11, was thereafter and on the 5th day of February, 1917, paid and satisfied by the payment to the comptroller of the state of New York of the sum of \$32,853.14, which payment was sanctioned and approved as an administration expense by an order of the said Surrogate's Court entered July 31, 1917.

The whole of this tax was paid by the plaintiffs as executors, out of the residuary estate of said decedent by direction and authority of said

Surrogate's Court.

The complaint also alleges that prior to and on February 23, 1917, the defendant, collector of internal revenue, claimed and demanded of the plaintiffs, as executors aforesaid, the sum of \$17,999.71, which he claimed had been lawfully assessed against said estate of said Theodore S. Savre by the Commissioner of Internal Revenue of the United States, pursuant to certain provisions of title 2 of the Act of Congress of September 8, 1916, and amendments thereof (Comp. St. §§ 6336½a-6336½m), and also alleges that February 23, 1917, under duress and with protest, and to avoid penalties threatened by the defendant, the plaintiffs, as executors aforesaid, paid to the defendant the said sum of \$17,999.71 out of the residuary estate of the said decedent. The complaint then alleges a further demand of the additional sum of \$5.12, which the defendant claims should have been included and paid, and that same was paid under like circumstances and with like protest, and further alleges that prior to and on January 30, 1918, the defendant claimed and demanded of the plaintiffs an additional sum of \$1,642.66, which he claimed had been lawfully assessed against said estate under the same authority of law, and that same was paid under duress and with protest, and to avoid penalties threatened by the defendant.

The complaint then alleges that "in making his said demand, and prior to and on January 30, 1918, for the said sum of \$1,642.66, the defendant pretended to be authorized by the regulation purporting to be issued in accordance with said title 2 of said Act of Congress of September 8, 1916, and amendments, and known as Treasury Decision No. 2524," and which regulation is then set out in full and reads as follows:

"Treasury Department,

"Office of Commissioner of Internal Revenue,
"Washington, D. C., September 10, 1917,

"To Collectors of Internal Revenue:

"An exhaustive study of the nature of state inheritance taxes has led this office to the conclusion that amounts paid to states on account of inheritance, succession, or legacy taxes are not 'such other charges against the estate as are allowed by the laws of the jurisdiction,' and accordingly are not deductible in arriving at the amount of federal estate tax. T. D. 2395 is hereby revoked.

David A. Gates, Acting Commissioner.

"Approved: Byron R. Newton, Acting Secretary."

The complaint alleges that the whole of said \$1,642.66, claimed, demanded, and paid as aforesaid, was claimed and demanded upon the theory that the payment of \$32,853.14, being the transfer tax lawfully due and paid to the state of New York, as stated in the complaint and charged against the estate of said decedent, is not allowed by the laws of the jurisdiction in which said estate was lawfully administered, The complaint alleges that the defendant refused to allow the deduction of said \$32,853.14 as a charge against the estate aforesaid, but demanded and compelled its inclusion as a part of the net estate upon which he claimed that the—

"pretended tax had been computed, thereby increasing the amount which he demanded and collected as aforesaid by 5 per centum of said \$32,853.14, or in the sum of \$1,642.66."

The complaint alleges that after having made all the payments set forth amounting in the aggregate to \$19,647.49, and on or about March 8, 1918, the plaintiffs, as executors aforesaid, duly appealed to the Commissioner of Internal Revenue from and on account of the action of the defendant in holding them or the estate of said decedent liable to the payment of the said sum so paid, and any or every part thereof, and in collecting said sum in the manner aforesaid, and represented to the Commissioner that the collection of said sum was unlawful, and claimed and demanded that the whole of said sum shall be refunded; that on or about July 12, 1918, the Commissioner of Internal Revenue rejected and disallowed the appeal made by the plaintiffs, and refused and still refuses to refund the said sum of \$19,647.49, and each and every part thereof, except the sum of \$38.30, which the Commissioner admits was erroneously and illegally demanded and collected. The complaint alleges that no part of the said sums so illegally paid have been repaid.

The complaint then alleges as follows:

"Plaintiffs further represent and allege that the said action of the defendant, in demanding said sum of \$19,647.49, and enforcing and exacting payment thereof, was without any warrant or authority of law and that the whole of said sum was illegally demanded and collected, for the reason that said title II of said Act of Congress of September 8, 1916, and the amendments thereto, are contrary to the Constitution of the United States, and unconstitutional and void, in that:

"a. They attempt to levy a tax upon the operation of the laws of the several states, and to diminish and impair the exercise by the several states of their constitutional right to control and regulate the administration of estates of decedents.

"b. They attempt to create a tax which, if valid, would tax the right or privilege of one individual at a rate fixed with reference to the value of the right or rights or privilege or privileges of another individual, or of other individuals, thus bringing about a profound inequality, which transcends the limitations arising from the fundamental conceptions of free government which underlie all constitutional systems.

"c. They attempt to create a direct tax, which, if valid, would be a direct tax not apportioned among the several states in proportion to population.

"d. They attempt to create a tax which, if valid, would not be uniform throughout the United States.

"e. They would, if effective, take property without due process of law.

"X.

"Plaintiffs further represent and allege that the said action of the defendant, in demanding so much of said pretended tax as was demanded and paid, as aforesaid, by reason of the refusal to consider said transfer tax of \$32,-853.14, paid as aforesaid to the state of New York, to be a charge against said estate duly authorized by the jurisdiction in which it was lawfully administered, and enforcing and exacting payment thereof, was without any warrant or authority of law, and that such portion of said pretended tax was illegally demanded and collected for all the reasons aforesaid and also in this:

"a. The said pretended regulation, known as Treasury Decision No. 2524, hereinbefore in paragraph VII hereof fully set forth, was not and is not a lawful rule or regulation, but was and is illegal and void, and the only lawful rule or regulation consistent with said title II of said Act of Congress of

September 8, 1916, and amendments, if said title and said amendments are constitutional, is the rule contained in Treasury Decision No. 2395, which said Treasury Decision in words and figures is as follows:

"Treasury Department,

"'Office of Commissioner of Internal Revenue,

"'Washington, D. C., November 17, 1916.

"'Sir: Replying to your letter of the 14th instant, inquiring whether state inheritance taxes are deductible from the gross estate of a decedent, in determining the federal tax due under title II of the Revenue Act of September 8, 1916, you are informed that among the deductions from the gross estate specified in section 203, paragraph a, subparagraph 1, of the above-mentioned act, is the item "such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered."

"'Since it does not appear open to question that state inheritance taxes are a primary charge against an estate, and allowable as credits to executors and administrators in every state imposing such taxes, they are clearly deductible from the gross estate of the decedent whose property and interests are liable to the federal tax imposed in title II of the Act of September 8, 1916.

" 'Respectfully,

W. H. Osborn, "'Commissioner of Internal Revenue.

"'Collector, 23rd District, Pittsburgh, Pa.
"'Approved: B. R. Newton, Acting Secretary of the Treasury.'"

- [1] The demurrer to the complaint admits all allegations of fact, but does not admit conclusions.
- [2] The state of New York had the right to impose the tax it did impose on this estate, acting through its Surrogate's Court, which was and is the court of competent jurisdiction. When that tax was imposed, it became a charge upon and against the estate, and this fact is clearly recognized by the act of Congress above referred to. It was not the policy or purpose of Congress to impose a tax upon the amount of a tax already paid from the estate of a decedent or to the state in which such estate is being administered. I think the tax paid the state of New York and imposed by the laws of that state, and approved and allowed by the Surrogate's Court, was and is one of "such other charges against the estate as are allowed by the laws of the jurisdiction whether within or without the United States under which the estate is being administered," and that it follows that the Commissioner and Collector of Internal Revenue in imposing the tax due the United States should have made the proper deduction for and on account of such payment to the state.
- [3] If I am correct in this view, it follows that the demurrer to the complaint must be overruled, as the complaint does not set forth separate and distinct causes of action, but seeks to recover the entire amount of tax paid the United States, and groups all the payments into one cause of action, and the demurrer, as we have seen, alleges that no cause of action is set up in the complaint. I think the complainant, under the facts alleged in the complaint, excluding from consideration conclusions, is entitled to recover the sum of \$1,642.66, and no more, and that therefore the complaint states a cause of action for that amount, and that the demurrer must be overruled for this reason. My opinion is that as to the balance the plaintiffs are not

entitled to recover, but this is not a trial on the merits. It is simply a question whether or not the complaint states any cause of action for

any amount, entitling the plaintiffs to recover any amount.

The demurrer is therefore overruled, and there will be an order accordingly. The defendant should be directed to answer the complaint within 10 days from service of the proper order, in default of which the plaintiffs should have judgment for the said sum of \$1,642.66, with interest thereon from January 30, 1918, but for no greater sum.

NEW YORK CENT. R. CO. v. PUBLIC SERVICE COMMISSION OF NEW YORK, SECOND DIST., et al.

(District Court, N. D. New York. August 10, 1920.)

1. Courts € 101—Application for preliminary injunction against Public Serv-

ice Commission must be heard by three judges.

In suit by a railroad against a state Public Service Commission, plaintiff's application for preliminary injunction restraining the commission from enforcing its order requiring plaintiff to file an amended tariff of passenger rates at 2 cents a mile, instead of 3, on the ground that the commission's order was a denial of the equal protection of the law and a deprivation of property without due process, violating Const. Amend. 14, must be heard by a court composed of three judges, as required by Judicial Code, § 266 (Comp. St. § 1243).

2. Railroads 51/2, New, vol. 6A Key No. Series—Federal control of rates valid.

Intrastate passenger rates of 2 cents a mile, authorized by state statutes, were lawfully changed to 3 cents a mile by General Order No. 28, issued May 25, 1918, by the Director General of Railroads, under Federal Control Act March 21, 1918, § 8 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115%h); it being a constitutional exercise of the war power of Congress.

3, Railroads 51/2, New, vol. 6A Key-No. Series—Termination of federal

control restored state regulations of rates.

The Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾ a-3115¾ p) merely suspended existing state laws continued to control the rates ex proprio vigore, so that where a railroad, before federal control was required by Laws N. Y. 1853, c. 76, § 7, and Railroad Law N. Y. § 57, to charge not more than 2 cents a mile for way passengers, such rate automatically became effective after September 1, 1920, the limit of time after return of railroads to private ownership, under Federal Transportation Act Feb. 28, 1920, § 208 (a), during which the states could not reduce rates; the state not being required to express its intention to continue its established rates by enacting a new law in the same terms; and, under Public Service Commissions Law N. Y. § 48, an order of the commission requiring the railroad to file with the commission, on or before August 1, 1920, an amended tariff restoring the 2-cent passenger rate, and a suit by the commission against the railroad to enforce the order, were proper.

Hough, Circuit Judge, dissenting.

In Equity. Suit by the New York Central Railroad Company against the Public Service Commission of New York, Second District,

and others. On plaintiff's motion for preliminary injunction. Motion denied.

Before WARD and HOUGH, Circuit Judges, and COOPER, District Judge.

WARD, Circuit Judge. The New York Central Railroad Company filed its bill against the Public Service Commission of the state of New York for the Second district, and against its attorney, alleging that the commission had made an order June 15, 1920, requiring it to file, 30 days before September 1, 1920, an amended tariff of rates, restoring its rates for way passengers between Albany and Buffalo to 2 cents a mile on and after that date, in accordance with the law of the state of New York, and had begun a suit by the defendant, its attorney, in the Supreme Court of the state of New York for an injunction or mandamus compelling it to do so. The bill further alleges that the plaintiff is entitled to charge three cents a mile under section 208 (a) of the federal Transportation Law (41 Stat. 464), and that the order in question denies it the equal protection of the law and deprives it of its property in violation of the Constitution of the United States, and more particularly of the Fourteenth Amendment thereof.

The answer of the commission denies that its order, or the suit instituted by it to enforce the order, violates the Fourteenth Amendment and alleges, on the contrary, that the rate in question is not regulated by the federal Transportation Law at all, but by section 7 of chapter 76 of the Laws of 1853, authorizing the plaintiff's consolidation, and by section 57 of the Railroad Law of the state of New York (Consol. Laws, c. 49), both of which require the plaintiff to charge not more than 2 cents a mile for such way passengers. The plaintiff now moves for a preliminary injunction enjoining the commission and its attorney from enforcing or attempting to enforce the order in question pendente lite.

[1] Obviously, if the contention of the plaintiff be right, a constitutional question is raised, viz. whether it is threatened by the state authorities with being deprived of one cent per mile per passenger, its property under the federal Transportation Law, and the application for a preliminary injunction must be heard by a court constituted as required by section 266 of the Judicial Code (Comp. St. § 1243). A

pure question of law is presented.

[2] The railroad company, by section 7 of the special act (chapter 76, Laws of 1853) authorizing its consolidation, and by section 57 of the Railroad Law of the state of New York, is required to carry way passengers between Albany and Buffalo at a rate not exceeding 2 cents per mile. This rate was observed down to June 10, 1918, when by virtue of General Order No. 28, issued May 25, 1918, by the Director General of Railroads, under section 8 of the Federal Control Act of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 31153/4h), the rate of carriage of passengers, both interstate and

intrastate, was fixed at 3 cents per mile. This is a constitutional exercise of the war power of Congress. Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897.

[3] The Federal Transportation Act of February 28, 1920, directed the return of railroads theretofore under federal control on February 29, 1920. Section 208 (a) of that act reads:

Section 208(a). "Existing Rates to Continue in Effect. All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge unless such reduction or change is approved by the commission."

The case turns entirely upon the construction of this section. It clearly authorizes the states to change the existing federal rates as to intrastate carriage on and after March 1, 1920, except that they cannot reduce those rates before September 1, 1920, without the approval of the Interstate Commerce Commission. The continuance of the federal rates for 6 months from March 1, 1920, was coincident with the government's guaranty of just compensation to the railroads for this period provided in section 209, and is a protection to the government.

Congress was legislating for 48 states, some of which we suppose had not fixed intrastate rates by legislation or by administrative commissions, and therefore it was provided that the change of the federal rates should be made by "state authority" or "pursuant to authority of law." When a state law existed regulating the rates the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a-3115¾p) did not repeal, but merely suspended, that law. Upon the termination of federal control the state law continues to control the rates ex proprio vigore. See the very analogous situation discussed in Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855, and Butler v. Goreley, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981.

It seems to us incredible that Congress could have intended to require a state which had enacted such a law to express its intention to continue its established rates by enacting a new law in the same terms. Section 48 of the Public Service Commissions Law of the state of New York (Consol. Laws, c. 48) authorizes the commission to investigate of its own motion any act done or omitted to be done by a railroad corporation "in violation of any provision of law." If, as we hold, the existing legislation of the state of New York will change the federal rates by restoring the state's rate on and after September 1, then the plaintiff was bound to file with the Public Service Commission an amended tariff in accordance therewith on or before August 1. It was this which the order complained of required the plaintiff to do, and the plaintiff refuses and has omitted to do so in violation of law.

We are told that the case is one of great importance, will go to the Supreme Court, and that no time should be lost; therefore, without saying more, the motion is denied.

HOUGH, Circuit Judge, dissents.

THE HENRY KOERBER, JR.

THE CHARLOTTE (two cases).

(District Court, W. D. New York. September 27, 1920.)

Nos. 1165, 1166, 1176.

Admiralty = 18-State officer not exempt from suit for maritime tort.

The Eleventh Amendment, providing that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," held not to include suits in rem in admiralty for a maritime tort, nor to exempt the superintendent of public works of a state, authorized by statute to charter and operate tugboats, from process under the fifty-ninth admiralty rule (29 Sup. Ct. xlvi) in a suit in rem against such boats for a tort committed while they were being operated by him under charter.

In Admiralty. Suits by the Murray Transportation Company against the steam tug Henry Koerber, Jr., and by William Dolloff and by George Wagner against the steam tug Charlotte. On motion to dismiss monition. Denied.

Charles D. Newton, Atty. Gen., and Edward G. Griffin, Deputy Atty. Gen., for State of New York.

Stanley & Gidley, of Buffalo, N. Y. (Ellis H. Gidley, of Buffalo, N. Y., of counsel), for respondents.

HAZEL, District Judge. The separate libels substantially allege that the tugboats Charlotte and Henry Koerber, Jr., while under charter by the superintendent of public works of the state of New York, and under his control and direction, were so negligently navigated that damages were sustained by several barges and vessels, of which the libelants were either bailees or owners. The proceeding is in rem. The owners of the towing tugs claim to be innocent parties to the subject-matter, since the towing tugs at the time of the accident were chartered by the superintendent of public works of the state of New York for the benefit of the state under an act of the Legislature authorizing him to tow boats for hire in the Erie Canal, and appropriating \$200,000 to carry the provisions of the act into effect.

After the libel was filed, the claimants of the tugs, under admiralty rule 59 (29 Sup. Ct. xlvi), cited the superintendent of public works to appear and answer the libel. In the petition it is stated that, in case the superintendent of public works cannot be found, then the goods and chattels of the state of New York within this district be attached to the amount of the claim. The Deputy Attorney General

of the state appeared specially on the return of the monition, and moved for a dismissal of the proceeding on the ground that this court is without jurisdiction of the person or the subject-matter herein, ei-

ther in a libel in rem or in personam.

The point is whether the proceeding is a suit in law or equity against the state of New York, or simply a suit in admiralty and of maritime jurisdiction. It is a suit, in my opinion, of the latter class. The decisions as I understand them, point to this conclusion. The only exemption from process by reason of a sovereign attribute under the admiralty law is possessed by the national government alone. Workman v. Mayor, etc., 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314. The Eleventh Amendment of the Constitution, true enough, provides that—

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

But this broad provision has several times been construed in a way

that does not include actions in rem to recover for a maritime tort; such actions not being strictly civil suits at law or in equity. The distinction between the latter forms of action and proceedings in rem is clearly suggested by Mr. Justice Story in his Commentaries on the Constitution of the United States (volume 3, § 1683), wherein he expresses a doubt as to whether the Eleventh Amendment of the Constitution extends to causes of that character. He states that a suit in admiralty is not, correctly speaking, a suit in law or in equity, but is often spoken of in contradistinction to both. In the Workman Case, supra, it was argued that, though courts of admiralty had the right to redress injuries to persons or property when the subject-matter was within the cognizance of such court and jurisdiction properly obtained of the person of the wrongdoer still admiralty courts were required to refuse relief whenever the relief was denied by the local

law of a particular state or the decisions therein, owing to the attributes of sovereignty of the wrongdoer. But the Supreme Court was of a different opinion, and held that decisions of a state court could not abrogate maritime law, and that under the general maritime law, where the relation of master and servant exists, an owner of a vessel committing a maritime tort is responsible under the rule of respondeat superior. The learned court discussed at length the question of the rights of a sovereign state to be relieved from suits against it, and reached the conclusion that no example is found in the admiralty law for determining that one subject to suit and amendable to process should be relieved from a maritime tort upon such a theory. It was also held that a vessel in fault was liable for injury at sea to the injured party; the claim being enforceable in admiralty, except "when the vessel is the property of the United States," and in that case, because of reasons of public policy, a liability could not be enforced in a

The principle in the Workman Case, supra, The Siren, 7 Wall. 153, 19 L. Ed. 129, and The John G. Stevens, 170 U. S. 120, 18 Sup. Ct. 544, 42 L. Ed. 969, clearly leads to the conclusion, in my opinion, that

direct proceeding against the ship.

all vessels, regardless of ownership, whether by individual, corporation, or state of the Union, are amenable to process in admiralty; the national government alone being exempted, although a suit at law or in equity where a state must respond is distinctly a suit against the state, as ably contended by the Deputy Attorney General, yet it is clearly and definitely recognized in the law that a proceeding in admiralty is sui generis, and general rules of procedure are treated as inapplicable. There is no rule of international application which in my estimation justifies the release of the superintendent of Public Works, who in his official capacity was authorized to engage in an enterprise involving the chartering of the tugboats in question for towing boats in the Erie Canal, and who furthermore was empowered by statute to collect fees for the towing services rendered and deposit the same in the state treasury.

Stress is laid upon the case of Governor of Georgia v. Juan Madrazo, 1 Pet. 110, 7 L. Ed. 73, where the libel was against slaves captured by pirates and seized under the state law. There was no attachment against the res, and Chief Justice Marshall, who wrote the opinion, treated the case as a libel in personam against the state, since the action was to recover the proceeds in the treasury realized on the sale of the slaves. Such a proceeding he regarded as a suit against the state, since the res was not in the possession of the District Court or properly with-

in its jurisdiction.

In this case, however, the proceeding is purely in rem, the admiralty court being in possession of the thing proceeded against, which suffices to enable bringing the state into the case under the fifty-ninth rule in admiralty for proceeding against it in personam through its proper official. Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991.

Motion to dismiss monition denied.

AMERICAN COAL MINING CO. v. SPECIAL COAL AND FOOD COMMIS-SION OF INDIANA et al.

(District Court, D. Indiana. October 2, 1920.)

No. 347.

1. Injunction =11-Will not issue to restrain interference with contracts

and interstate commerce not threatened.

Even though complainant has a right under the federal Constitution to have his contracts not impaired, and to engage in interstate commerce without restriction by a state coal commission, an injunction restraining interference with such rights by the commission will not be issued, before the commission makes an order, the enforcement of which would violate those rights.

2. Injunction 5-75-Nonliability for license fees not ground, in absence of

showing want of remedy at law.

The nonliability of a coal mining company for license fees under a statute creating a state coal commission is not ground for an injunction against the commission, where, so far as the court's information of the state law went, plaintiff would have an adequate remedy by paying under protest and bringing action to recover the amount paid.

3. States =1-Have general sovereign powers.

The states have all the powers of an absolute unrestrained sovereign, except so far as certain powers have been surrendered to the federal government; while the federal government, is one of enumerated, specially defined powers and powers essential to those specifically granted.

4. Constitutional law ≈26-States have police power over subjects, except

as limited by Constitution or surrendered to federal government.

The state Legislatures are free to exercise the sovereign power of the state, except in so far as restrained by the state Constitution, and for purposes of federal inquiry may be assumed to have the full police power of a sovereign, except in so far as such power has been surrendered to the federal government.

5. Constitutional law =212, 253—Fourteenth Amendment did not restrict

police power to matters previously regulated.

The adoption of Const. U. S. Amend. 14 did not guarantee future freedom of action in all matters in which action had not theretofore been restricted, so as to prevent the application of the police power of the state in matters to which it had not theretofore been applied.

6. Mines and minerals \$\infty\$86—States can fix coal prices.

The regulation of the coal-mining business is within the police power of a state, and in such regulation the state can fix prices, which is a well-recognized mode of police regulation.

7. Constitutional law 212, 253—State law under police power violates

Fourteenth Amendment only when without bearing.

The test to determine whether a state law passed under its police power violates Const. U. S. Amend. 14 is whether there is no basis of fact on which to support the Legislature's finding of public welfare, or when the remedy prescribed has no possible connection with the evil to be cured.

8. Injunction =11-Relief denied, in absence of actual or threatened injury,

notwithstanding possibility of injury.

A bill to restrain action by a state coal commission will be dismissed, where there is no showing of action or threatened action by the commission which interferes with complainant's rights, even though it is possible that the commission may in the future make orders which will interfere with complainant's rights under the federal Constitution,

In Equity. Suit by the American Coal Mining Company against the Special Coal and Food Commission of Indiana and others. Application for temporary injunction denied, and bill dismissed without prejudice.

Charles Martindale, and Whitcomb & Dowden, all of Indianapolis, Ind., and Cooper, Royse, Bogart & Gambill, of Terre Haute, Ind., for plaintiff.

Ele Stansbury, Atty. Gen., for the State.

James W. Noel and Howard S. Young, both of Indianapolis, Ind., for Special Coal and Food Commission of Indiana and others.

Before BAKER and EVANS, Circuit Judges, and GIEGER, District Judge.

BAKER, Circuit Judge. [1] Respecting the motion for a preliminary injunction, the court is of opinion that certain parts of the bill do not present any emergency. Granting that the plaintiff has the right, under the federal Constitution, to have its outstanding con-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tracts protected from interference, it would be time enough to consider that question when an actual order is made by the commission, the effect of the enforcement of which would be to impair such contracts. Until

that time the question, in our judgment, is purely moot.

Similarly in regard to the question of interference with interstate commerce, no order has been made which directs this or any other mining company to do any specific thing. When some order may hereafter be made by the commission, the plaintiff, instead of finding itself damaged, may possibly find itself benefited. If the commission should direct the plaintiff to produce a maximum of 100,000 tons of coal for Indiana consumption, and the plaintiff should say, "We have already arranged for a larger Indiana consumption," certainly the plaintiff would not be injured by such an order; or, if the commission were to direct the plaintiff to dispose of 100,000 tons to Indiana consumers, at a price of \$2.50 per ton, the plaintiff might very gratefully accept the order and say "We had expected to charge only \$2.25 a ton."

We will not indulge in any presumption that orders, when they come to be issued, will in fact cause or threaten to cause any material damage

to the plaintiff.

[2] The question of the license fees the court would not deem a sufficient basis for the issuance of an injunction pendente lite, because as far as our information of the Indiana law goes, the plaintiff would have an adequate remedy by paying under protest, and bringing an action for the recovery of the amount paid, with interest; and the coal commission statute itself provides that none of the penalties shall be enforced while a civil question is being determined. Even if there should be a threat of enforcement of penal provisions, by reason of a refusal to obey some order of the commission, it would be time enough then to appeal to a court of equity, on the ground that no adequate remedy at law existed, and that there was an impending, actual threat of invasion of rights.

There is involved, however, in this application for a preliminary injunction, the one foundational question of the right of the state to

touch, at all, the coal-mining business.

If no such right exists in the state, then the temporary injunction should be issued at once; and because there would be no questions of fact to controvert, a final decree in favor of the plaintiff should at once be entered, if there is a total lack of power in the state to create this commission, through which to undertake the control of coal mining.

[3] Does such a power exist? Of course, it is elementary that our federal government is one of enumerated, specially defined powers, and powers essential to the execution of those specifically granted, and that out state governments are organized on the exact converse of that theory. The state has all the powers of an absolute, unrestrained sovereign, except so far as the state surrendered certain sovereign powers with which to constitute and create the federal government.

[4] The Legislature of the state is the agent of the people of the state in exercising the people's powers as an absolute sovereignty. The Legislature is an absolutely free agent in exercising state powers, except in so far as its principals, the people, have expressed a limitation

in the state Constitution. For the purpose of this federal inquiry it may be taken that the state Legislature had the full power of the people of the state of Indiana, and that the people of Indiana stood as absolute sovereigns over the persons and properties within the limits of the state, except in so far as those powers of sovereignty had been surrendered to the federal government. Among the powers surrendered, of course, was the power over interstate and foreign commerce, treaty making, the war power, and others. But there remained to the people of Indiana, as absolute sovereigns, the whole of the police power over matters within the state. That means the power of the people to determine upon measures for the public welfare, which may be expressed by the Legislature without any limitation that is not imposed upon the state by the federal Constitution.

[5] In this present inquiry concerning the right of the plaintiff to a preliminary injunction, the only federal question presented is that which arises under the Fourteenth Amendment. The Fourteenth Amendment was adopted, according to my present memory, in 1868. In 1868 there was a certain circle within which a person had his life, his right to his physical being. Within that circle he had free movement, and it was not until he came to cross its periphery that he collided either with his fellowmen or with the government as a social organism. And similarly in 1868 there existed circles which circum-

scribed a person's business and property rights.

Now, did the adoption of the Fourteenth Amendment mean that civilization was arrested at that date? Did it mean that the historian of the year 3000 would look back to the year 1868 as the time of the formation of a crystallized stratum of civilization in which, as in the geological stratum, he might find the footprints of the megatherium and the fossils of the dinosaurus? If that is true, then every attempt since 1868 to narrow the circle within which one was entitled to life has been in violation of the federal Constitution. If that is so, then every statute which created and defined a new crime and provided a punishment for it was unconstitutional. If that is so, then every time a new condition was imposed by which liberty of contract was restricted, and this circle was diminished in its area, the statute creating the condition was unconstitutional. Property is coupled with life and liberty. It is thereby entitled to equal consideration, but certainly to no greater. And therefore a state Legislature was just as free to limit the circle in which property rights stood as it was to diminish the circles in which life and liberty, freedom of contract, freedom of action, were circumscribed.

Of course, all the cases that have upheld any sort of state legislation since 1868, that has in fact diminished one's condition with his fellows and with the state, have necessarily meant that this Fourteenth Amendment did not fix a date line at which civilization should be considered as stratified and embodied in a dead layer.

[6] To my mind there are two classes of cases that illustrate the right of the state to exercise its police power. Over on the one side fall all of the cases in which there is a public franchise, or a public service, or a public utility. Over on that side belong, also, innkeepers

along with the carriers, and to that class was added, in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, the warehouse, which had been a private warehouse. In such cases the right to exercise the police power is based upon the fact that they either had a public charter, exercising a public power, like that of eminent domain, or they were performing a public service.

But there are other cases in which none of these elements of a charter, or the power of eminent domain, or a public service, or a devotion

of property to public use, appears.

How about the law in Indiana, back in 1881, that forbade a lightning rod expert to sell 40 rods to a farmer, and put them up on his barn, and go in and get the farmer to persuade or coerce his wife into signing as surety? In that case there was no charter, no franchise, no eminent domain, no public service, involved. It was purely an interference with the right of private contract, without the slightest excuse of the kind found over on the other side of the line. And what was the basis of it? The basis was the finding by the Legislature that wrongs and oppressions were being inflicted upon the married women of this state through the persuasion or duress of husbands or sons, and that the condition was of such consequence to the state, as an organized society, that a stop should be put to it; and so the Legislature passed the law (Rev. St. Ind. 1881, § 5119) that any contract of suretyship of a married woman should be void. That act was passed since 1868. If the adoption of the Fourteenth Amendment created a crystallized stratum, so that never thereafter could the right of contract be impaired, then that law was unconstitutional.

How about the laws, in this coal-mining industry, relating to the furnishing of timbers and props, and cages, and ventilation, and the general taking away of the freedom of contract between the mine operators and the miners with respect to the conditions under which they shall work? Under those laws it was no longer permissible for them to barter about what should be done with respect to the conditions in the mines. There was an absolute standard fixed, and the mine operator was absolutely prohibited from doing certain things. Why that law? Because of the dominance of the operator it was found by the Legislature that the men needed protection. The same thing is the basis of all our inspection laws. All of these things that are controlled in that way may be inspected, and the cost of the inspection charged against that particular industry, just as the examination of

banks is charged against the banking business.

Those are all familiar restrictions. Thousands of them could be cited, but they are all over on the other side, and there is a clear line dividing them from the cases that are based upon franchises and the exercise of eminent domain, the employment of streets for water and lighting and transportation purposes. These have no basis at all, except upon the power of the people to restrict the theretofore existing circle in which a person had his life, and the one within which he had his liberty, and the one within which he had his property, to bring these down narrower on account of conditions that were found to be oppressive to the people.

Over on this side, where the source of the power is the existence of a franchise, when the evil has been found to be that of exacting more than was fair to exact of the people, there has never been any doubt that the proper remedy was to say that "all you shall obtain shall be a fair return."

Now, what basis is there for any distinction in remedies? There is no distinction as to the source of power of regulation. It all comes from the police power. Dividing that into the two subject-matters upon which the police power operates—the one based upon the public franchise or the like, and the other upon abuses of the theretofore existing right of private contract or private property—when in the one case you find that the evil to be cured is extortion and the remedy is price regulation, then in the other case, when extortion is also found to be the evil, you should apply the known remedy for extortion. The power is one; the evil is the same evil; and the remedy is drawn from the same reservoir, though from different faucets. There is no infringement of the right of a man to hold property, if, under the power of eminent domain, it is taken from him for a public use and the fair value of it is paid him. That is a constitutional thing, and there is no objection to it. So, when it comes to regulating the returns that he shall receive from his property, that is not taking his property; it is simply a control of his property as an instrument in his hand, with which the Legislature has found that he has been bludgeoning the people.

I remember very well reading ancient statutes about cutting off the ears of the wage-earner and putting him in a pillory, if he went from one parish to another without written consent, and about fixing the wages of the laborer, and fixing prices, back in the times of Queen Elizabeth. Those statutes, though long ago repealed, demonstrate that in Anglo-Saxon institutions there was no lack of power to restrict the freedom of contract and to apply to the evil of extortion the remedy of price fixing. But there has been one statute that from the earliest times has stood over on this side of the line purely as an interference with the right of contract, and regulating the price. Take the case of the lender making a loan to a man at usurious interest. Now, what is a loan? A loan is really a sale. Title passes at once. Money is a commodity. Bankers buy and sell money. Now, here is one line of business that never has depended, as a basis for control, upon the power of eminent domain, or a public service. It is a private business. Nothing could be more private than the pawnbroker's business, and vet, from time immemorial, it has been unquestioned that the power existed to regulate that business by fixing the prices for money. I am unable to distinguish the underlying principle in that case from this, or from the statutes regulating rentals. I know, from common knowledge, that the state of New York has had under consideration such a statute, and Wisconsin has passed a law regulating rentals under certain conditions and during certain times; that is, there was a finding by the people of Wisconsin, who were the absolute sovereigns in all respects over every person and every piece of property in that state -except to the extent that sovereignty had been surrendered to the federal government—through their agent, the Legislature, that extortion was being practiced by landlords. The Legislature was the unrestricted agent of the people; it had the full power of the people, just as much so as if the people got together in a new constitutional convention and found exactly the same quality of oppression that was exercised by the man who took advantage of the necessity of some one to get some currency for himself. Are the sovereign people helpless in such a situation? They certainly are, if the Fourteenth Amendment stopped the narrowing of these various circles within which persons theretofore might move freely with respect to life, liberty, and property. But, otherwise, not. The police power is continuous. It has always existed, and necessarily must always exist. And it is as wide as any conceivable sovereignty can be. It is absolutely as wide—laying aside for the moment the part of the absolute sovereignty that has been made over to the federal government—as that of the Arab sheik, sitting out in front of his tent, controlling the actions of his tribal members.

Such is the power of the people of the state, provided they preserve a republican form of government and do not otherwise infringe upon

the federal Constitution.

One of the powers that was surrendered by the state was the war power. But the state never surrendered a jot or tittle of the police power as affecting the affairs within the state. Of course, they surrendered their police power as involving war. That has gone to the federal government. The power over interstate and foreign commerce has all gone to the federal government. With respect to internal affairs the power stands absolutely unchanged, unrestricted, in the state.

The federal government, being a government of listed, delegated powers, never had any general totality of sovereignty, as the states originally had. The federal government has no sovereignty, except that which was cut off from the states and welded together to make what there is of the national sovereignty. The federal government has no general police power, but with respect to war it is the successor of the state in police power—the power of the state to protect itself, the power to determine its own necessities, the power to protect the health and welfare and morals of its people. No dispute has ever arisen when health and morals were concerned. When you get down to welfare, the question is frequently raised about financial considerations. But, of course, the state has a right to protect its people with respect to financial considerations. All of our blue sky laws, and our married women surety laws, and our laws restricting the sale of patent rights, and our laws controlling fire insurance rates, and our exemption laws, are all financial questions, looking to the welfare of the citizens of the state, and ultimately the welfare of the state, because the state has an interest in the welfare of all of its citizens and inhabitants.

The federal government, with respect to the war power, is simply the successor of a part of what was once the state police power. The national power, with respect to war, is simply a piece cut off of the general power that belonged to the original states, which might have kept up, if they had chosen, each for itself, an absolute, full sovereignty.

Now, under that war power, which, in the national scheme of gov-

ernment, stands exactly analogous to the police power of the state, what has been done? Of course, the war power has been interpreted, and had to be interpreted, in view of the restrictions in the federal Constitution; had to be construed with respect to what was reserved in the federal Bill of Rights—the first ten amendments, and particularly the Fifth Amendment.

We have never thought, for a moment, that this war power authorized the federal government to go out and take a man's property without compensation. No. The Food Administration did not appropriate a man's property without due compensation. The Fuel Administration did not propose to take his coal away from him without due compensation. The federal government has this war power, originally the police power of the state, and it would have all been in our state, fully and completely, if it had not been assigned to the federal government, and when assigned its character did not change a particle; but it remained the police power, and under that police power, interpreted with the other provisions of the federal Constitution, you cannot take a man's property from him; but the Congress has declared, and, so far as the courts have passed upon it, they have said that, under that assigned part of the state police power, the right did. exist to regulate conditions of handling, and the prices of food and fuel. If the police power stops, it will stop when and where civilization and human rights stop, and not before. These questions are questions for each generation—each generation of free men; it ought to be so, and under the law it is so.

[7] Now, is there any rule for determining when the federal courts shall interfere, under the Fourteenth Amendment, with a state statute enacted under the police power? Yes. The best analogy, to my mind, is the basis on which an appellate court interferes with the verdict of a jury. If there is no basis on which a reasonable man could arrive at the result, it is set aside. Otherwise, it is not, even though the court, sitting as a jury, might have found the facts the other way.

It is only when either no basis of fact exists on which to lay the Legislature's finding, or when the remedy prescribed by the Legislature has no possible relevant bearing or connection with the evil to be cured,

that the statute is set aside.

As an illustration of that last feature, let us assume that the city of Indianapolis has passed an ordinance regulating the sale of fruit by retailers, which provides that the fruit shall be protected from flies and dirt by keeping proper netting over it, even prescribing the size of the openings in the netting. I assume that nobody would dispute that that was a reasonable exercise of the police power, to protect the health of the people. But suppose the council, finding the same evil existing among these vendors, not very cleanly, and not acquainted with the germ theories regarding the spread of diseases through the excretions of insects, should prescribe as a remedy that these fruit vendors should wear red plug hats? Of course, that ordinance would fall as an unreasonable, arbitrary, whimsical exercise of the police power, because, so far as we are now informed, there is no reasonable connection between the evil to be cured and the way in which the city

council said it should be cured. But, as we have heretofore indicated,

control of prices is known of old as a remedy for extortion.

This leads to the conclusion that all aspects of this bill are premature, except this one on the general power of the state. We are satisfied that the general power of the state to touch, in some way, upon the coal-mining industry, exists. If by actual orders, the state of Indiana, through its coal commission, should make a requirement upon some particular coal operator, that, instead of being favorable to his interests, as the supposititious order that I stated a while ago, was deemed by him to be detrimental to his interests—detrimental by reason of a conflict between the order and the rights guaranteed to him by the federal Constitution—then he would have a right to complain. That would be the time to determine whether the particular order did, in fact, infringe some right of the plaintiff—not theoretically, but in a way to inflict a trespass, an actual impending trespass, upon his property rights. The question about contracts, about violations and impairments of existing contract rights, could be raised at such a time. That is all purely speculative and conjectural now. And it is also purely speculative and hypothetical, even now, to inquire whether the plaintiff in such a case would have a sufficient legal remedy in the circuit court of Marion county, or whether he would be entitled to the prompt intervention of the federal court.

[8] This discussion of the one underlying principle involved in the hearing of this motion for the preliminary injunction also goes to the heart of the motion to dismiss. That is, there is in this bill—speaking now for myself, on the motion to dismiss, which is before the District Court—there is no basis in fact for injunctive relief, except this one of want of power. The power existing, that ground disappears from the bill, and the other grounds present theories of what might happen and not allegations of fact respecting an existing situation—except as to those items of the \$25 and the license tax of 1 cent a ton.

The order will be that the application for a temporary injunction is denied, and on the motion to dismiss the order will be that the bill is dismissed without prejudice. That means that there is absolutely nothing in the bill, now, in our judgment, that warrants either a temporary injunction or a final injunction. You cannot make any proof as to a

hypothetical condition in the future.

The bill will be dismissed without prejudice, and the record may show affirmatively that there is absolutely nothing decided, except the one question, that the state, under its police power, can lay its hand upon the coal-mining industry. There may be, to-day, wholly private businesses that we would have no hesitancy, to-day, in saying were beyond the reach of the Legislature—saying so, just as we would say in case of a verdict of a jury, because there is no basis of fact upon which to predicate such a finding; but our sons, or our grandsons, may find a very urgent necessity for including that class of business, or enterprises, within the regulation of the state, under its police power.

My Brethren graciously state that they concur in the views that I

have endeavored to express for all of us.

VANDALIA COAL CO. et al. v. SPECIAL COAL AND FOOD COMMISSION OF INDIANA et al.

(District Court, D. Indiana. November 27, 1920.)

No. 359.

1. Commerce \$\infty\$60(1), 79—Temporary injunction against interference with interstate commerce; regulation of sale of coal for delivery outside state, interference with commerce by coal commission.

The Indiana Coal and Food Commission Law and orders issued thereunder, requiring coal mines which had contracted to deliver their coal outside the state to sell the same to concerns within the state, is an interference with interstate commerce, and an interlocutory injunction will issue against its enforcement.

2. Constitutional law = 154(1)—Coal commission orders, impairing existing

contract obligations of producers, enjoined.

Orders of the Indiana special coal and food commission, requiring coal mines to deliver coal to specified concerns within state, which impair contract obligations of coal mines which had otherwise contracted for their output, are unconstitutional, and will be temporarily enjoined.

3. Mines and minerals \$\iff 93\frac{3}{2}\$, New, vol. 11A Key-No. Series—Coal commission cannot require owner to sever coal from land.

Indiana Special Coal and Food Commission Law does not empower the commission to require a coal landowner to sever the coal from the soil.

Mines and minerals \$\iff 93\frac{1}{2}\$, New, vol. 11A Key-No. Series—Coal commission orders to ship coal to specified concerns enjoined.

Orders of the Indiana coal and food commission, requiring coal mines to ship carloads of coal to parties of whose credit they had no information, will be temporarily enjoined, where no provision is made for supplying cars to the mines, and no information given regarding the credit standing of the proposed consignees.

5. Mines and minerals \$\iiii 93\frac{1}{2}\$, New, vol. 11A Key-No. Series—Coal commission's threats to enforce penalties a sufficient basis for injunction. Where the Indiana special coal and food commission publicly threatened to exact penalties from coal mines disobeying their orders, such action will be temporarily enjoined, since the act contains no definite assurance that penalty prosecutions will be postponed pending appeal proceedings.

In Equity. Bill by the Vandalia Coal Company and the Vigo Coal Products Company against the Special Coal and Food Commission of Indiana, James P. Goodrich, Otto L. Klauss, and Jesse E. Eschbach. Interlocutory injunction granted.

Cooper, Royse, Bogart & Gambill, of Terre Haute, Ind., and Whitcomb & Dowden and Charles Martindale, all of Indianapolis, Ind., and George Sutherland, of Salt Lake City, Utah, for plaintiffs.

Ele Stansbury, James W. Noel, and Howard S. Young, all of Indianapolis, Ind., for defendants.

Before BAKER and PAGE, Circuit Judges, and ANDERSON, District Judge.

BAKER, Circuit Judge. Coreeding to the state the general power to take control, from time to time, of businesses which, prior to such times, have been purely private, by reason of change of circumstances, by reason of the existence of facts showing that such a state of wrong

has arisen in that business that the safety and welfare of the people of the state demand intervention by way of regulation, and granting also to the state the benefit of the presumption that a statute is valid until the contrary is shown, we will pass to the final hearing any considerations that may be advanced by the complainants to show that no facts existed which justified the finding of necessity of intervention on the part of the state; the state being free, of course, to meet and combat such a showing.

On the question whether the remedy prescribed by the Legislature has any proper bearing on the supposed evil, we will grant to the state the benefit of assuming that on the face of the statute the remedy proposed has the necessary connection with the supposed evil.

As to the real facts of the operation of such remedy, whether it is workable, we will pass that matter, also, until the full facts can be

developed on final hearing.

On the showing that has been made to-day we are all of the opinion that an interlocutory injunction should be issued, for the follow-

ing reasons:

[1] First. That the operation of the statute, as indicated by the orders of the commission, is a direct interference with interstate commerce. When the coal is severed from the ground it becomes an article of commerce, and the owner of that commodity, under the commerce clause of the federal Constitution (article 1, § 8), which recognizes no state lines, has the right, so far as the state is concerned, to sell and to contract to sell his entire output to citizens of other states. The orders are also an interference with interstate commerce by reason of the showing in the bill that the output of three of the five mines that are being operated by the complainants had been contracted to the Pennsylvania Company, an interstate carrier, under a contract meeting the approval of the Interstate Commerce Commission, which approval carries an implied finding of fact that the coal, so used, is directly consumed in, or in aid of, interstate commerce.

[2] The second ground for granting the temporary injunction is that the action of the commission impairs the obligation of pre-existing contracts. Our conception on that point is this: That there is a distinction to be made between the contract of a carrier, or other public utility, which at the time of making the contract is of that public character, and by making the contract when it bears that character the carrier knowingly is making it subject to the power then existing to change the rate or make other requirements that are inconsistent with that contract; and, on the other hand, the contract of a business enterprise that had the standing of a purely private enterprise until the time had arrived when for the first time the state had declared that it was affected with a public interest. Taking the insurance company rate case as an illustration of that, we conceive that all policies at the old rate remained in force, and were of an absolutely binding nature, after the passage of the legislation which brought the private business of insurance into the public regulable class. To hold otherwise, in our judgment, would be to give the legislation, which should be presumed to be prospective, a retroactive effect.

[3] The third ground for granting the temporary injunction is that the orders, and the scheme of administration apparently adopted by the coal commission, requires the owner of coal land to sever the coal from his soil. That is a power beyond any that the state has professed to exert in this legislation, even if, under any circumstances, or at any time, the state would have the right to order the owner of

a purely private title to sever the coal from his soil.

[4] The fourth ground for granting the injunction is that, assuming that there might be some residue after the demands of existing contracts and of interstate commerce were satisfied, the orders of the commission direct the complainants to make shipments of carloads of coal. The showing by the complainants is that the Indiana coal contains a large amount of sulphur, and that it cannot be safely stored at the mine; that if stored there, or anywhere else, it would be likely to be destroyed by spontaneous combustion; that it requires quick and prompt handling, and quick and prompt consumption by the users, and requires that cars be available at the mouth of the pit, into which the coal can be placed.

Neither the act nor the plan of operation of the commission makes any provision for the supplying of cars to complainants, or other operators, by which they could comply with the mandatory direction.

A further reason that affects the orders as to this supposititious surplus that might remain after interstate commerce and contract parties have been satisfied, is that the showing of the complainants demonstrates that the necessities of transporting this coal are such that it is impossible to get bills of lading, and to collect by the well-known method of bank collection, by means of sight drafts attached to bills of lading, and that without such security, or any security, the complainants are required to ship to parties whom they declare to be unknown to them, and of whose credit they have no information, and are given no information.

Of course, if the complainants are required to part with this coal, and not to receive compensation therefor, it would be a case, in that

respect, and to that extent, of pure confiscation.

[5] There is a fifth ground for granting the temporary injunction, in the showing of threats made by the commission to exact the penalties. We should agree with the state that this ground for a temporary injunction, or any injunction, would not be tenable if we were enabled to read section 11 of the act with the same understanding that counsel for the state and the coal commission put upon it; but, as we read that section, we find no definite assurance that penalties, or prosecutions for penalties, will be suspended a day longer than the final decision in the Marion circuit court. There is no direct and clear, definite, positive assurance that the penalties, or other penalizing means, would be held in abeyance until the question had been carried to the highest court to which it can be carried.

On the present showing of the bill, the complainants have existing arrangements by which their interstate business will consume their entire output. They have three mines that are taken entirely out of

the case.

As to the other two mines, the allegations of the bill are that their output would be consumed in the interstate commerce that they have, and so all of the orders will be restrained as to these complainants, on the facts alleged in their bill, and the question is left open for the complainants to adduce evidence of a situation—and for the state to meet—as to the existence of any facts on which the Legislature could make any finding at all of such oppressions or wrongs as would justify the classing of the business as one subject to regulation, giving the state the plain benefit that it has had heretofore of the presumption of validity, together with the holding that there is such a continuing, general police power, that was not hamstrung, to use a common expression, by the Fourteenth Amendment, so that no change of circumstances after the adoption of that amendment could be made the basis of the state's exertion of its police power.

For these reasons the temporary injunction to restrain the enforce-

ment of the orders, presented in the bill, will be issued.

FEDERAL SUGAR REFINING CO. v. UNITED STATES SUGAR EQUALI-ZATION BOARD, Inc.

(District Court, S. D. New York. June 24, 1920.)

 Money received \$\infty\$9—Vendor, preventing performance of another vendor's contract and supplying the goods, held liable.

A complaint held to state a cause of action for money had and received, where it alleged that plaintiff contracted to sell for export 4,500 tons of sugar to a commission representing the Norwegian government; that the president of defendant corporation, who was also head of the sugar division of the Government Food Administration, arbitrarily and wrongfully refused to approve the issuance of a license for the export of such sugar; that defendant, through its president or other officers, by wrongfully representing that no export license could be obtained for sugar unless bought from defendant, and that defendant was authorized to fill all contracts, induced the commission to purchase the sugar from defendant and to refuse to accept it from plaintiff, whereupon an export license was issued, and that defendant made a large profit on the transaction.

2. United States = 125-State corporation, created by direction of Presi-

dent, subject to suit under state law.

A corporation organized under the laws of a state, although it is incorporated by direction of the President in the exercise of a discretionary power, and is used as a government agency and its stock is owned solely by the government, has only the powers conferred, and is subject to all the liabilities imposed, by the laws of the state, including liability to suit, and a suit against it is not one against the United States.

- 3. Torts = 16—Not a defense that act was directed by government officer. In an action against a corporation for a tort, it is no defense that the act complained of was done by direction of the President or other officer of the government.
- 4. United States € 125—Ownership of corporation by government not a de-

In an action against a state corporation for money had and received, the fact that the profit from the tortious transaction, sought to be recovered, has become a part of the assets of the corporation, which is owned solely by the United States government, held not to constitute a defense. At Law. Action by the Federal Sugar Refining Company against the United States Sugar Equalization Board, Incorporated. On demurrer to answer. Demurrer sustained.

To the complaint herein the answer has interposed three affirmative defenses, and to each and every one of these defenses plaintiff has demurred. The complaint sets forth three causes of action, and, omitting formal allegations, the essential features set forth in these causes of action are as follows:

First Cause of Action.—Substantially all the allegations are on information and belief. Defendant is a Delaware corporation. The Norwegian Government Food Commission was the official agency of the kingdom of Norway for the purpose of securing food supplies on behalf of the kingdom, including the purchase of sugar in the United States for shipment to Norway. On or about August 21, 1917, plaintiff entered into a written agreement with the Norwegian Commission, whereby the commission agreed to purchase from plaintiff, and plaintiff agreed to sell and deliver to the commission, 4.500 tons of refined sugar at \$6.60 per 100 pounds for granulated sugar, and upon certain other terms. This contract was entered into prior to the placing of any embargo upon the export of sugar from the United States or the promulgation of any regulation governing the establishment or maintenance of governmental control of the importation, manufacture, storage, or distribution of sugar in the United States.

On or about August 10, 1917, under the authority of an act of Congress approved August 10, 1917, and known as the Food and Fuel Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½e-3115½kk, 3115½e-3115½r), the President of the United States by executive order established the United States Food Administration, and appointed the Food Administrator, and vested in him all of the powers in the act conferred upon the President, so far as the same applied to foods. The Food Administrator appointed one Rolph as head of the Sugar Division of the Food Administration, and all of the powers of the Food Administration, so far as related to governmental control of sugar, were thereafter exercised by Rolph, as head of the Sugar Division, as a consequence whereof Rolph was vested with and exercised complete control over the sugar industry in the United States.

On or about August 27, 1917, under authority conferred by an act of Congress approved June 15, 1917, known as the Espionage Act (40 Stat. 217), the President of the United States, by proclamation, prohibited the exportation of sugar from the United States except in accordance with regulations prescribed by him. Under said regulations the power to issue export licenses, thereunder required, was vested in the Exports Administrative Board, and the proclamation and regulations thereunder and the embargo thereby established were enforced continuously thereafter during the times covered by the subsequent events alleged in the complaint. The Exports Administrative Board required that all licenses for the exportation of sugar be approved by the Food Administration, and under this requirement no license for the exportation of sugar was granted or could be secured, except upon the approval of Rolph, as head of the Sugar Division, as a consequence whereof Rolph was enabled to prevent the exportation of sugar from the United States.

The Norwegian Commission requested the Exports Administrative Board or its successor to issue a license for the exportation of the 4,500 tons of sugar above referred to, and this request was referred to Rolph, as head of the Sugar Division, and was disapproved by him, and because of such disapproval the request was refused, and thereafter repeated requests similarly made, both by plaintiff and by the Norwegian Commission, were refused by Rolph. Because of the refusal to issue the license the Norwegian Commission was unable to take delivery of the same under the contract or to furnish shipping instructions therefor, and by reason of this on or about February 2, 1918, by mutual agreement the contract between plaintiff and the Norwegian Commission was modified by extending the date of delivery to June 1, 1918; and thereafter, on or about June 6, 1918, there was further modification by extending the date of delivery to October 1, 1918, and by fixing the price for the sugar at \$6.60

per 100 pounds, or any higher price demanded by the United States government.

Rolph, while head of the Sugar Division, and on or about July 23, 1918, subscribed to the certificate of incorporation of defendant and was one of its incorporators, and immediately thereafter was elected one of the directors and president of defendant, and duly qualified as such, and from July 23, 1918, Rolph was continuously the president and a director of defendant. In August or September, 1918, defendant, through its president, Rolph, or its other officers and agents, "well knowing that the aforesaid contract between plaintiff and said Norwegian Government Food Commission was in full force and effect, and wrongfully designing and contriving to deprive the plaintiff of the benefits of its aforesaid contract, and with the wrongful intent to secure the benefits of said contract for itself, wrongfully represented to the said Norwegian Government Food Commission that no refined sugar could be exported from the United States, nor would any license for the exportation of any sugar be issued, unless such sugar was purchased from or through the defendant, and further wrongfully represented that the said commission could not secure said fortyfive hundred (4,500) tons of sugar contracted to be purchased from the plaintiff as aforesaid, except through the defendant, and wrongfully induced the said commission to believe said representations to be true; that prior to and at the time said wrongful representations were made to the said commission the said George M. Rolph, as head of the said Sugar Division, arbitrarily and in abuse of the discretionary power vested in him as such, refused and continued to refuse to approve the issuance of a license for the exportation of the said forty-five hundred (4,500) tons of sugar contracted to be sold by the plaintiff as aforesaid, as a consequence whereof the said commission, relying upon the aforesaid wrongful representations and believing the same to be true, agreed to and did purchase from the defendant forty-five hundred (4,500) tons of refined sugar in place of the said forty-five hundred (4,500) tons that it had theretofore agreed to purchase from the plaintiff; that said defendant delivered to the said commission forty-five hundred (4,500) tons of refined sugar, and the said George M. Rolph, as head of the Sugar Division aforesaid, wrongfully approved the issuance of the export license therefor, and the said commission received the said sugar, and exported the same, and paid to the defendant therefor approximately the sum of one million one hundred thousand dollars (\$1,100,000).

Thereafter, on about September 20, 1918, the Norwegian Commission refused to receive any sugar from plaintiff under its contract, or to furnish shipping instructions, and informed plaintiff that the cause of its refusal was that it had already filled its contract and satisfied its requirements through defendant, and had received or would receive the 4,500 tons of sugar thereunder from defendant upon the representations aforesaid. Defendant represented to the Norwegian Commission that the United States government demanded that said sugar be sold at 11 cents per pound, and the commission believed said representations to be true, and agreed to pay and did pay to defendant 11 cents per pound for the 4,500 tons of sugar delivered to the commission by defendant. "Each and all of the aforesaid acts of the defendant were pursuant to and in execution of the wrongful design and contrivance aforesaid, to the injury of the plaintiff and to its damage in excess of two hundred and nineteen thousand dollars (\$219,000)."

The net profit on the sale by defendant to the Norwegian Commission amounted to \$219,744, "which said sum was in the month of September or October, 1918, had and received by the defendant to and for the use of the plaintiff, which in equity and good conscience the defendant should not retain." Plaintiff demands from defendant the sum of \$219,744, "the money of the plaintiff so had and received by the defendant," but no part has been paid.

Second Cause of Action.—This sets forth the history of the transactions as alleged in the first cause of action and then continues as hereinafter stated. While Rolph, as head of the Sugar Division, continued to refuse to approve the issuance of a neems for the exportation of the 4,500 tons, defendant by its officers, including Rolph, as president and one of its directors, wrongfully entered into the contract with the Norwegian Commission above described,

whereby defendant wrongfully agreed to sell to the commission, and the commission agreed to purchase from the defendant for export, at 11 cents per pound, the same quantity and quality of sugar which the commission had theretofore agreed to purchase from plaintiff, and defendant delivered to the commission the 4,500 tons of sugar contracted to be sold by it to the commission, and the said sugar was exported under a license issued with the wrongful approval of Rolph, as head of the Sugar Division, and the Norwegian Commission refused to accept the sugar contracted by it to be purchased from plaintiff. At the time defendant entered into the contract for the sale of the sugar to the Norwegian Commission, defendant knew that the commission required 4,500 tons of sugar to satisfy the needs of the Norwegian government, and that the commission had contracted to purchase the sugar from plaintiff, and was ready to carry out its contract as soon as Rolph, in his capacity as head of the Sugar Division, approved the issuance of a license for the exportation of the sugar.

Defendant knew, or should have known, that by entering into its wrongful contract with the commission and making delivery thereunder it wrongfully deprived plaintiff of the benefit of plaintiff's contract with the commission and the profits to be derived therefrom; and defendant knew that its president, Rolph, was, by virtue of the power vested in him as head of the Sugar Division, able to prevent and had continuously prevented the fulfillment of the contract between plaintiff and the commission by refusing to issue a license for the exportation of sugar thereunder. The act of Rolph in refusing to approve the issuance of a license for the exportation of the sugar contracted to be sold by plaintiff to the Norwegian Commission was contrary to law, in excess of any authority vested in Rolph, an abuse of the discretionary power vested in Rolph, and contrary to the purpose and intent of the acts of Congress, all of which was known to defendant at the time it negotiated and entered into its contract with the Norwegian Commission, and each and all of the acts of defendant were wrongful and to the injury and damage of plaintiff in excess of \$219,000. The profit derived by defendant from the sugar. it sold and delivered to the Norwegian Commission was \$219,744; "which said sum was in or about the month of October, 1918, had and received by the defendant to and for the use of the plaintiff, which in equity and good conscience the defendant should not retain."

Third Cause of Action.—The allegations as to the facts are repeated. The complaint then continues:

On or about August and September, 1918, defendant, through its president, Rolph, or other officers and agents, with knowledge of the contract between plaintiff and the Norwegian Commission and wrongfully designing and contriving to deprive the plaintiff of the benefits of the contract to itself, wrongfully represented to the Norwegian Commission that no refined sugar could be exported from the United States, or any license for exportation of any sugar be issued, unless the sugar was purchased from or through defendant, and that the commission could not secure the 4,500 tons of sugar under its contract with plaintiff, except through defendant; that defendant further wrongfully represented to the commission that it had taken over all contracts for the sale of sugar for export from the United States to neutral countries, and that said defendant would fill all contracts for the sale of sugar on behalf of refiners who had made such. Defendant further wrongfully represented to the commission that, if the commission would take 4,500 tons of sugar from the defendant, said defendant could and would, through its president, Rolph, as head of the Sugar Division, secure the necessary export license, and defendant would and could fill the contract on behalf of plaintiff, and would deliver to the commission 4,500 tons of sugar on behalf and as agent of plaintiff at the price of 11 cents per pound.

Defendant wrongfully induced the commission to believe these representations, and to believe that in receiving the 4,500 tons of sugar from defendant the commission was fulfilling its contract with plaintiff, and the commission, relying thereon, agreed to take and did take and receive the 4,500 tons of sugar from defendant in fulfillment of its contract with plaintiff. Subsequently the commission refused to take any sugar from plaintiff under the

contract, and informed the plaintiff that it had satisfied its requirements through defendant. Each and all of the acts of defendant were pursuant to and in execution of "the wrongful design and contrivance aforesaid," to plaintiff's damage in excess of \$219,000.

Defendant represented to the Norwegian Commission that the United States government demanded that the sugar be sold at 11 cents per pound, and the commission believed the representation to be true, and paid this sum for the 4,500 tons of sugar delivered to the commission by the defendant. Defendant received as net profit on this sale to the Norwegian Commission the sum of \$219,744, "which said sum of money was had and received by the defendant to and for the use of plaintiff, which in equity and good conscience the defendant should not retain."

First Affirmative Defense.—On or about August 10, 1917, pursuant to the provisions of the act of August 10, 1917, the President by executive order established the Food Administration, and appointed Hoover as Food Administrator. The Food Administrator was directed to supervise, direct, and carry into effect the provisions of the act, and the powers and authority therein given to the President, in so far as the same apply to foods, feeds, and their derivative products, and to any and all practices, procedures, and regulations authorized

or required under the provisions of said act.

Thereafter as part of the machinery of the food control, and in order to enable the Food Administration more fully to carry out the regulation of the supply and distribution of sugar, upon the direction of the President on July 13, 1918, defendant was incorporated under the laws of Delaware, its entire capital stock of \$5,000,000 being at all times thereafter owned by the United States of America; said stock having been paid for out of the appropriation of \$50,000,000 authorized by the provision of the act of July 1, 1918. The certificate of incorporation of the defendant provided, as part of its objects and purposes: "To exercise all powers which may be delegated to it by the President of the United States." And upon the incorporation of the defendant said Hoover was elected a director and chairman of the board of directors thereof.

On or about August 27, 1917, under authority of statute, the President prohibited the exportation of sugar from the United States, except in accordance with regulations which required that a license therefor be first obtained in each case from the Export Administrative Board, and thereafter on or about October 12, 1917, by executive order, the President established the War Trade Board as the successor to the Export Administrative Board and vested in the War Trade Board all the power and authority of the Export Administrative Board, and from and after August 27, 1917, at all times mentioned in the complaint, it was settled policy of the Export Administrative Board and its successor, War Trade Board, to refuse all licenses for export of sugar from this country.

In or about September, 1918, upon the representations of the Norwegian minister of the urgent need of sugar in Norway, the Food Administrator directed defendant to sell and deliver 4,500 tons of sugar to the Norwegian Commission for export to Norway, and in obedience to said direction defendant thereupon sold and delivered in this country 4,500 tons to the Norwegian Commission, which was thereupon exported by them upon a license therefor duly issued by the War Trade Board, all of which was done under the authority and direction of the Food Administrator and the President of the United States in pursuance of lawful statute. The 4,500 tons of sugar sold as aforesaid are the 4,500 tons of sugar mentioned in the complaint as sold by defendant to the Norwegian Commission.

Said sale and delivery of the 4,500 tons of sugar was purely a governmental transaction between the United States through its Food Administration, and the government of Norway, through its Norwegian Commission, which said sale and delivery was arranged and carried out upon governmental orders and instructions through governmental agencies, and the act of the defendant in selling to the Norwegian Commission was an act of the Food Administrator representing the authority of the President of the United States, and it therefore was the act of the government of the United States.

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Second Affirmative Defense.—This repeats the allegations down to that part relating to the representations of the Norwegian minister, and then phrases the allegations as hereinafter. In or about September, 1918, upon the representations of the Norwegian minister of the urgent need of sugar in Norway, the Food Administrator directed defendant to sell and deliver 4,500 tons of sugar to the Norwegian Commission for export to Norway, and in obedience to said direction defendant thereupon sold and delivered in this country to the Norwegian Government Food Commission 4,500 tons of sugar, which was thereupon exported by them upon a license therefor duly issued by the War Trade Board. The 4,500 tons of sugar sold as aforesaid are the 4,500 tons of sugar mentioned in the complaint herein as sold by defendant to the Norwegian Commission. All the profits, if any, which accrued to defendant through the said sale and delivery of 4,500 tons of sugar to the Norwegian Commission, have been received and are now owned by defendant as a part of its assets in common with all its other assets. The entire capital stock of defendant, since its incorporation, has been and is now owned solely by the government of the United States of America, and all the assets of defendant are the sole property of the government of the United States of America.

Third Affirmative Defense.—Pursuant to the provisions of the Food and Fuel Act, approved August 10, 1917, the President by executive order established the Food Administration, and Hoover was therein designated Food administrator. On July 13, 1918, defendant was organized and incorporated under the laws of Delaware, upon the direction of the President, as a part of the machinery of the food control, to act as a subordinate officer or agent of the Food Administration, in obedience to the orders, direction, and control of the Food Administrator. In or about September, 1918, the Food Administrator, by an order purporting in every way to be within the powers conferred upon him by law, and to be validly and fairly issued, directed defendant to sell and deliver in this country to the Norwegian Commission 4,500 tons of sugar, and in obedience to said order, as required of it by law, defendant thereupon sold and delivered in this country said 4,500 tons of sugar to the Norwegian Commission. Said 4,500 tons of sugar sold as aforesaid are the 4,500 tons of sugar mentioned in the complaint herein as sold by defendant to the Norwegian Commission.

Bigelow & Wise, of New York City (Lindley M. Garrison, Ernest A. Bigelow, and Charles A. Boston, all of New York City, of counsel), for plaintiff.

Shattuck, Glenn, Huse & Ganter, of New York City (William A. Glasgow, Jr., of Philadelphia, Pa., and Edwin P. Shattuck and Garrard Glenn, both of New York City, of counsel), for defendant.

MAYER, District Judge. (after stating the facts as above). [1] It is, of course, elementary that a demurrer searches the complaint, and therefore it becomes necessary at the outset to determine whether the complaint states one or more causes of action. So far as language goes, it is plain that the complaint is framed upon the theory that the facts set forth causes of action upon an implied promise upon the count for money had and received, which in equity and good conscience defendant should not retain and should pay to plaintiff. It will be unnecessary to determine whether the allegations of the complaint set forth causes of action upon any other theory, if the implied promise theory is sound. The three causes of action, all moving to the same end, are differentiated by plaintiff as follows:

"The second difference between the allegations of the first and second causes of action is that in the first the basis is the wrongful inducement of a contract with the plaintiff's vendee, and in the second the wrongful entry into a con-

tract with the plaintiff's vendee with full knowledge of the facts, in both utilizing the wrongful activity of the defendant's president. The second cause of action suggests, under the circumstances alleged, the violation of a duty on the part of the defendant, with knowledge of the facts alleged, to abstain from preventing the vendee carrying out its contract with the plaintiff. The third cause of action alleged is based upon the same elementary facts, which are reiterated; but it is also alleged that the defendant, with knowledge of these facts, and a wrongful design to deprive the plaintiff of the benefit of its contract with its vendee, not only made the wrongful representations that no sugar could be exported unless purchased through the defendant, but further that the defendant had taken over all contracts, and the defendant would fill the plaintiff's contract, and the defendant would secure a license for export and fill the said contract on behalf of the plaintiff, and that the defendant induced the belief on the part of the vendee that the defendant was fulfilling the plaintiff's contract, and relying thereon the vendee refused to complete with the plaintiff, and the plaintiff received no profit therefrom. Thus the third cause of action presents the additional element of estoppel, in that defendant actually represented and induced the belief on the part of the vendee that defendant was fulfilling the plaintiff's contract."

The law of quasi contracts, so called, has as one of its vital features the aim of the courts to apply a suitable remedy for the results flowing from certain kinds of wrongs. Thus it is that an action, in some circumstances, will be regarded as ex contractu, even though there has not been agreement between the parties. The broad principle is succinctly stated in 13 C. J. 244, as follows:

"Contracts implied in law, or more properly quasi or constructive contracts, are a class of obligations which are imposed or created by law, without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action ex contract. They rest solely on a legal fiction, and are not contract obligations at all in the true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy, and the obligation arises not from consent, as in the case of true contracts, but from the law or natural equity. * * * Among the instances of quasi or constructive contracts may be mentioned cases in which one person has received money which another person ought to have received, and which the latter is allowed to recover from the former in an action of assumpsit for money had and received, or money received to the use of plaintiff. * * * "

See, also, Miller v. Schloss, 218 N. Y. 400, at page 407 et seq., 113 N. E. 337.

The implied promise springs up by virtue of or follows the commission of a wrong. In each of the causes of action here a wrong is alleged. In the first and third causes of action, the wrong alleged is clearly of the kind discussed in Angle v. Chicago, St. Paul, etc., Railway, 151 U. S. 1, at page 13 et seq., 14 Sup. Ct. 240, 38 L. Ed. 55, and American Malting Co. v. Keitel, 209 Fed. 351, at page 358 et seq., 126 C. C. A. 277. In the second cause of action the wrong alleged is the failure to abstain from preventing the Norwegian Commission from carrying out its contract with plaintiff, when its duty was so to abstain.

Of course, the wrong must have been the proximate cause of failure of the Norwegian Commission to perform its contract, else plaintiff has no case; and it is earnestly contended by defendant that its conduct as alleged was not such cause. I am unable to follow this contention. As the three causes of action are drawn, they plainly attribute the fail-

ure of the Norwegian Commission to carry out its contract with plaintiff to the acts of defendant; the first and third by active representations, and the second by failing in violation of duty, to abstain from preventing performance by the Norwegian Commission. Had the complaint merely alleged the refusal of Rolph, as head of the Sugar Division, to issue an export license, and then an independent agreement between defendant and the vendee, without representations or without violation of duty, the case, of course, would have been different. Nor does the fact that the export license was refused prior to the defendant's incorporation alter the matter, because plaintiff relies, not only on that fact, but necessarily also upon the facts alleged to have occurred subsequent thereto.

A further contention of defendant, earnestly urged, is based on the expressions of Keener and Woodward in their works on Quasi Contracts. Woodward, Quasi Contracts, § 274, referring in part to Keener, says:

"Perhaps it was arguable at one time that the obligation of a tort-feasor in assumpsit is analogous to that of a constructive trustee, and that he should be held accountable for any profits derived by him from his wrongful act. It seems to be now taken for granted, however, that the obligation is not to account for profits but to make restitution. It follows that it is not enough that the defendant has been enriched by his wrong; it must further appear that the benefit received by defendant has been taken from the plaintiff. As Prof. Keener puts it, there must be 'not only a plus but a minus quantity."

Plaintiff's counsel analyze these propositions of the writers, and, finding that Keener's reference (followed by Woodward) is to one English case, Phillips v. Homfray, L. R. Ch. Div. 439, they dissect that case to ascertain the real point decided. But, laying aside the case referred to, the principle announced is illogical in its limitations. The point is not whether a definite something was taken away from plaintiff and added to the treasury of defendant. The point is whether defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched.¹

The whole trend of the law points to the aspiration of the courts to find an adequate and orderly remedy for wrongs as to which redress was elusive until this theory of quasi contracts was developed. Mr. Justice Brewer, early in the Angle Case, said:

"Surely it would seem the recital of these facts would carry with it an assurance that there was some remedy, * * * and that such remedy would reach to the party * * * by whose acts these losses were caused."

Judge Collin, in Miller v. Schloss, supra, speaks of natural equity and good conscience, and of the circumstances under which money ex æquo et bono belongs to another. Indeed, this is one of those develop-

1 "Unjust enrichment" is now a familiar expression used to describe a result in different relations and in differing forms of litigation. Schall v. Camors, 251 U. S. 239, 40 Sup. Ct. 135, 64 L. Ed. 247: Eastern Extension Co. v. United States, 251 U. S. 355, 40 Sup. Ct. 168, 64 L. Zd. 305; Miller v. Schloss, supra; Matter of Wilson (D. C.) 252 Fed. 631.

ments of the law where the courts have shown themselves keen to avoid refinements in their efforts to reach sound and practicable remedies, and their goal has been the remedy. The correct principle, as it seems to me, is well stated in a recent note in the Columbia Law Review of May, 1920, at page 602:

"The most that can be said is that ordinarily, and apart from some rule of policy which dictates the contrary result, recovery should be allowed where there has been actual enrichment at the plaintiff's expense.

In the case at bar it might further be contended, not without merit, that the case comes even within the limitations stated by Keener and Woodward; but I prefer to rest my conclusion on the broader ground.

It is further urged that, unless plaintiff has been actually damaged, it has no grievance, and that the complaint should have alleged ability profitably to perform plaintiff's contract with the Norwegian Commission. This position misconceives the nature of an action for money had and received as framed in this complaint. Whether inability to perform is a defense need not now be determined. The action is not for damages for breach of contract, but for the profit which defendant is alleged to have made as the result of its alleged wrongful acts. Ability to perform, in such circumstances, is no part of plaintiff's case. Angle Case, supra, 151 U. S. 12, 14 Sup. Ct. 240, 38 L. Ed. 55.

In any event, at any time prior to October 1, 1918, the date to which the performance of plaintiff's contract had been extended, the necessary license might have been obtained. It was within Rolph's power to grant the license before October 1st; but prior thereto (i. e., on September 20th) the Norwegian Commission notified plaintiff that it would not take the sugar from plaintiff, because defendant had filled its requirements. In other words, defendants' alleged tort having been committed prior to October 1st (i. e., prior to September 20th), ability of plaintiff to perform after September 20th becomes immaterial as a necessary requirement of plaintiff's causes of action.

Finally, in respect of the third cause of action, there is neither a question of estoppel nor a question of ratification. Its allegations are not of the kind where a principal ratifies the unauthorized acts of an agent in order to avail of the benefits of those acts. In principle this cause is like the first cause of action, in that it alleges misrepresentations which induced the breach of the contract between plaintiff and the Norwegian Commission.

For the reasons thus outlined, I am of opinion that the complaint is not demurrable.²

Demurrer to Defenses.—At the outset, it is apparent that the transactions described in the defenses were not transactions between the governments of the United States and Norway. Such international transactions, if in pursuance of treaty powers, must have the constitutional consent of the Senate. Any other international transaction,

² It is, of course, not practicable to discuss all the points, such as the claimed analogy with infringement suits. They have received consideration, but only the more important features of the controversy have been stated.

even under the war power, must find its authority in statute. No such

authority is found in this case.

[2] The defenses rest principally upon the proposition that the defendant was an agent of the sovereign, and that an action against the agent is in effect an action against the sovereign, and that the sovereign cannot be sued without its consent. The Executive, under the Act of August 10, 1917, could have used plaintiff, a New York corporation, as its distributing agent, and as a necessary consequence of defendant's contention, if, in distributing sugar, it had injured some person, then the person so injured could not have sued this plaintiff without the consent of the United States.

Before such and similar results can be justified, it must be clear, both on reason and authority, that, where the corporation used as an agency is created and organized under a state statute, it may be relieved of all the responsibilities usually attached to it. Section 2 of the Act of August 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ee), provided:

"Sec. 2. That in carrying out the purposes of this act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to co-operate with any agency or person, to utilize any department or agency of the government, and to co-ordinate their activities so as to avoid any preventable loss or duplication of effort or funds."

The agency here concerned is a Delaware corporation. Nothing in section 2, supra, purports to change (if there were power so to do) the rights, duties, obligations, and liabilities of such a corporation. The Congress did not enact any statute incorporating the defendant or specifically providing for its incorporation. Its incorporation was under the laws of Delaware, and the Revised Code of Delaware of 1915 (chapter 65, § 1916) provides:

"Sec. 2. Powers.—Every corporation created under the provisions of this chapter shall have power. * * *

"2. To sue and be sued, complain and defend in any court of law or equity. * * *

"8. To conduct business in this state, other states, the District of Columbia, the territories and colonies of the United States and in foreign countries. * * * "

If the sovereign thus chooses as its agent a state corporation which can be sued it cannot by ipse dixit deprive one injured by such an agent of the right to sue. The state of Delaware allowed defendant to be created, but as a condition of its creation and existence it afforded the right to any one to sue the corporate being which it thus created. It is alleged that, upon "the direction" of the President, defendant was incorporated. This is but another way of saying that the President directed that the necessary number of persons required under the Delaware statute should take the steps necessary under that statute to incorporate a defendant subject to the liabilities of that statute. Neither the Executive nor any person acting with authority under him had the power to change the Delaware statute, and hence no power to change the obligations, rights, or liabilities of a corporation which was

the creature of the statute; i. e., the creature of the sovereign state of Delaware.

If Ballaine v. Alaska Northern Ry. Co., 259 Fed. 183, 170 C. C. A. 251, is to be deemed an authority, it must be on the special facts of that case. The mere fact that the United States was a stockholder in the Alaska Railway is not enough. Bank of the U. S. v. Planters' Bank of Georgia, 9 Wheat. 904, 6 L. Ed. 244; Panama Ry. Co. v. Curran, 256 Fed. 768, 168 C. C. A. 114; Salas v. United States, 234 Fed. 842, 148 C. C. A. 440. In the Ballaine Case certain express powers were conferred upon the President with reference to the acquisition of railroads in a territory, and the court held that by virtue of the act of Congress, taking its provisions together, the United States acted in its sovereign capacity in acquiring the stocks, bonds, and property of the railway, and employed the corporate organization as an agency through which to execute the purposes of the statute.

By citing Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808, it is apparent that the court regarded the Alaska Railway as owned as a direct governmental agency to carry out a governmental purpose in the territory. But in the Ballaine Case the court was not called upon to determine whether the laws of a state may be regarded as inoperative and inapplicable merely because a corporation of the state is used as a governmental agency. See Gould Coupler Co. v. U. S. Shipping Board Emergency Fleet Corporation (D. C.) 261 Fed. 716, which, though somewhat different from the case at bar, expresses the reluctance of the courts to extend the doctrine

of immunity beyond limits clearly defined.

[3] But it is alleged that, pursuant to an order from the Food Administrator, "purporting * * * to be within the powers conferred upon him by law," defendant was directed to sell the sugar. If this is anything more than a conclusion of law, then in any event it is no defense to the commission of a tort. The complete answer is that neither the Executive nor the Food Administrator had the power (even if it had been alleged that they sought to exercise it) to order the defendant to do a wrong.

[4] Finally, it is urged that the second affirmative defense must be good, because all the profits derived from the transaction are owned by defendant as part of its assets, and all the assets of defendant are the sole property of the United States by virtue of its ownership of the entire stock of defendant. Here again the Ballaine Case, supra, is referred to in support of the proposition thus advanced. Citing cases, the learned judge in that opinion points out that the Supreme Court held that "Congress could create corporations as appropriate means of executing the powers of government."

In the case at bar the Congress did not create the corporation. In the Ballaine Case it was stated that the United States, acting in its sovereign capacity, "merely employed the corporation as an agency through which to execute the purposes of the statute"; but the court necessarily held that the purpose of the statute and its execution were not commercial, and pointed out that the Alaska Railway was acquired for the settlement of public lands and other governmental purposes.

The commercial nature, if any, of the business in that regard, was an incident, and the case turned on the character of the agency, while the ownership by the government of bonds was immaterial, as is emphasized by the court's reference to Salas v. United States, 234 Fed. 842, 148 C. C. A. 440. In the latter case it appeared that the United States owned all of the stock of the Panama Railroad Company, but because the Panama Company had entered into a commercial business the conspiracy complained of was held not to be against the United States. Panama Ry. Co. v. Curran, 256 Fed. 768, 168 C. C. A. 114; Commercial Cable Co. v. Philippine National Bk. (D. C.) 263 Fed. 218.

In the case at bar it is also claimed by defendant that the profit was an incident foreign to the performance of defendant's duty and the purposes of its incorporation. But the incorporation under a state statute of a business corporation cannot deprive the agent thus created of its right as a corporation to make a profit nor relieve it of its corporate liabilities. It may be, as was held in the Panama and Commercial Cable Co. Cases, supra, that when the government itself creates its own agent, and owns part or all of the stock of the agent thus created, the test as to whether the corporation is suable, or whether the agent is a department of government, is the nature of the business done; but when the sovereign uses an agency created, not by itself, but under a state statute, he takes his agent as he finds it.

No case has been nor can be cited which authorized the President of the United States to change a state statute, or the powers conferred thereby, or the liabilities necessarily flowing therefrom. The property of the corporation cannot become the property of the stockholders until all provable claims are liquidated, no matter what the purpose of the stockholder may be, and the government's position as a stockholder is no different from that of a sovereign state which is a stockholder. As was said by the Chief Justice in Bank of U. S. v. Planters' Bank of Georgia, supra:

"The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the Constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."

Here the case, if anything, is not so strong. The United States is not an incorporator, but a stockholder in a corporation, which, as a condition or necessary accompaniment of its existence, can be sued and can engage in business. In enacting the statutes, supra, Congress intended, inter alia, to conserve necessaries during the war, and therefore, conferring large and almost unlimited powers to select agencies

to that end, it is fair to assume that the Congress realized that it might be necessary to engage in commercial transactions. The very incorporation of defendant demonstrates that the ordinary methods of transacting business by executive departments were inadequate, and doubtless subject to embarrassment by a maze of unworkable statutes and regulations, and that the elastic powers of a business corporation would enable the purchase and sale of sugar to be engaged in with the same facility as such transactions ordinarily go forward at the hands of individuals or business corporations. Such an incorporation was undoubtedly a practical and helpful instrumentality for doing the work with which the government was confronted; but it is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and be able to contract with others, or to injure others, confident that no redress may be had against it as matter of right, but only, if at all, as matter of the favor of the sovereign.

There is not even in this case the creation of a corporation by act of Congress nor an express direction to incorporate, such as is found in the Shipping Act (Comp. St. §§ 8146a-8146r). Gould Coupler Co. Case, supra. But here the Executive, in pursuance of the discretion vested in him, chose an agent which by its very nature and existence had the right to engage in a commercial business. The whole tendency is against the extension of the immunity of the sovereign as against proper suitors, as is evidenced by such legislation as the Tucker Act (24 Stat. 505) and the Shipping Act (construed in certain respects in The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962), and by cases such as are cited supra! This is not a case which invites a

step in the opposite direction.

The demurrer to each and all of the affirmative defenses is sustained.

TILDEN et al. v. BARBER et al.

(District Court, D. New Jersey. October 8, 1920.)

 Courts \$\infty\$ 375—State statute of limitations not binding on federal court of equity.

Act N. J. April 8, 1903 (P. L. 1903, p. 362), supplementing the Corporation Law, and providing, inter alia, that promoters who make a secret profit or bonus shall be liable to the corporation therefor in an action either at law or in equity brought within four years but not afterwards, imposed a condition upon the right to sue at law, but as to suits in equity, which could be brought independently of the statute, merely prescribed a limitation binding upon the courts of the state, but not upon the federal courts.

2. Equity \$\iff 70\$—Time for bringing suit for fraud runs from discovery.

Where the fraud by which promoters of a corporation secured an unlawful bonus was concealed, a federal court of equity will not deem a right of action for its recovery to have accrued until the fraud is discovered, or should have been discovered.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. Corporations \$\iiii 30(3)\$—Promoter liable for secret profit.

Defendant obtained options on a number of cereal plants to be taken over by a corporation in which the sellers were to become stockholders. He also advertised for and obtained subscriptions to the stock from outsiders, and then organized the corporation, with dummy directors, who accepted his offer to sell the plants to the company at the price named by him in stock and bonds of the company, and issued all its stock to him as its agent. He settled with the seller's separately, having each property conveyed directly to the corporation for the expressed consideration of \$1. concealing from each seller the price paid to the others, and also concealed the amount paid from knowledge of the corporation after it was taken over by the stockholders for ten years, when it was discovered that he had made a profit on the transaction of over \$1,000,000. Held, that he was not the owner of the properties, dealing with the corporation at arm's length, but occupied a fiduciary relation to it and at least to the outside subscribers to its stock, and was accountable to its receivers for such profit.

Corporations \$\infty\$ 30(2)—Promoter bound to select competent and honest directors.

Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property and to select competent persons as directors, who will act honestly in the interest of the stockholders.

5. Corporations \$\iiii 30(3) \to Undisclosed profits of promoter.

A prospectus and subscription agreements, put out by the promoter of a corporation, setting forth that the stock was to be issued for the acquisition of certain plants and good will, to provide a working capital, and pay the necessary expenses of organization, held not to disclose to subscribers that the property was to be acquired through the promoter, at a large advance over the price paid to the sellers, or that their stock was not to be issued to them direct by the corporation, but was to come from that issued to the promoter in payment for the property.

6. Principal and agent ⊕ 180—Notice to agent is not notice to principal, where agent adversely interested.

That a trust company, which acted as fiscal agent for the promoter of a corporation and was afterward made registrar of the corporation by him, had knowledge of the profit made by him from the promotion, held not to charge the corporation with such knowledge, especially where the trust company refused to disclose information on the subject to an officer of the corporation.

7. Corporations \$\infty 426(2)\$—Void act by officers cannot be ratified.

An injurious act done by the officers or directors of a corporation, which is not merely voidable, but void, cannot be ratified or condoned by the stockholders.

8. Corporations ≈ 30(3)—Cannot validate by ratification ultra vires act of directors in issuing stock to promoter for property.

Under the New Jersey Corporation Act, providing that nothing but money shall be considered as payment for the capital stock of a corporation, except that it may purchase property necessary for its business and issue stock to the amount of its value in payment, and that in the absence of actual fraud the judgment of the directors as to such value shall be conclusive, as construed by the highest court of the state, holding that conscious and intentional overvaluation of the property is actual fraud, the issuance to the promoter of a corporation by his dummy directors of stock in payment for property in an amount largely in excess of the price paid by him to the owners for the property held ultra vires, and not subject to ratification by the corporation, either expressly or by acquiescence.

 Corporations 560(7)—Suit by receivers against promoter not barred by laches.

Suit by receivers of a corporation, brought 12 years after its organization, to recover profits fraudulently made by its promoter, held not barred by laches, where defendant and his associates in the promotion dominated the corporation during the most of that time and successfully concealed knowledge of his profits from the other officers and directors, and where he is not shown to have been prejudiced by the delay.

10. Corporations \$\iiii 30(3)\$—Remedy against promoter for making illegal profit.

The remedy against a promoter of a corporation for securing a profit by fraudulently selling property to the corporation at a large overvaluation is not limited to a recovery or cancellation of the stock issued to him for the excess in valuation, and where the corporation has become insolvent, and its stock is of no value, its receivers may recover the amount of such profit for the benefit of its creditors.

In Equity. Suit by William A. Tilden and Charles D. Thompson, receivers of the Great Western Cereal Company, against Ohio C. Barber and others. Decree for complainants.

Hartshorne, Insley & Vreeland, of Jersey City, N. J., and Adams, Childs, Bobb & Westcott, of Chicago, Ill. (Wm. E. Decker, of Jersey City, N. J., and Elmer H. Adams, of Chicago, Ill., of counsel), for plaintiffs.

Sims, Welch & Godman, of Chicago, Ill. (Gilbert Collins, of Jersey City, N. J., and Albert G. Welch, of Chicago, Ill., of counsel),

for defendant Ohio C. Barber.

RELLSTAB, District Judge. This is a suit in equity, brought by the receivers of the Great Western Cereal Company, a corporation of New Jersey, decreed insolvent by the Court of Chancery of that state, against Ohio C. Barber and others, to recover undisclosed profits made by them in the promotion and organization of that company. Barber alone was served with process. The suit was originally brought in the Court of Chancery of New Jersey (bill filed November 17, 1913), and removed by Barber into this court on the grounds of diversity of citizenship and separable controversy between him and the plaintiffs. Since the argument Barber has deceased, the suit has been revived, and his personal representatives have been substituted in his stead as defendants.

Briefly stated, the bill alleged that Barber and his associates planned and consummated the organization of the Great Western Cereal Company (hereinafter called the company) and the acquisition by it of 10 certain oatmeal mills for the purpose of gaining secret profits; that he secured such profits by taking from the company, at a time when all its directors and officers were his agents, its stock and bonds as consideration for the conveyance to it of such mills, far in excess of the value of such properties; and that he so manipulated such transaction that the overvaluation was hid from the company until shortly before the filing of the bill.

The New Jersey Corporation Act (Rev. 1896; P. L. 1896, p. 277) prescribes that—

"Nothing but money shall be considered as payment of any part of the capital stock, * * * except as hereinafter provided. * * *"

The proviso is that—

"Any corporation * * * may purchase * * * manufactories or other property necessary for its business, * * * and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive. * * * " Section 49.

The New Jersey cases construing these sections all hold:

"That, the stock must be paid for in money or money's worth, and that any conscious or intentional overvaluation is actual fraud, within the meaning of the sections quoted." Tooker v. Sugar Refining Co., 80 N. J. Eq. 305, 315, 84 Atl. 10, 15, and cases cited.

The pleaded defenses, generally stated, are that Barber but exchanged his own property for the stock and bonds of the company; that this exchange was approved by all the persons who held the company's stock at the time of such exchange; that he sustained no fiduciary relations to the purchasers of the company's stock and bonds; that the plaintiffs and the company are guilty of laches; and that the New Jersey statute, approved April 8, 1903 (P. L. N. J. p.

362), is a complete bar to the suit; [1] As this New Jersey statute is said to protect Barber from a suit of this character, regardless of the merits of the plaintiff's allegations of fact, that defense will be considered first. This act is a supplement to the New Jersey Corporation Act, approved April 8, 1903 (P. L. N. J. 1903, p. 362). It provides:

11. Any director, officer, promoter or other agent of any corporation organized or existing under the laws of this state who shall have heretofore made or received, or who shall hereafter make or receive, while acting in such capacity, any bonus, profit or reward of any kind whatsoever out or on account of any transaction for or with such corporation, without disclosure of the fact of such bonus, profit or reward to the corporation and without obtaining its approval thereof, shall be liable to such corporation for the amount or value of such bonus, profit or reward for and during the period of four years from and after the making or receipt of the same and not afterwards; and an action shall lie on behalf of such corporation, either at law or in equity, to recover such bonus, profit or reward, or the value thereof, or for an account with respect thereto, at any time before the expiration of said period of four years, but not afterwards.

ars, but not afterwards:

"2. This act shall take effect immediately, but shall not affect any action or proceeding pending in any court at the time it takes effect, or any right of any corporation, or of any stockholder, against any such director, officer, promoter, or other agent, under existing law, provided action thereon be com-

menced within six months after this act takes effect."

This act was repealed in 1907 (P. L. N. J. 1907, p. 631), but as it is claimed that while it was in force Barber obtained certain vested rights which, under the Constitutions of New Jersey and the United States, were preserved to him, notwithstanding such repeal, its

(268 F.)

provisions as affecting the jurisdiction of the federal court will be considered.

As noted, it dealt with profits made by promoters of a New Jersey corporation, without disclosure to it, and without obtaining its approval thereof. It declared the promoter liable to the corporation for such profits during, but not after, four years from the making or receipt of such profits. It authorized the recovery thereof, either at law or in equity, at any time before, but not after, the expiration of said period. Before the passage of this act, only an action in equity could be brought for a return of such profits. The act created the right to sue at law, but was only declaratory of such a right in equity. As to the action at law, the four-year period within which such suit could be brought was probably a condition annexed to the right, and not a limitation affecting merely the remedy. Partee v. St. Louis & S. F. R. Co. (C. C. A. 8), 204 Fed. 970, 972, 123 C. C. A. 292, 51 L. R. A. (N. S.) 721. Not so, however, as to suits in equity. As to these, such period affected only the remedy, and in essence was a statute of limitation.

Whatever effect the repeal of this statute had upon the legal remedy, the equitable remedy still remained, and the time within which such remedy is enforceable is controlled by equitable principles alone. Do these require that a suit brought after the statute was repealed, but founded upon a fraudulent transaction covered by the statute when in force, be dismissed because more than four years elapses after the fraud was committed, regardless of when the fraud is actually discovered, or whether the suit is brought in a state or United States court?

[2] Under general equity principles, not the time when the fraud is committed, but when it is discovered, or might have been discovered by the exercise of ordinary diligence, fixes the time when the cause of action accrues. Construed literally, the New Jersey act fixed the time when the profit was made or received, and not the discovery of the taking of it, as the beginning of the four-year period within which suit might be brought. Whatever might have been the effect of this legislation upon the powers of the New Jersey courts, it did not impair the jurisdiction of the United States courts in enforcing distinctively equitable rights. Kirby v. Lake Shore & Michigan Southern R. R., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; Taylor v. Louisville & N. R. Co. (C. C. A. 6) 88 Fed. 350, 357, 31 C. C. A. 537; James v. Gray (C. C. A. 1) 131 Fed. 401, 408, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321; Stevens v. Grand Central Min. Co. (C. C. A. 8) 133 Fed. 28, 32, 67 C. C. A. 284; Humphreys v. Walsh (C. C. A. 3) 248 Fed. 414, 160 C. C. A. 424; Independent Harvester Co. v. Tinsman (C. C. A. 7) 253 Fed. 935, 166 C. C. A. 35.

In the Kirby Case the United States District Court held, upon what it supposed had been determined by a state court as the proper interpretation of a state statute, that the cause of action accrued on the commission, and not the discovery, of the fraud. The Supreme Court, after expressing doubt as to whether the cited state

authorities justified such a conclusion, said that, be that as it may, a local statute could not "impair the power of the courts of the United States to enforce the settled principles of equity in suits of which they have, by the Constitution and laws of the United States, full jurisdiction" (120 U. S. 137, 7 Sup. Ct. 434, 30 L. Ed. 569), and that it was the duty of the United States courts to follow the settled rules of equity, and "adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was or should, with due diligence, have been discovered. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every state." 120 U. S. 138, 7 Sup. Ct. 434, 30 L. Ed. 569. This being the rule controlling the federal courts in suits of this character, the disputed contentions regarding the effect of the repeal of this statute are purely academic and need not be considered.

[3] Whether there was laches in bringing this suit, and, if so, whether it is imputable to the receivers, may best be discussed after the merits of the plaintiffs' allegations of fact have been considered, to which I now turn. In his answer (paragraph IV) to the plaintiff's allegation that he, jointly with Frank M. Atterholt (then deceased), Arthur D. Bevan, Joy Morton, and Frank P. Sawyer (all of whom, except Atterholt, were made defendants), promoted the company and had it acquire the plants referred to, that they might make secret profits, Barber asserted that at the request of Atterholt and Morton he "devoted his efforts, influence, and credit" to their plan for the promotion of the company and to acquire such properties, but he denied that it was with any purpose of acquiring for the defendants any secret profits, or any profit for himself, "other than a reasonable return for the efforts, influence, capital, and credit" which he "should and did devote to such enterprise."

No testimony was offered by or on behalf of Barber, and at the argument on final hearing his counsel admitted that he promoted this company. Barber's failure to introduce evidence to support his pleaded affirmative fact defenses, or to contradict or explain any of the evidence introduced by the plaintiffs, reduces the judicial inquiry, so far as the facts are concerned, simply to whether such evidence sustains the allegations of their bill. This amply sustains

the following findings:

Early in 1901 (the year to which all the dates hereinafter mentioned refer, unless otherwise stated), after some previous futile attempts by the owners of a number of oatmeal mills to agree upon some satisfactory basis to relieve the strain of the severe competition in their line of business, Atterholt and Barber began to negotiate with some of these owners for options to purchase their respective plants. As a result Barber secured written options in his own name for the purchase of 10 several mills, bearing date April 1st. In these the owners of the mills (hereinafter called millers) were named "vendors" and Barber the "purchaser." They each recited the intention of the purchaser to organize a corporation

under the name of the Great Western Cereal Company, to purchase a number of plants engaged in the manufacture of flour and cereals, and the vendors' desire and agreement to sell to the purchaser, or his nominee, provided he gave notice on or before April 15th, that he would avail himself of the option. In negotiating for these options Barber dealt with the millers separately, declining to divulge to any what was to be paid to another, and at the time they were given no miller knew the price which any other miller was to receive for his plant. Before and after the date of these options, Barber and the millers held a number of joint conferences, at which the formation and operation of a proposed company were discussed. At one of these meetings before such date the prospectus or announcement of the organization of such a company, and the subscription agreement for the purchase of its capital stock, were furnished by O. C. Barber and his associates, and agreed upon. After some discussion at the meeting of March 28th, at which Barber was present, it was unanimously resolved:

"That it be the sense of the millers present, representing their several properties, that they combine them into one company, to be known as the Great Western Cereal Company, as outlined by a certain prospectus and subscription agreement heretofore furnished by O. C. Barber and associates.

"That said Barber be hereby authorized and instructed to at once take out

a charter under the laws of New Jersey, as set forth in said prospectus.

"That, when subscriptions are made under said subscription agreement, to comply with its terms, then inventories of the several plants be taken, and that the several properties be taken over by the new company not later than April 15, 1901.

"In order to establish the value of said vendors' stock and best protect the interests of all concerned, the stock be pooled for sale, or issued only on promise of recipient that it shall not be offered for sale at less than par for a period of 12 months."

The prospectus (undated) was headed:

"Announcement

"of

"The Great Western Cereal Company

"of

"New Jersey.

"Authorized Capitalization:

"Shares, \$100.00 Each."

Among other things it declared that-

"After acquiring the properties and good will, and paying the necessary expenses incident to the organization of the company, there will be left in the treasury \$1,250,000,00 for working capital.

"The Great Western Cereal Company is a corporation about to be organized under the laws of the state of New Jersey, for the purpose of manufacturing and dealing in oatmeal and cereal products.

"Contracts have been closed for the purchase of the plants, good will and business, valuable trade marks, names, copyrights, patents, and patent processes of the following cereal companies." It also gave the names of the 10 companies upon whose plants Barber then held options, the names of 13 persons who were to be on the board of directors of the new company, including the defendants Barber, Morton, and Sawyer, and 9 other persons, who with Sawyer were then identified with plants to be acquired, the names of the persons who were to be its officers (being some of the directors), and concluded with the statement that Barber was to be the chairman of the board of directors, and that the American Trust & Savings Bank of Chicago was to be the registrar of the company. This prospectus contained other provisions which are not necessary to be reproduced here. The subscription agreement is as follows:

"The Great Western Cereal Company

"Subscription Agreement.

"Authorized Capital:

6% 20-year sinking fund	gold bonds	\$1,500,000.00
Capital stock		. 3,000,000.00

"To be issued as set forth in prospectus of even date herewith for acquisition of plants and a working capital of \$1,250,000.00.

"Now Offered For Sale:

Bonds	 	 \$1,000,000.00
Stock	 	 1,000,000.00
		• •

accompanied by

"Subscription to bonds and stock must be in equal amounts. No subscriptions for less than \$500.00 of each will be accepted.

"We, whose names are hereunto subscribed, agree severally, but not jointly, with Ohio C. Barber, and with such other persons as he may elect to associate with him and with each other, to pay the amount of cash set opposite our respective signatures, as follows: 25% shall be payable into the American Trust & Savings Bank, Chicago, on allotment, to the order of Ohio C. Barber, as soon as subscriptions aggregating \$1,000,000.00 have been secured hereunder, and under like papers.

"The remainder shall be paid to said American Trust & Savings Bank, likewise to the order of said Ohio C. Barber, in three equal monthly payments.

"The right is reserved to allot less than the amount applied for hereunder. "Each subscription hereto for \$5,000.00 of the bonds and \$5,000.00 of the stock shall entitle the subscriber to an additional \$1,000.00 par value of the stock.

"Subscriptions for larger or smaller amounts shall participate in the like proportion.

"This agreement may be signed in separate writings with the same effect as if all signatures were made upon one paper, and shall bind the parties hereto of the first part, their successors, personal representatives and assigns."

On April 8th the company was incorporated. The authorized capital was \$100,000, divided into shares of \$100 each, and the amount with which it was to begin business was \$1,000. On April 10th the company was organized by five stockholders, each of whom held 2 shares of stock, paid for by Barber. These, representing Barber, elected themselves directors, and from among themselves selected the first officers of the company. To these—his own nom-

inees (hereinafter called dummies)—he made the following proposi-

"April 15, 1901.

"The Great Western Cereal Company, 15 Exchange Place, Jersey City, N. J.—Gentlemen: I control property and rights more particularly described below, and am of the opinion that same would be of great value to your company, and I therefore take pleasure in making you the following proposition:

"In consideration of the sum of \$2,499,000 in the capital stock of the Great Western Cereal Company, said stock to be full-paid and nonassessable, and \$1,000,000 in the 6 per cent. 20-year sinking fund gold bonds, of your company, said bonds to be secured by mortgage deed on the properties herein proposed to be transferred to your company and to draw interest at 6 per cent., payable semiannually in gold, and provision to be made for a sinking fund of 5 per cent. per annum of the par value of the bonds issued, and such bonds to be subject to redemption on and after March 1, 1903, at one hundred and five per cent. (105%) of their par value and accrued interest. I will sell, assign, transfer, set over, and deliver, or cause to be sold, assigned, transferred set over and delivered, to your company or your assigns by good and sufficient deeds of conveyance, the properties, good will, valuable trademarks, and business of the following companies:

	The Akron Cereal CompanyAkron, Ohio	
	Auscatine Oatmeal Company	
	H. R. Heath & SonsFort Dodge, Iowa	
	Nebraska City Cereal Mills Nebraska City, Neb	b.
	Stewart & MerriamPeoria, Ill.	. "
•	Sioux Milling Company Sioux City, Iowa	
	David OliverJoliet, Ill.	
	Pillsbury-Washburn oatmeal business (except real	
	estate)Minneapolis, Minn.	
	Northwestern Cereal Company Minneapolis, Minn.	
	Cedar Falls Mill Company	

and pay or cause to be paid into the treasury of your company the sum of \$249,000 in cash as a working capital.

"The above-mentioned stock and bonds to be issued to myself or my nominees as I shall in writing direct, and to be delivered by you to the American Trust & Savings Bank of Chicago, to be by them delivered to me or my nominees upon receipt by them for your company of proper and sufficient deeds of conveyance of the above-described properties.

"Trusting you will give the above proposition your favorable consideration,

and awaiting your reply, I am,

"Respectfully,

Ohio C. Barber."

On April 22d Barber's proposition was accepted by the company thus controlled by him, and on his orders all the company's stock, other than the 10 shares issued to the five persons before mentioned, was directed to be issued to him as agent. Subsequently, viz. April 29th, the membership of the board of directors was increased, and on the same date all but one of these "dummy" directors were superseded by stockholders who had become such after Barber's proposition had been thus accepted. Barber was elected one of the enlarged board of directors and the chairman thereof, a position which he held until June 21, 1906.

On May 2d and 3d the 10 plants were deeded to the company for the recited consideration of \$1 each. When the deeds were delivered, the millers were separately called before Barber, Atterholt (his attorney), and a Mr. Jones, representing the American Trust

&: Savings Bank, in one of such bank's offices, and there they were each given the amount of stock, bonds, and cash called for in their respective options. Receipts, called "O. K. statements," from their being so initialed by the millers and Barber, were taken from these millers. By this method of dealing with the millers separately, each miller was kept in ignorance of the exact consideration which the other millers received for their plants, and it was not until the year 1910 that any of them learned what the others had received. The bonds and stock thus delivered to these millers were part of those ordered issued to Barber. Before the company was incorporated, Barber began to actively solicit "outsiders" to subscribe for the stock and bonds of the proposed company, using the prospectus and subscription agreement referred to for such purpose. This solicitation began as early as February 19th. Of the persons thus solicited a considerable number promptly subscribed. At the meeting of March 28th, at which, as noted, it was resolved to incorporate the company, Barber reported that he had received about \$175,000 of subscriptions from such outsiders and about \$400,000 from his friends. On April 11th Barber sent out a circular letter to the subscribers, notifying them that subscriptions aggregating \$1,000,000 of bonds and stock of the company had been received; that the first installment of their subscriptions was then due and payable, and to make their checks payable to the order of the American Trust & Savings Bank. In a letter to the millers (undated), but from the reference of dates mentioned therein evidently sent about this time, Barber notified them that it was expected that "the payments on the stock subscriptions [would] be in hand, so that a full meeting may be had on Wednesday, April 24th." It is testified that this letter was formulated at a meeting of the board of directors of the company, over which Barber presided.

On April 29th, David Oliver, an owner of one of the plants purchased by the company, became secretary of the company, and continued in that office until June 14, 1907. Shortly after the company acquired these plants, upon inquiring of Barber what amounts he should enter upon the company's books as the value of each of the several plants, he was told by him that such a "division was not necessary." Frank P. Sawyer, one of the owners of a plant sold to the company, was president of the company from April 29, 1901, until June 8, 1904, and from June, 1911, until the appointment of the receivers; Joy Morton was the president from June 8, 1904, until June, 1911. Not long after the organization of the company, Sawver went to the American Trust & Savings Bank to obtain a list of the holders of the company's bonds, and was refused such information, on the ground that it was confidential. In 1910 Sawyer agian sought the bank for the same information, and in looking over a bundle of papers which it gave him at that time he noticed several of the O. K. statements hereinbefore referred to. He made no examination of them at that time, but in 1911, after he had been again elected to the presidency of the company, he did examine them. By totaling the figures therein contained he ascertained what had been paid the millers for their plants 10 years before, and, by comparison with the amount that Barber had received from the company at the time of its organization, that Barber had made a profit of over \$1,000,000.

Shortly thereafter he disclosed this information to Joy Morton and his attorney, Stern. Later, in a circular letter, dated October 14, 1911, issued to the company's stockholders over his name as president, advising them of the company's condition—financial and otherwise—there appeared the following statement:

"A few months ago the management obtained the original contracts showing the figures at which the different plants were taken over by the company."

Then followed detailed figures showing the amounts of cash, bonds, and stock received by the millers for the plants they had conveyed to the company in 1901. On May 13, 1912, pursuant to a bill filed for that purpose, the company was declared insolvent and receivers were appointed for it by the New Jersey Court of Chancery. Subsequently that court gave leave to the receivers to file a bill against Barber and the other defendants named herein, and on November 17,

1913, as hereinbefore noted, the present bill was filed.

Barber's dealing with the millers in the negotiations preliminary to securing the options, viz. cautioning them not to disclose to each other what they respectively were to receive for their plants, and his dealing with them separately when they were paid for their properties, evidence a purpose to prevent their knowing how much profit he contemplated making in that undertaking. His refusal shortly after the organization of the company to divulge to Oliver, the secretary of the company, how much had been paid for each plant, though requested by him to furnish such information for bookkeeping purposes, evidences a purpose also to withhold such knowledge from the company's officers and stockholders. All this tends to establish, and in the absence of contradiction or explanation does establish, that Barber was seeking to secure a profit in the formation of this company and in its purchasing of these plants, which he was unwilling to disclose to the millers whose plants were to be purchased, the company whose securities were taken by him as consideration for such properties, or the outsiders who purchased the company's bonds and stock at his solicitation.

Without seriously disputing that such was the purpose of Barber, it is contended on his behalf, and alleged to be a complete defense, that Barber was the owner of the properties—options—at the time he sold them to the company, and that his taking over the bonds and stock of the company in lieu thereof was but the exchanging of one class of property for another, that in such a situation he was under no obligation to disclose what profits he was making, and that under the case of Old Dominion Mining & Smelting Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025, he was not accountable to the company for any profit that he may have made in such transaction.

In Yeiser v. United States Board & Paper Co. (C. C. A. 6), 107 Fed. 340, on page 344, 46 C. C. A. 567, on page 571 (52 L. R. A. 724), it was said (Severens, Circuit Judge, writing the opinion):

"It is a well-settled principle of equity that those who participate in bringing about the organization of an incorporated company, and in getting it in condition for transacting the business for which it is organized, assume the obligations of a trust towards the company and those who shall be invited to come into the enterprise as stockholders and share in its fortunes. The latter have the right to rely on the good faith and fair dealing of those who have promoted the company, and to assume that they have not perverted the organization by secret means to the accomplishment of selfish purposes, and the destruction of that equality of right which, in the absence of some known modification, all the shareholders are entitled to enjoy. nition of a fiduciary relation in such circumstances is merely for the application of a familiar principle of equity, which fastens a trust upon one who has such power over another and his affairs as to give the former an opportunity to make personal gains in his dealings with them. The reasons for the enforcement of that principle in such cases as this are obvious. Without it there is nothing to hinder the concoction of schemes which the reports of decisions show are becoming quite too frequent in recent years, during which corporations have so greatly multiplied, whereby one may take an option or conditional contract for the purchase of property, and then turn it over, at a profit to himself, to a corporation to be organized, and be under his own control for a sufficient time to enable him to realize the fruits of his enterprise. Unless the promoter of the company is restrained by the obligations of a duty which prevents him from bringing the consequences which are liable to result to others who may be led into danger, he may practice such schemes with impunity."

There is much more in this helpful opinion, the excellency of which was recognized in Davis v. Las Ovas, 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. 426, that might be quoted, but this is deemed sufficient for present purposes. That this case states the general doctrine applicable to promoters of corporations is not disputed, but it is contended that when it is read in the light of Old Dominion Copper Co. v. Lewisohn, supra, it will be found inapplicable to the instant case. In the Lewisohn Case the Supreme Court announced a doctrine differing in some respects from that prevailing generally in the state courts. See Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314, and cases cited. In substance, the Lewsiohn Case holds that, where the owners of a property sell it to a corporation at a time when they are the only stockholders, they are under no legal obligation to disclose their profits, though at the time of sale a further large issue of the company's stock to the public was contemplated, and thereafter actually issued, and that a subordinate fraud practiced by such owners upon some of their associates in the promotion syndicate was immaterial to the corporation and gave it no right of action against such vendors. This case was decided on demurrer, and while the report of the case does not fully disclose the allegations of the bill in regard to the time when the subscriptions to the additional stock were solicited, it was stated that such stocks were not offered to the public until after the sales in question had been consummated. The absence of "any innocent interest" at the time the sale was made seemingly was the deciding factor in that case. See comments of

Noyes, Circuit Judge, in the same entitled case, 202 Fed. 178–180, 120 C. C. A. 392. The presence of innocent interests at such time stamps the relation as one of trust and confidence, and the promoter is bound to make a full disclosure. Arnold v. Searing, 78 N. J.

Eq. 156, 78 Atl. 762, and cases cited.

The instant case is very unlike the Lewisohn Case. Barber was not the owner of the properties conveyed to the company. thereof never lodged in him. He held only unpaid options. These he did not transfer to the company for a consideration, but left it to exercise them in his stead. His scheme contemplated the conveyance by the millers of their plants to the company direct, but not the payment of the consideration by the company directly to the millers. To transfer the options to the company, and to permit it to deal directly with the millers, would have enabled the contemplated new board of directors, to be composed mainly of these millers or their representatives, to readily ascertain what profits Barber received. The use of himself as a conduit through which the consideration was to flow from the company to the millers was necessary only to avoid disclosing his profits, and seemingly this was the only purpose he had in mind in having the stock of the company issued to him as agent.

Barber's scheme, in addition to being one to hide the profits he was contemplating, negatives the idea that he was to become the owner of the plants, or even financially obligated to the millers in any degree. It contemplated the financing of the deal by the millers and the outsiders. He worked on both. The more bonds and stock of the new company the millers could be induced to take, the less cash would have to be paid them as consideration for their mills. The more bonds and stock he could get the outsiders to subscribe for, the less cash he would have to raise in other ways to pay the millers the cash portion of the consideration for their plants and to pay into the company's treasury the \$249,000 he was contemplating coupling with his offer to the company. If more cash than necessary for such purpose was realized from the millers and outsiders, that much more cash he would receive as part of his profits. His scheme has none of the earmarks of a purchase by him of property to be exchanged for the securities of a company. It was essentially a scheme to obtain from the millers and outsiders the cash part of the consideration that had to be paid for the mills and the \$249,000 cash that was to be paid into the company's treasury. In the options Barber was called the purchaser. In fact, he never became so. In realty, he was but an exploiter of both millers and the company, and also of the confiding public, who were induced to part with their cash because of their belief in Barber, whom they knew as the head of a successful

The subscription agreement, signed by the subscribers, calls for them to—

[&]quot;agree severally, but not jointly, with Ohio C. Barber * * to pay the amount of cash set opposite [their] respective signatures."

He signed one of these agreements, personally subscribing for \$225,000 of the securities of the company. If, as contended, the stock he was offering in the prospectus was his own stock, why become a subscriber for any part of it?

His scheme employed a corporation, not as a vendee to trade its securities for properties owned by him, but solely as a clearing house to enable him to make a profit. As he did not at any time disclose to the corporation the price that was to be paid for the properties according to the terms of the options, he is liable to its receivers in this action if, at the time of the sale, there existed persons who bore to the company the relation of innocent stockholders (Yeiser v. United States Board & Paper Co., 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; Old Dominion Copper Co. v. Lewisohn, 210 U. S. 206, 212, 28 Sup. Ct. 634, 52 L. Ed. 1025; Davis v. Las Ovas Co., 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. 426), unless the claimed estoppel is established. Literally, at the time of sale, no one but Barber's dummies were stockholders. But before that time, and for the purpose of becoming stockholders of the proposed company, the millers and a large number of outsiders had subscribed for a large amount of the stock to be issued by the company when it was organized. The outsiders had sent Barber, at his solicitation, their subscriptions, and he had made a call for the first payment due thereon, before he submitted his offer to the company on April 15th. The reports from the American Trust & Savings Bank show that a number of these outsiders responded to such call and paid the first installments of their subscriptions before the company accepted Barber's offer.

By such conduct he took upon himself the relation of a fiduciary, both to the company to be formed and to these subscribers. As noted, the company, at his direction, issued all of the 24,990 shares of its stock, mentioned in his offer of April 15th, to him as agent. On May 4th, immediately following the settlement with the millers for their plants, Barber then being the chairman of the company's directors, the company wrote a letter to the Merchants' Loan & Trust Company, the transfer agents, referring to the issue of stock to Barber as agent, wherein it is stated that—

"Mr. O. C. Barber, to whom the options were given, preferred to issue the stock to himself as agent in sufficient quantity to cover the amount required by the different plants, stating that he understood that in this manner the stock could be subdivided without expense of revenue stamps, as he, receiving the stock as agent, represented the several interests collectively."

Whatever may have been Barber's purpose for so doing, he took such shares, not as the absolute owner thereof, as is contended on his behalf, but as trustee. The cestuis que trustent were the millers, the outsiders, and the corporation. The interests of the millers and outsiders are measured by the amount of their subscriptions, and that of the company by the extent of the injury sustained by such of its stockholders as were ignorant of the trustee's wrongdoing.

The outside subscribers' relation to the company's stock so issued to Barber is radically different from that of the outside sub-

scribers of the stock in the Lewisohn Case. In the latter there were no such subscribers at the time of sale, and the court was dealing with a pleader's attempt to extend the doctrine of a promoter's liability down to a later time, when other subscriptions were made. Lewisohn and the syndicate associates at the time of sale were the only persons interested in the company or its purchase. On the pleaded facts of that case the Supreme Court said:

"Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land." 210 U. S. 212, 28 Sup. Ct. 636, 52 L. Ed. 1025.

In the instant case, at the time of the sale, there were persons interested in that transaction, whose interests as outside subscribers to the company's stock were adverse to Barber's interest as a promoter. The interests of these subscribers were not on both sides of the bargain, but solely on the purchasing side. Barber, who voluntarily assumed to act in a dual capacity, representing, not only his own interests, but those so adverse thereto, was not in a position to do as he pleased. His assuming such dual rôle made him a fiduciary, and his conduct is to be tested on that basis, and not as a vendor exchanging his property of one character for that of another.

Such of the outsiders who then had subscribed for the company's stock (hereinafter called equitable stockholders), as they were in Arnold v. Searing, supra, obtained a real interest in the stock which the promotion of this company contemplated would be issued when the plan outlined in the prospectus and subscription agreement had been carried out. They were the equitable owners of the shares of stock that then had been allotted to them, and at the instant the company's stock was taken over by Barber they became entitled to all the protection that a court of equity would accord to one who actually had the certificate of stock issued in his name.

[4] To these equitable stockholders, Barber was a promoter, and—

"Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors, who will act honestly in the interest of the shareholders, and are precluded from taking a secret advantage of other shareholders." Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423.

This duty Barber did not perform. As noted, when Barber's proposal was made and accepted, there were no independent persons acting as directors of the company. They were all there to do whatever Barber wanted, and they did what he or his agents directed them to do. A week after Barber's offer had been accepted, and the company's stock and bonds had been ordered issued to him, all but one of these directors resigned; the remaining director continuing as such to satisfy the New Jersey statute that requires at least one director to be resident in that state. P. L. N. J. 1896, p. 281, § 12. The places of those who resigned, as well as the additional ones resulting from the increased number of directors authorized by the

company, were filled by real stockholders. Of these the millers or their representatives constituted a majority during the entire existence of the company. No formal or express disclosure of Barber's profits was made to them, or to any of their successors in office. So far as the millers are concerned, it is not necessary to consider whether the company could obtain a standing through them to maintain a suit of this character. They do not occupy the same position as the equitable stockholders referred to, whose innocent interests give the wronged corporation the right to bring the wrongdoer to book.

In the first negotiations for their properties, the millers occupied the position of prospective vendors. While they bore this relation to Barber, he was not legally required to disclose how much profit he intended to make out of the options that he was seeking to secure from them. They were struggling to maintain themselves against adverse business conditions. Self-interest occasionally brought them together, but this was not long continued. While in this situation, Barber began his negotiations with them. They were easily induced to give options on their plants. They first demanded all cash. If the consideration paid them had been all cash, they would have had no interest in what Barber did with the properties. That they subsequently were induced to agree to take stock and bonds of the proposed company as a part of the consideration for their property perhaps did not change the nature of their relation to Barber. They still might be called prospective vendors, and Barber a prospective vendee. If this be so, he was under no obligation voluntarily to disclose to them what profits he intended to make out of such options. They were always in a position to demand a full disclosure, and to refuse to give the options in case Barber declined to do so. That he was to make a profit must have been known by them, and some testified that they so understood. His requirement that they should not reveal what they each were to receive was readily agreed to, and seemingly they carried out that agreement.

However, the outside public, who before the incorporation of the company had been induced by Barber and his associates to subscribe for the stock of such proposed company, were in a different class from the millers. These by their subscriptions became original subscribers to the stock of this proposed company, just as much as did Barber by his subscription. With these Barber was not dealing at arm's length; to them he was a promoter, offering stock in a proposed company which was to take over the properties of these millers, intending (without disclosing such intention) to make a profit by such transaction. To such of them as had subscribed for the stock of this company, and had paid a portion of the amount due on their subscription at the time Barber's proposal was accepted by his dummy directors (and there were a number of such subscribers), he owed the duty of making a full disclosure, or, failing in that, to make it to an independent and competent board of directors of the company when formed. McKinley v. Williams (C. C. A. 8) 74 Fed. 94, 20 C. C. A. 312; Yeiser v. United States Board & Paper Co., 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; Gregg v. Megargel (D. C.) 248 Fed. 960; Davis v. Las Ovas Co., 227 U. S. 80, 86, 33 Sup. Ct. 197, 57 L. Ed. 426; Arnold v. Searing, 78 N. J. Eq. 146, 158, 78 Atl. 762; Parker v. Boyle, 178 Ind. 560, 99 N. E. 988. See, also, text and citations in 14 Corpus Juris, pp. 285, 286. He never made any affirmative disclosure to either.

However, it is contended that the transaction itself completely dis-

closes that he was making a profit.

[5] First. As to the alleged disclosure to the outside public: The prospectus and subscription agreement were the source of their information, and these did not disclose Barber's plan or purpose of receiving profit. They did show that the expenses of organizing the company and the acquisition of properties would be paid out of the subscribed capital. But this, while undoubtedly including reasonable compensation in promoting the company, cannot be held to disclose the large profits that Barber contemplated and subsequently took. Whether or not we assume that these—prospectus and subscription agreement—were artfully drawn so as not to disclose that Barber contemplated the making a profit, the fact remains that they do not show what profits the promoters of this proposed company were to receive, or even that any promotion profits, as distinguished from compensation, were to be paid. Neither indicates that any persons but these millers were to be the vendors to the company; that there would not be any other offering of bonds and stock; that those then offered were not to be issued to the solicited subscribers by the company direct; that the entire proceeds thereof were not to be used in the purchase of the plants, etc., mentioned in the prospectus; or that a part of such proceeds was not to be retained by the company as the working capital referred to.

The declaration in the subscription agreement, that the capital—stock and bonds—totaling \$4,500,000 was "to be issued as set forth in the prospectus of even date herewith for acquisition of plants and a working capital," and that the subscribers agreed with Barber and his associates, "and with each other, to pay the amount of cash set opposite our [their] respective signatures * * * as soon as subscriptions aggregating \$1,000,000 have been secured hereunder, and under like papers," suggests the issue of stock and bonds to subscribers by the company direct, limits the use of such stock and bonds, or the proceeds thereof, to acquiring plants and to provide working capital, and negatives any idea that Barber was to be the vendor of the stock and bonds, or that he, or any other intermediary, was to make a profit in such transaction. The natural and ordinary meaning of this agreement is that the subscribers were becoming original subscribers to a joint enterprise, and that it was so understood by some of them is established by the evidence.

Indeed, the phraseology employed in both prospectus and subscription agreement, as undoubtedly the framers thereof intended, would have the effect of persuading the "confiding public," and all others not expert in promotion schemes, that here was a proffered opportunity to get in on the "ground floor" of an enterprise fathered and

recommended by Barber, who was well and favorably known by many of those solicited by him to subscribe for the bonds and stock of this proposed company. Rose Rosenberg, one of the outside subscribers, on April 5th sent in her subscription to a Mr. Herbert Wright, thanking him "for the opportunity of being able to get in." Barber, in 1901, as the prospectus stated, was the president of the Diamond Match Company, a large and successful business concern, and he permitted, if he did not cause, this prospectus to be worded as it was, and issued, with the subscription agreement referring to it, to the stockholders of that company. Letters written by him to some of such stockholders, thus circularized, leave no doubt that he intended they should know that he thought well of the prospective enterprise, and that it would be worth their while to become the holders of its stock and bonds. That some of the stockholders of the Diamond Match Company, thus circularized, were induced to subscribe for the stock and bonds of the proposed cereal company by reason of their faith in Barber, and because of his being the head of the Diamond Match Company, is established by the evidence.

Robert M. Cox, writing from Liverpool, England, under date of March 12th, in response to Barber's letters of February 19th and 20th,

already referred to, said:

"Your letter dated 19th Febr. to hand this day only; also your circular announcing the proposed formation of the 'Great Western Cereal Company.' I know nothing about this business, but I know you as president of the Diamond Match Company, and for that reason I inclose my signature for \$5,000 subscription to the proposed company, say half in stock, accompanied by the stock bonus, and half in bond 6%. I shall be prepared to pay the 25% on allotment as soon as I receive particulars. It takes time to correspond across the Atlantic."

Subscribers to the stock of a proposed company, thus secured, and whose subscriptions are subsequently paid, bear a different relation to the company, when formed, both before and after its formation, than if they had purchased stock in a company already organized, from persons who were then the holders thereof. In the latter case the purchaser deals only with the holder in his individual capaci-If any actionable wrong results from such transaction, the remedy is individual, and not corporate. The vendee has no grievance against the company, and the company has no actionable grievance against the vendor, by reason of that transaction. However, in the former case, the subscriber deals with the promoter, not as a vendor selling his own stock, but as a trustee acting for the proposed company, a being already conceived by him and then progressing through the necessary period of formation. The breach of duty on the part of such trustee creates an additional remedy. The wrong is not confined to the individual subscriber; it affects the proposed company as well; and it obtains through such wrongdoing a right of action against the wrongdoer, unless barred by laches or other matter of estoppel.

[6] Second. As to a disclosure to the corporation: Barber's offer of the plants did not disclose his profits, and he never made any such disclosure to the company at any later period. But it is said that the company's registrar—the American Trust & Savings Bank—who had a list of the company's stock and bonds and the millers' O. K. statements, knew it, or that from these it readily could have ascertained it at any time after May 3, 1901.

Upon the assumption that information thus obtainable is all the disclosure that a promoter is required to make, the insistence is that this bank was the "joint fiscal agent" of Barber, the company, and the subscribers for the company's stock—both millers and outsiders. Here the familiar rule that notice to an agent is notice to the principal is invoked. But the rule of constructive notice is not applicable to a situation like the one under consideration.

"The general rule, which imputes an agent's knowledge to the principal, does not apply when the third party knows there is no foundation for the ordinary presumption, and he is acquainted with circumstances plainly indicating that the agent will not advise the principal. The rule imputing agents' knowledge to the principal is intended to protect those exercising good faith and not as a shield for unfair dealing." Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. Ed. 1202.

Barber was not such an innocent person. Before the company was organized, the bank was acting on Barber's behalf. The subscription agreement, which he caused to be sent out in advance of the incorporation of the company, directed that the subscriptions should be paid into this bank to his order. In his instructions to the subscribers, issued on April 11th, before he made any offer to the company, he directed them to pay their subscriptions into this bank. In his offer of the plants to the company, under date of April 15th, he directed that upon acceptance it should deliver the consideration—stock and bonds—to this bank, "to be by them delivered to me, or my nominees." This bank was not designated registrar of the company's stock until April 22d, before which, as noted, it was already receiving subscription moneys and acting on behalf of Barber in furtherance of his promotion scheme. The company's designation of it as registrar was by a board of directors which was still composed of Barber's dummies. The books of this bank, showing the receipts from subscribers to the company's stock and the disbursements from that fund, disclose that on April 30th Barber had deposited therein \$200,000 (presumably a part of his personal subscription), and that the day after he was permitted to withdraw the same amount therefrom. Without more, an agent thus selected and acting will not be presumed to have communicated to the company the knowledge it acquired, or could have acquired, of Barber's profits—the only foundation for the rule herein invoked on Barber's behalf.

But there is more. The evidence discloses that Barber used this bank as one of his means to hide his profits. As noted, it was his, not the company's, or the outside subscribers', fiscal agent. That it later became also the registrar of the company in no way made it the company's fiscal agent, or changed its relation to Barber as his "wash house" to float the consideration required to carry out his

promotion scheme to make a profit through a manipulation of this company's capital. That this bank recognized that it bore a dual relation in this transaction, and that it did not consider itself under obligation to disclose to the company any of the information contained in any documents left with it by Barber or his syndicate associates or agents, or which it obtained through any subscriptions received by it, is evidenced by its refusal to permit Sawyer, shortly after the company was organized, and at which time he was the company's president, to see the lists of the subscribers or holders of the company's securities, without which it was impossible under Barber's scheme for any miller or outsider to ascertain his profits. And the assigned reason for such refusal—that it would be a breach of confidence—in the absence of contradiction shows that it considered itself under a duty to Barber not to permit such disclosure. Barber, as a fiduciary to the company and its stockholders, has no standing to invoke the rule which imputes to the principal knowledge acquired by his agent. The company could not tell from the prospectus and the subscription agreement, any more than could the persons who subscribed for its stock on Barber's solicitation, what Barber was to secure as a profit in the promotion of the company. That it, with other information, when obtained, would furnish a basis from which Barber's profit might be approximately ascertained. perhaps is true; but this is not the kind of disclosure that Barber was bound to give to protect him in his profits.

In dealing with this question, Lindley, M. R., in Re Olympia, Limited, L. R. 1898, 2 C. D. 153, 67 L. J. Ch. 433, said:

"To inform a person of a fact is one thing; to give him the means of finding it out, if he will take trouble enough, is another thing. A promoter of a company, whose duty it is to disclose what profits he has made, does not perform that duty by making a statement not disclosing the facts, but containing something which, if followed up by further investigation, will enable the inquirer to ascertain that profits have been made, and what they amounted to."

The doctrine here announced was approved and followed by Vice Chancellor Howell in Arnold v. Searing, supra, and in my opinion expresses the correct rule on this phase of the question of disclosure.

[7] Third. As to the company's alleged ratification of, or acquiescence in, the profit: A corporation may not condone, approve, or acquiesce in every wrong done it, differing in that respect from a natural person. If the injurious act done by an officer or director of the company is not merely voidable, but void, it cannot be ratified or condoned by the stockholders. They cannot make lawful acts which the statute has declared to be unlawful. Tooker v. Sugar Refining Co., 80 N. J. Eq. 305, 318, 84 Atl. 10.

[8] When the dummy directors voted the bonds and stock to Barber for an amount far in excess of the value of the plants, they were acting as Barber's agents. As he fixed the consideration that the company was to pay him for such plants, we have a plain case of a conscious overvaluation by him of the properties purchased by the company. This was a clear and deliberate violation of the New

Jersey statute, and ultra vires the corporation. Being so, it could not have been affirmatively approved, under the New Jersey cases, and what cannot be expressly ratified cannot be done impliedly. Therefore the claim that the company ratified or acquiesced in the transaction is not tenable.

[8] Are the company and its receivers estopped by laches to maintain this suit? A considerable time elapsed—12 years—from the time Barber made the undisclosed profit and the institution of the present suit. However, mere lapse of time does not constitute laches, but in the absence of explanation a long delay is evidence of it. In Bailey v. Glover, 88 U. S. 342, 22 L. Ed. 636, it was held:

"In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud." 88 U. S. 347, 348, 22 L. Ed. 636.

See, also, Kirby v. Lake Shore & Michigan Southern R. R., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; 2 Pom. Eq. Jur. § 917.

In Pickens v. Merriam (C. C. A. 9) 242 Fed. 363, 155 C. C. A. 139, it was held:

"Laches is not a mere matter of time, but principally a question of the inequity of permitting a claim to be enforced because of some change in the condition or relations of the property or the parties."

In Humphreys v. Walsh (C. C. A. 3) 248 Fed. 414, 160 C. C. A. 424, it was held:

"In legal significance, 'laches' is not mere lapse of time, whether greater or less than the precise time of a statute of limitations; it is delay for such time as makes the doing of equity either impossible or doubtful, as involves the inequity of permitting a claim to be asserted after the death of parties, change of title, or intervention of the rights of others, where, in consequence, evidence has been lost or become obscured, the discovery of the truth is made difficult, and the party attacked is placed in a position of evident disadvantage."

As already observed, no miller or subscriber to the company's stock knew what was paid for the plants at the time the company acquired them. So far as the record discloses, no one but Barber, his attorney, Atterholt, and possibly Mr. Jones, who represented the American Trust & Savings Bank, possessed that knowledge. What was done with the O. K. statements at that time, which in the aggregate would disclose that fact, does not appear. In June, 1910, some of them were discovered by Sawyer in a bundle of papers handed to him by a trust officer of this bank, upon his request for a list of the persons holding the company's bonds. The bank's knowledge of what Barber made in promoting the company, as already found, not being imputed to the company, the question of laches before June, 1910, is narrowed down to whether in the circumstances this company was derelict in not making an effort at an earlier date to discover what profit Barber had made in such transaction.

In approaching this question, we should keep in mind that Barber, the wrongdoer, is here invoking the estoppel; that it was his method of carrying out the transaction that prevented a disclosure to the company at the time the company acquired the plants, and that his plan to prevent a disclosure of his profits was a continuous affair; that the company was dominated by him and the millers throughout all this period, some of whom are charged in the bill as his associates in this promotion scheme, and two of whom Barber in his answer asserts were his principals in such purpose. Except for the bank's refusal to let Sawyer know who were the holders of the company's bonds, coupled with the statement that such information would be a breach of confidence, there was nothing to suggest the need of making any inquiry of this character. Ordinarily one would say that a refusal to give to the president of the company information of matters which the company had a right to know, and particularly when such refusal is based upon the idea that to give the information would be a breach of confidence, would arouse the suspicion and challenge further inquiry. Sawyer, however, does not seem to have been so impressed. Whether this was due to an improper motive on his part (hardly likely), or in ignorance of the significance of such refusal (more probable), the fact is he did not deem such conduct and statement of the bank of sufficient importance to call it to the attention of the company's directors. His explanation for not paying more attention to the bank's refusal is that he secured sufficient information from other sources to meet the purpose of his inquiry.

While this is not a satisfying reason for Sawyer's failure to follow up such refusal by an insistence that the bank give him the information, it is well to note that Sawyer was one of the millers, who were said to be jealous of one another, and who readily acquiesced in Barber's refusal to tell what they were to receive for the plants. Even 10 years later, when he actually learned what had been paid to the millers, Sawyer did not disclose that information to any one connected with the company, other than Joy Morton, and that not until 3 or 4 months later. Both are charged by the bill as copromoters with Barber. Whether they were or not is not established. However, in view of Barber's answer, asserting that his efforts in the promotion of the company were performed at the request of Joy Morton and Atterholt, it is not necessary to determine Morton's relation to him. As far as Barber in the present inquiry is concerned, Morton occupied a fiduciary relation to this company and the innocent stockholders referred to; and so far as these stockholders are concerned, neither Sawyer's nor Morton's dereliction of duty to them can inure to the benefit of Barber.

According to Sawyer's testimony, his discovery in 1911 of what Barber obtained as profits in turning over the millers' plants to the company was a surprise—not that Barber had made a profit, but the largeness of it. In reporting his discovery to Morton, Sawyer says he thought that was all he should have done. If at this time the president of the company had been a person free from the taint of defrauding the company at its organization, the failure to prompt-

ly advise the stockholders of the company of the discovery that Sawyer had made would require more serious considerations. But, according to Barber's answer, Morton was not such, and for present purposes he cannot be so considered. Furthermore, there is nothing in the record that shows, or even suggests, that Barber has been

prejudiced by the delay in bringing this suit.

In 1910, when Sawyer learned that the bank had some of the O. K. statements, the company was battling with adverse business conditions. Its officers still had hope of securing help from its bond-holders sufficient to tide it over its financial difficulty. This proved vain. On October 14, 1911, it issued the printed statement to its stockholders (hereinbefore referred to), showing that the company had been conducting a losing business for some time. This circular gave the first notice to the stockholders, other than Barber and his alleged promotion associates, of what had been actually paid for the mills.

In my judgment, it is only from this date—October 14, 1911—that the time began to run on the question of delay in bringing suit. Before that date no stockholder, or officer, or director, or agent of the company, whose knowledge could be imputed to the company, had notice that Barber had made more than a reasonable profit. The financial condition of the company at and from that time, the struggle of its officers to improve it, the passing of the company into the hands of a receiver on the ground of insolvency, the need of sufficient time thereafter for the receiver to become thoroughly acquainted with its condition, and of the facts underlying a possible suit to recover the undisclosed profits, sufficiently accounts for and excuses the delay that ensued in the bringing of suit.

In view of Barber's legal duty to positively apprise the company of the profits he was making in such transaction, his purpose that such profits should be kept secret, his successful plan to prevent an early disclosure thereof, the dominance that Barber personally exercised over the company's directors during the first years of the enterprise, the continuance of a like dominance by Morton, who, as far as Barber is concerned, must be treated as exerting such dominance to maintain the secrecy of such profits, and the absence of evidence showing that the delay in instituting suit against Barber has prejudiced him in his defense, the charge of laches must be held not sus-

tained.

[10] As to the remedy: The remedy for such wrong done the corporation is not single—a rescission of the contract and a restoration of the status quo—as contended on Barber's behalf. To restore the status quo may not be possible. In the case of a solvent going concern that would be practical, and usually the more equitable; but in the case of an insolvent corporation to recover or cancel the stock—now become worthless—would not be a remedy for the wronged corporation and its creditors, but an immunity for the wrongdoer. In Yeiser v. United States Board & Paper Co., supra, it was said (107 Fed. on page 349, 46 C. C. A. 576, 52 L. R. A. 724):

"With regard to the kind of relief which should be awarded, it must be adapted to the situation at the time when it was applied for; that is, when the suit was commenced."

For further citations see 14 Corpus Juris, pp. 297-301. In case of insolvency, the remedy inures to the creditors and may be enforced by receivers. What the promoters unjustly gained is to be restored for the benefit of the creditors. This may be accomplished by recovering such gain in gross, or by an assessment of the stock, as unpaid in favor of such creditors. See v. Heppenheimer, 69 N. I. Eq. 36, 61 Atl. 843; Bigelow v. Old Dominion Copper, etc., Co., 74 N. J. Eq. 502, 71 Atl. 153. See, also, McKinley v. Williams (C. C. A. 8) 74 Fed. 94, 20 C. C. A. 312.

The plaintiffs are entitled to a decree for an accounting against the estate of the defendant Ohio C. Barber for the whole amount of his profits in the promotion of the Great Western Cereal Company, and for a reference to a master to ascertain such profits, unless the amount thereof can be agreed upon.

NICKELS v. PULLMAN CO.

(District Court, W. D. Virginia. August 7, 1920.)

1. Removal of causes 26—Diverse citizenship and requisite amount not sufficient to give jurisdiction.

That the parties to a suit are citizens of different states and the requisite amount is involved is not sufficient to give a federal court jurisdiction on removal.

2. Removal of causes =11—Citizenship and residence of plaintiff not suffi-

cient to give jurisdiction.

That plaintiff in an action is a citizen of the state and a resident of the district is not sufficient to give a federal court jurisdiction on removal, where valid service of process of that court could not have been made on defendant in an original action.

3. Removal of causes =11—Essentials to jurisdiction of federal court.
Original jurisdiction by the federal court, by reason of diversity of citizenship and sufficiency of amount involved, and an invitum jurisdiction over the person of the defendant are essential to removal, unless the plaintiff consents or waives objection.

4. Removal of causes \$\iiint\$86(1)—Petition must show jurisdiction of federal

A petition for removal should state facts which, taken in connection with such as already appear in the record, show that the federal court would have jurisdiction of the suit when transferred.

At Law. Action by one Nickels against the Pullman Company. On motion to remand to state court. Granted, subject to leave to amend petition for removal.

Morison, Morison & Robertson, of Bristol, Va., for plaintiff. Scott & Buchanan, of Richmond, Va., for defendant.

McDOWELL, District Judge. 1. This action was removed by the defendant to this court from the corporation court of the city of Bris-

tol, Va. The plaintiff is a citizen of Virginia, residing within this judicial district. The defendant is an Illinois corporation. The amount involved is \$25,000. The action arose from the fact, as alleged, that the plaintiff, a woman, was treated with indignity by the conductor and porter, while a passenger on a Pullman car. The plaintiff started on her journey as a Pullman passenger at Bristol Va., and the incidents set out in the declaration occurred in Alabama. The service of the process of the corporation court was made on the secretary of state at Richmond, Va., who is by the new Virginia Code made the agent of all nondomestic corporations. Sections 3845, 3847, Code 1919. The theory of the plaintiff seems to be that a part of the cause of action arose in Bristol, where the Pullman ticket was purchased. Section 6050, Code 1919. On removal of this cause to this court, the defendant, appearing specially, filed a plea to the jurisdiction and also a plea in abatement, setting up want of jurisdiction of the corporation court. The plaintiff, not objecting or replying to either plea, also appearing specially, has filed a motion to remand, and stands thereon.

This litigation (but not this action) was commenced in this court. The plaintiff filed in this court at Big Stone Gap, in 1916, a declaration substantially, if not exactly, the same as the present declaration. The first of plaintiff's efforts to get the defendant into court consisted of service of the process of this court in this district on one Bush, alleged to be an agent of the defendant, and also by service in the Eastern district of Virginia on the statutory agent (sections 1105a-14, 3225, Code 1904) of the Pullman Company. Making a special appearance for the purpose, the defendant showed that Bush was not an agent of the defendant on whom process could be validly served, and of course was successful in its contention that service of the summons of this court outside of this district was invalid. The plaintiff next had service made in this district on the Norfolk & Western Railway Company, alleging it to be an agent of the Pullman Company on whom service could be made. But on reading the contract between these companies I held that such was not the fact. The next effort was the publication of the summons in a weekly newspaper of small circulation published in this district. This effort also was held to have been unavailing. The plaintiff then sued out writ of error, but unfortunately from the wrong court. Nickels v. Pullman Co. (C.C.A.) 263 Fed. 551. The plaintiff then instituted the present action in the corporation court of Bristol. The plaintiff files with her motion to remand, as part thereof, a copy of the record of the action in this court at Big Stone Gap. In the petition for removal there is no allegation of facts showing that, at the time of the institution of this action in the corporation court, the defendant had in this district any agent on whom the service of the process of this court in an original action could have been validly made: nor does the record otherwise show such fact. In the record is a plea in abatement, verified March 31, 1917, and filed April 4, 1917, in which it is said:

"This defendant has no agent in the Western district of Virginia, authorized to receive service of process, or upon whom process against this company can be legally served."

The Supreme Court has frequently ruled that the purpose of the Judiciary Act of 1887-88 (24 Stat. 552, 25 Stat. 433), was to restrict the jurisdiction of the federal trial courts. In Smith v. Lyon, 133 U. S. 315, 319, 10 Sup. Ct. 303, 304 (33 L. Ed. 635), it is said:

"* * * Show the purpose of the Legislature to restrict rather than to enlarge the jurisdiction of the Circuit Courts. * * *"

In the case of In re Pennsylvania, 137 U. S. 451, 454, 11 Sup. Ct. 141, 142 (34 L. Ed. 738), it is said:

"The general object of the act is to contract the jurisdiction of the federal courts."

In Fisk v. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. 207, 210 (35 L. Ed. 1080), it is said:

"The attempt was manifestly to restrain the volume of litigation pouring into the federal courts. * * * "

In Shaw v. Quincy Mining Co., 145 U. S. 444, 449, 12 Sup. Ct. 935, 937 (36 L. Ed. 768), it is said:

"And the general object of this act, as appears upon its face, and as has often been declared by this court, is to contract, not to enlarge, the jurisdiction of the Circuit Courts of the United States."

In Camp v. Gress, 250 U. S. 308, 312, 39 Sup. Ct. 478, 480 (63 L. Ed. 997) it is said:

"The 1887-1888 act accomplished its purpose of restricting the jurisdiction of the federal courts, in part, by, * * * " etc.

See, also, Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 583, 16 Sup. Ct. 389, 40 L. Ed. 536.

The question here turns on the intended meaning of the word "jurisdiction," as used in section 2, Act of 1887-88 (25 Stat. 434) and in section 28 of the Judicial Code (Comp. St. § 1010). The cause here is one between citizens of different states, involving much over \$3,000. It follows that every federal trial court in the United States has original jurisdiction of what may inaccurately, but conveniently, be called the subject-matter of this controversy. It is also true that every federal trial court in the United States would have complete original jurisdiction (of the subject-matter and of the persons of both parties), if the defendant either consented to the jurisdiction or waived its objection. The removal clause (section 2) of the statute of 1887-88 refers to the original jurisdiction given by section 1. The language is:

"* * * Of which the Circuit Courts of the United States are given original jurisdiction by the preceding section. * * *"

In section 28 of the Code District Courts are substituted, and "this

title" takes the place of "the preceding section."

[1, 2] This language, considered alone, could mean: (1) Any cause may be removed if the federal trial courts have original jurisdiction of the subject-matter; or (2) if the particular federal court to which the cause is removed would have had original jurisdiction of the subject-matter and jurisdiction over the person of the defendant by consent (or by waiver of objection) of the defendant; or (3) if the particu-

lar federal court to which the cause is removed would have had complete original jurisdiction, if the defendant had neither consented to the jurisdiction of the court over his person, nor waived his objection to such jurisdiction. For brevity's sake, I shall refer to such jurisdiction of the person of the defendant as an in invitum or compulsory

iurisdiction.

If the first construction is right, every action between citizens of different states involving over \$3,000 is removable. I know of no power vested in the subordinate federal courts to decline to follow either the rulings or the necessary implications of the rulings of the Supreme Court. Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264 (and I refer only to that ruling which stands to-day unreversed, and, by the Supreme Court, unquestioned), and In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, seem to me to put the first of the above-mentioned constructions out of the range of discussion. In the first case a citizen of Michigan sued a citizen of Louisiana in a state court within the Eastern federal judicial district of Missouri. The defendant removed the case to the federal trial court of that district. The plaintiff moved to remand. It was held that the cause should have been remanded. The ground of the decision (203 U. S. p. 460, 27 Sup. Ct. 150, 51 L. Ed. 264), is that the particular federal court to which the case was removed would not have had original jurisdiction of the action. In the Moore Case, a citizen of Illinois (the citizenship of the next friend of the plaintiff being of no importance, 209 U. S. 508, 28 Sup. Ct. 585, 706. 52 L. Ed. 904, 14 Ann. Cas. 1164; Blumenthal v. Craig, 81 Fed. 320, 26 C. C. A. 427) sued a citizen of Kentucky in a state court within the Eastern district of Missouri. The defendant removed the case to the federal trial court of that district. Thereafter the plaintiff filed in the federal court an amended pleading on the merits and entered into several stipulations for continuances. Still later the plaintiff moved to remand, and, this being overruled, applied for mandamus. The jurisdiction of the federal court was upheld on the ground that both parties had waived their right to object to the jurisdiction of that court. In each case there was a controversy between citizens of different states, involving the requisite amount. That these facts alone do not give jurisdiction on removal cannot to my mind be questioned by a subordinate federal court. In support of this conclusion see Pendar v. Empire Co. (D. C.) 260 Fed. 669; Guaranty Trust Co. v. McCabe, 250 Fed. 699, 163 C. C. A. 31; Peninsular Co. v. Royal Co. (D. C.) 237 Fed. 297; Mutual Life Ins. Co. v. Painter (D. C. 4th Circuit) 220 Fed. 998, 999; Western Union Co. v. Louisville & N. R. Co. (D. C.) 201 Fed. 932; Baldwin v. Pacific, etc., Co. (D. C.) 199 Fed. 291; Stone v. Chicago, etc., R. Co. (D. C.) 195 Fed. 832; Odhner v. Northern Pac. Co. (C. C.) 188 Fed. 507; Shawnee Bank v. Missouri etc. R. Co. (C. C.) 175 Fed. 456; Baxter etc. v. Hammond Co. (C. C.) 154 Fed. 992; Southern Pac. Co. v. Burch, 152 Fed. 168, 82 C. C. A. 34; Goldberg v. German Ins. Co. (C. C.) 152 Fed. 831, 834; Yellow Aster Co. v. Crane Co., 150 Fed. 580, 80 C. C. A. 566; Foulk v. Gray (C. C. 4th Circuit) 120 Fed.

156. See, contra (possibly), Centaur Motor Co. v. Eccleston (D. C.) 264 Fed. 852; Sanders v. Western Union Co. (D. C.) 261 Fed. 697; Matarazzo v. Hustis (D. C.) 256 Fed. 882; James v. Amarillo Co. (D. C.) 251 Fed. 337; M. Hohenberg v. Mobile Liners (D. C.) 245 Fed. 169; Louisville & N. Co. v. Western Union Co. (D. C.) 218 Fed. 91; Rubber, etc., Co. v. John L. Whiting, etc., Co. (D. C.) 210 Fed. 393; Morris v. Clark Co. (D. C.) 140 Fed. 756; Kansas, etc., Co. v. Interstate Co. (C. C.) 37 Fed. 3; Wilson v. Telegraph Co. (C. C.) 34 Fed. 561.

However, it seems to me that by necessary intendment the Moore Case, if not the Wisner Case, negatives the possibility of adopting the second of the above-mentioned possible constructions. It may be thought that the ruling in the Wisner Case, that there was no jurisdiction on removal because there would have been, even by the consent of the defendant, no original jurisdiction, is based on the fallacy that consent by the defendant would not have given original jurisdiction. But certainly the Moore Case is not based on such fallacy. The Moore Case, 209 U. S. 507, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, overrules this statement in the opinion in the Wisner Case.

In both the Wisner Case and the Moore Case complete original jurisdiction (the power to hear and determine) would certainly have been given the federal court to which the removal was made (as well as every other federal trial court in the United States) by the consent or by waiver of objection on the part of the defendant. In the Wisner Case it was held that the court to which removal was sought did not have jurisdiction on removal. In the Moore Case it was held that jurisdiction on removal was obtained only because of the waiver of objection. The necessary implication being that there would have been no jurisdiction on removal if the plaintiff had not waived his objection, I cannot see any way to escape the conclusion that these rulings by the Supreme Court necessarily imply that an original jurisdiction, gained by consent or by waiver on the part of the defendant, is not sufficient to give jurisdiction on removal, except by consent or waiver on the part of the plaintiff. The necessary result is that complete original compulsory jurisdiction alone is sufficient to give jurisdiction on removal, unless the plaintiff consents or waives objection thereto.

I freely grant that the Supreme Court has in the above-mentioned cases in effect construed into the removal clause some words that are not in the statute. Original power to hear and determine (given diversity of citizenship and the requisite amount) has ever been given by consent or waiver of objection on the part of the defendant. The Wisner and Moore Cases have in effect made the removal clause read:

"Of which the District Courts of the United States are given complete compulsory jurisdiction by this title. * * *"

[3] It is earnestly contended by counsel for the defendant that the fact that the court to which the removal is here sought is the federal court of the state of the plaintiff's citizenship and of the district of her residence, although valid service of the process of this court could not in an original action in this court be made, entirely discriminates

the case at bar from the Wisner and Moore Cases. I am unable to concur. In the situation stated this court could obtain complete original jurisdiction only by consent or by waiver of objection on the part of the defendant. If this court is without compulsory original jurisdiction over the person of the defendant, this court has merely the same incomplete original jurisdiction which is possessed by every federal trial court in the United States. Throughout the Judiciary Act complete original jurisdiction is by necessary implication dependent on valid service of process on the defendant, or on consent or waiver on the part of the defendant. It follows that the federal trial court of the plaintiff's district, unless valid service of process can there be made, is as much dependent on consent or waiver on the part of the defendant for complete jurisdiction as is every and any other federal trial court. In other words, this court, without service of process, has exactly the same incomplete original jurisdiction that the Circuit Court for the Eastern District of Missouri would have had in the Wisner and Moore Cases.

It is easy to say that these two cases can be discriminated because the Supreme Court was not in either case considering the state of fact that is here under discussion. But the fact that a case under discussion presents only an immaterial difference of fact from earlier and controlling decisions does not afford ground for discrimination. And, to my mind, the existence of venue (without original compulsory jurisdiction over the person of the defendant) is an immaterial fact, because venue without valid service of process can never give jurisdiction to hear and determine, unless by consent or waiver of the defendant. And this incomplete jurisdiction is possessed by every federal trial court.

The learned counsel for the defendant here rely on Cain v. Commercial Publishing Co., 232 U. S. 124, 34 Sup. Ct. 284, 58 L. Ed. 534, Goldey v. Morning News Co., 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, Wabash Western R. Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431, Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272, and Garvey v. Campania, etc. (D. C.) 222 Fed. 732, as authority against the foregoing construction. In Cain v. Commercial Publishing Co., 232 U. S. 124, 34 Sup. Ct. 284. 58 L. Ed. 534, the plaintiff did not move to remand. On the other hand, the plaintiff, after unsuccessfully demurring to defendant's plea to the jurisdiction, joined issue on the plea. In other words, instead of objecting that the federal court had no jurisdiction, the plaintiff was ill-advised enough to submit to the federal court the question of the validity of the service of the process of the state court. The plaintiff thereby waived his right to stay out of the federal court, and thereby gave to that court complete jurisdiction. That particular federal court had jurisdiction of the subject-matter of the action (between citizens of different states and involving \$20,000); it had jurisdiction of the person of the defendant to decide the question as to the validity of the state court's process, by consent of the defendant; but that particular federal court would not have obtained jurisdiction of the person of the plaintiff to decide on the validity or invalidity of

the service of process if the plaintiff had done nothing but move to remand.

It should here be parenthetically said that a waiver may result when it was not intended (Wabash Western R. Co. v. Brow, 164 U. S. 271, 278, 17 Sup. Ct. 126, 41 L. Ed. 431), even when the intent not to waive is plainly shown (St. Louis, etc., Co. v. McBride, 141 U. S. 127, 128, 11 Sup. Ct. 982, 35 L. Ed. 659; Western Loan Co. v. Butte Min. Co., 210 U. S. 368, 370, 28 Sup. Ct. 720, 52 L. Ed. 1101; Jones v. Andrews, 10 Wall. 327, 332, 19 L. Ed. 935), and that the submission by the plaintiff to the federal court of the question of the validity of the service of the process of the state court is inconsistent with a subsequent objection by the plaintiff to the jurisdiction of the federal court, and hence a waiver of such objection (In re Moore, 209 U. S. 490, 506, 507, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Kreigh v. Westinghouse, 214 U. S. 249, 252, 253, 29 Sup. Ct. 619, 53 L. Ed. 984; Foulk v. Gray [C. C.] 120 Fed. 156, 164).

In Goldey v. Morning News, 156 U. S. 518, 519, 15 Sup. Ct. 559, 39 L. Ed. 517, the defendant in effect moved to quash the process of the state court and the return thereon, and the federal court in response to such motion issued a rule against the plaintiff to show cause why the motion to set aside the summons and service should not be granted. The plaintiff, instead of moving to remand and objecting to the right of the federal court to decide the issue tendered by the defendant, appeared and resisted on its merits the defendant's motion. The plaintiff thereby waived her right to successfully object to the jurisdiction of the federal court to decide the question of the validity of the service of the state court process.

validity of the service of the state court process.

In Wabash Western R. Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431, also, the plaintiff after removal made no motion to remand and (65 Fed. 943, 13 C. C. A. 222) joined issue in the federal court as to the validity of the service of the process of the state court, and thereby waived his right to object to the jurisdiction of the federal court.

In Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272, after removal, the defendant (first filing and then withdrawing a motion to quash the summons) filed a plea to the jurisdiction (215 U. S. 439), The plaintiff did not move to remand. On the other hand, the plaintiff filed an affidavit (215 U. S. 440) contradicting defendant's affidavits on the issue as to the validity of the

service of the process of the state court.

In Garvey v. Campania, etc. (D. C.) 222 Fed. 732 (the remaining case cited in the brief for defendant), it appears (page 734) that after removal the defendant filed objection to the service of the process of the state court; that thereafter the plaintiff filed a motion to remand, but subsequently, failing to stand on his motion to remand, the plaintiff demurred to the motion to quash. In other words (as in all the cases cited by counsel for defendant in this connection) the plaintiff there impliedly admitted the jurisdiction of the federal court over his person for the purpose of trying the issue as to the validity

of the process of the state court. As was said in Lowe v. Stringham, 14 Wis. 241:

"If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection."

It is true that in no one of the last above-mentioned cases did the court discuss, or even mention, the waiver by the plaintiff of objection to the jurisdiction of the federal trial court over the plaintiff's person; but in each case there was a waiver by the plaintiff, too clear to call for remark, and the court naturally discussed in each case only the controverted questions.

The following quotations are from cases not presenting the state of fact assumed here, but they at least express the same belief that I hold as to the effect of the Wisner and Moore Cases:

In Isaac Kubie Co. v. Lehigh Valley R. Co. (D. C.) 261 Fed. 806, 808, it is said:

"However, the modifications declared by these cases do not change the rule, enunciated in the Wisner Case, that to remove a cause into a particular United States District Court, upon the ground of diversity of citizenship, the cause must not only be one over which a United States District Court is given original jurisdiction, but, unless the plaintiffs have expressly or impliedly consented to such removal, it must be one over which the selected court could have taken original jurisdiction in invitum."

In Keating v. Pennsylvania Co. (D.C.) 245 Fed. 155, 159, it is said:

"As a result, however, of Ex parte Wisner and In re Moore, and numerous decisions of subordinate United States courts, following and applying the same, it seems to be settled law that an action brought in a state court may not be removed to a United States court, unless it could, in the first instance, have been brought in that court, despite the timely objection of a nonconsenting party, even though, by failure to object after removal, the right so to do is waived, and the United States court may, as a result of such waiver, acquire ample jurisdiction to proceed to final judgment."

I am fully aware of the fact that the conclusion I have reached is highly restrictive of federal jurisdiction on removal. If I am right (except where the plaintiff consents or waives objection), the only court to which removal can be made is that of the district of the plaintiff's citizenship and residence, and removal to that court can be validly made only if the defendant could in that district have been validly served with the process of the federal court in an original action. In other words, original jurisdiction of what I have called the subject-matter and an in invitum jurisdiction over the person of the defendant are essential to removal, except when the plaintiff consents or waives objection to the removal.

It is I think true, as is urged by counsel for defendant, that when an original action is brought in the federal court of the district of the plaintiff's citizenship and residence, and valid service of process is there made on the defendant, the court can enter a valid judgment by default. And I think that it is also true that, if the original action be brought in the federal court of a district in which neither party resides, a valid judgment cannot be rendered by default, although the

defendant was validly served with process in the district of suit. But these admissions seem to lead nowhere in the present discussion. They amount to saying that the federal court which has venue has a power to render a default judgment which other federal courts have not. But the power of the court of the plaintiff's residence to render a valid original judgment by default is predicated on the existence of the very fact which I hold to be necessary to give that court jurisdiction on removal—valid service of process within the district of suit.

The strongest argument that can be made against the position that I take is that made by counsel for defendant, as follows: Sections 24 and 51 of the Judicial Code (Comp. St. §§ 991, 1033) are the only sections prescribing the jurisdiction of the federal trial courts, and hence the "jurisdiction" intended by section 28 is the jurisdiction of the subject-matter (given by section 24) and the venue (prescribed by section 51), regardless of service of process in an original action on the defendant. As I have fully admitted throughout this discussion, the language of the Judicial Code (and of the act of 1887-88), considered without reference to the Supreme Court rulings, could be so read. But such construction of the statute is not restrictive, and is forbidden by the necessary implication of the Wisner and Moore Cases. for in each of those cases the federal court to which the case was removed would have had original complete jurisdiction if the defendant had consented or had waived objection, and so much and only so much can be said of the original jurisdiction of this court of this case, if valid service of the process of this court could not have obtained at the time of the institution of the present action.

If by any possibility it be considered that the Wisner and Moore Cases can be discriminated from the assumed case herein discussed, the result is simply that we have here an unadjudicated question. I know of no case in which the question has been decided. Here and there among the opinions of the subordinate federal courts cited hereinabove are expressions indicating a belief that, if the court to which removal was sought had been the court of the plaintiff's residence, the right of removal would have been clear. But I believe that in every such opinion the thought is based on the implied supposition that valid service of process could have been made in the district of venue. And if the question is regarded as an open one, our choice must be between a lax and a restrictive construction of the statute. And assuredly the Supreme Court has never since the act of 1887–88 was passed failed to inculcate the duty of adopting a restrictive construction.

It is further urged by the defendant here that every possible doubt as to the jurisdiction of this court ought to be solved in favor of the defendant, as it has no appeal from an order remanding. But it seems to me that the situation of the plaintiff should also be considered. She has been since 1916 vainly knocking at the doors of this and of the corporation court of Bristol in an effort to have her case tried on its merits. If this court erroneously refuses to remand, she may have to endure the expense and delay of a trial on the merits by a court which has no jurisdiction over her person, and at the end of a long litigation may be as far from a binding adjudication of her case as

she was in 1916. As an order of remand by this court will be absolutely final and binding (Missouri Pacific v. Fitzgerald, 160 U. S. 556, 583, 16 Sup. Ct. 389, 40 L. Ed. 536; McLaughlin v. Hallowell, 228 U. S. 278, 286, 33 Sup. Ct. 465, 57 L. Ed. 835), the jurisdiction of the corporation court of Bristol to decide every question (including that as to the validity of the service of its own process) will be unquestionable. Believing, as I do, that this court may have no jurisdiction, I would clearly be doing wrong to retain this case, unless the defendant can

make it appear that this court has jurisdiction.

141 2. Counsel for the defendant here have shown no disposition to question the soundness of the positions taken by them in this litigation in this court at Big Stone Gap; and, without having given the matter much thought, I am inclined to think that the rule against taking inconsistent positions in court forbids that they should. Davis v. Wakelee, 156 Û. S. 680, 689 et seg., 15 Sup. Ct. 555, 39 L. Ed. 578. It is, however, possible that the defendant has had in this district since April, 1917, an agent on whom valid service could be made. If such is the fact, it seems that such fact should have been alleged in the petition for removal. If I am right in thinking that this court can get no jurisdiction of this case (the plaintiff neither consenting nor waiving objection), unless this court would have had original jurisdiction of the subject-matter and an in invitum jurisdiction over the person of the defendant, the petition for removal is defective in not alleging the facts which show such situation to have existed at the date of the institution of this action. In Railway Co. v. Ramsey, 22 Wall, 322, 328 (22 L. Ed. 823), it is said:

"To obtain the transfer of a suit, the party desiring it must file in the state court a petition therefor and tender the required security. Such a petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that The Circuit Court would have jurisdiction of the suit when transferred. The one necessarily includes the other."

In Insurance Co. v. Pechner, 95 U. S. 183, 185, 186 (24 L. Ed. 427) it is said:

"This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer."

See, also, Gold-Washing Co. v. Keyes, 96 U. S. 199, 201, 24 L. Ed. 656; Ches. & Ohio R. Co. v. Cockrell, 232 U. S. 146, 151, 34 Sup. Ct. 278, 58 L. Ed. 544. As has been said, the record here does not

anywhere show the necessary fact.

Inasmuch as the plaintiff's (written) motion to remand does not specifically make objection to the petition for removal on this ground, it may be that the strictly regular course would be for the court of its own motion to now frame an issue of fact and fix a day for the trial of such issue. This course, principally because of my numerous engagements, involves very considerable delay, and probably also involves very unnecessary expense. A better solution is for the court of its own motion to allow the defendant a reasonable time within

which to amend the petition for removal (Kinney v. Columbia, etc., Ass'n, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103), so as to allege the fact, if it be such, that at the time of the institution of this action in the corporation court the defendant had in this district an agent on whom the process of this court against the defendant could have been validly served, or any other fact which obviates the existing objection to the jurisdiction of this court. If within the time fixed no such amendment is made, an order remanding will be made.

UNITED STATES v. ROSSI.

(District Court. D. Oregon. October 18, 1920.)

No. C-8929.

1. Counterfeiting \$\inspec 2\to Altering nonnegotiable government securities offense. Pen. Code, §§ 148, 151, 154 (Comp. St. §§ 10318, 10321, 10324), making it an offense, with intent to defraud, to alter or counterfeit any security or obligation of the United States, or to pass such forged security, or to buy or sell the same, with intent that it be passed, are applicable alike to negotiable and nonnegotiable securities or obligations.

2. Counterfeiting \$\infty 2, 8—Alteration of war savings certificates constitutes crime; "obligation of United States."

A war savings certificate, issued pursuant to Act Sept. 24, 1917, § 6 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 68291), with stamp or stamps affixed thereto, and the name of the owner written thereon, is an obligation of the United States within Penal Code, §§ 148, 151, 154 (Comp. St. §§ 10318, 10321, 10324), and the removal of the stamp therefrom with intent to defraud constitutes an alteration within section 148, and the uttering or passing the stamp so removed with like intent is an offense, under section 151. When such a certificate has been registered, the removal or erasure of the registration number with intent to defraud constitutes an alteration: but the erasure of the serial number, which is not material to its validity, does not.

f.Ed. Note.-For other definitions, see Words and Phrases, Second Series, Obligation of United States.]

- 3. Counterfeiting \$\ince{-16}\$—Indictment for altering war savings certificates good. An indictment for altering or counterfeiting war savings certificates is not predicated on a violation of the regulations under which such certificates are issued, but solely on the provisions of the Criminal Code.
- 4. Counterfeiting \$\infty\$16—Indictment for altering government obligation should set out obligation.

An indictment for altering or counterfeiting a government obligation, or for passing the same, or having it in possession with intent to defraud, should set out the obligation in hec verba, or allege some potent reason why that cannot be done.

5. Counterfeiting =16-Indictment for altering war savings certificate insufficient.

An indictment for altering a war savings certificate with intent to defraud, by erasing the registration number, held bad, where it did not show by appropriate allegation that the certificate had been registered.

Criminal prosecution by the United States against Angelo H. Rossi. On demurrer to indictment. Demurrer sustained.

Lester W. Humphreys, U. S. Atty., and John C. Veatch, Asst. U. S. Atty., both of Portland, Or.

Barnett H. Goldstein, of Portland, Or., for defendant.

WOLVERTON, District Judge. Rossi is indicted under 19 counts. A short analysis of the several counts will suffice for the present in-

quiry.

Counts 1, 4, 7, 10, and 13 charge that Rossi, with intent to defraud, did pass, utter, and sell certain altered obligations of the United States, being certain war savings certificate stamps, which were altered by having removed and erased from the face thereof a certain registration and identification number, to wit, No. 50819.

Counts 2, 5, 8, and 11 charge that Rossi, with intent to defraud, did pass, utter, and sell certain altered obligations and securities of the United States, namely, certain war savings certificate stamps, which were altered by being removed from the certificate or certificates to

which they had theretofore been attached.

Counts 3, 6, 9, 12, and 14 charge that Rossi did sell, transfer, and deliver to a person named certain obligations and securities of the United States, namely, certain war savings certificate stamps, which were altered by having removed and erased from the face thereof a certain registration and identification number, with intent that such war sav-

ings certificate stamps be passed and used as true and genuine.

Count 15 charges the defendant with having and keeping in his possession, with intent to defraud, certain altered obligations and securities of the United States, namely, certain war savings certificate stamps, which were altered by having removed and erased from the face there-of a certain registration and identification number, to wit, No. 50819. Counts 16 and 17 are predicated upon like allegations, except that the alteration consists of having removed the war savings certificate stamps from the war savings certificates to which they had theretofore been attached.

Count 18 charges the buying and receiving from a person named, with intent that they be passed as true and genuine, certain altered obligations and securities of the United States, namely, certain war savings certificate stamps, which alteration consisted in the removing and erasing of the registration and identification number, to wit, No. 50819.

Count 19 charges Rossi with falsely altering certain war savings certificates, of series given, with intent to defraud, by attaching to each of said certificates war savings certificate stamps which had thereto-

fore been removed from other war savings certificates.

The sufficiency of each of these counts is challenged by demurrer. By section 6 of the Act of Congress of September 24, 1917 (40 Stat. 288, 291 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 68291]), the Secretary of the Treasury is authorized to borrow money on the credit of the United States, to meet certain designated public expenditures, such sum or sums as in his judgment may be necessary—

"and to issue therefor, at such price or prices and upon such terms and conditions as he may determine, war savings certificates of the United States on which interest to maturity may be discounted in advance at such rate or

rates and computed in such manner as he may prescribe. Such war savings certificates shall be in such form or forms and subject to such terms and conditions, and may have such provisions for payment thereof before maturity, as the Secretary of the Treasury may prescribe. Each war saving certificate so issued shall be payable at such time not exceeding five years from the date of its issue, and may be redeemable before maturity, upon such terms and conditions as the Secretary of the Treasury may prescribe. * * * The Secretary of the Treasury may, under such regulations and upon such terms and conditions as he may prescribe, issue, or cause to be issued, stamps to evidence payments for or on account of such certificates."

By Department Circular No. 94 (War Savings Circular No. 1), hearing date November 15, 1917, the Secretary of the Treasury offered for sale an issue of United States war savings certificates, series of 1918. The circular prescribes that

Payments for or on account of such war savings certificates must be evidenced by United States war savings certificate stamps, series of 1918, which are to be affixed thereto."

The regulations further prescribe that—

"A United States war savings certificate, series of 1918, will be an obligation of the United States when, and only when, one or more United States war savings certificate stamps, series of 1918, shall be affixed thereto. * * * No war savings certificate will be issued unless at the same time one or more war savings certificate stamps shall be purchased and affixed thereto. * * * The name of the owner of each war savings certificate must be written upon such certificate at the time of the issue thereof."

Further than this, provision is made by the regulations whereby war savings certificates may be registered—

"at any post office of the first, second, or third class, and payment in respect of any certificate so registered will be made only at the post office where registered. Unless registered, the United States will not be liable if payment in respect of any certificate or certificates be made to a person not the rightful owner thereof."

By another regulation:

"War savings certificates are not transferable, and will be payable only to the respective owners named thereon," except in case of death or disability.

Like regulations were promulgated embracing war savings certificates of the issue of 1919, by Department Circular No. 128, of date December 18, 1918.

[1] In the light of the act and the department regulations, provision is made for the issuance of two kinds of documents, namely, war savings certificates and war savings certificate stamps; but these documents become obligations of the United States only when a stamp or stamps shall have been affixed to the certificate and the name of the owner or owners shall have been written upon the certificate. Such certificates, when so made up and completed, it may be confidently affirmed, are obligations or securities of the United States, within the purview of sections 148, 151, and 154 of the Penal Code (Comp. St. §§ 10318, 10321, 10324). Separately considered, neither the stamp nor the certificate can be deemed such an obligation. Although the completed certificates are made nontransferable by the regulations, that could have no significance where an attempt was made to counter-

feit or alter them, or to pass, utter, or sell, or to have in possession such as had been forged, altered, or counterfeited, with intent to defraud, or that they should be passed, published, or used as true and genuine, in violation of sections 148, 151, and 154 of the Penal Code. In other words, their transferability or nontransferability does not in any way modify the offenses denounced by these sections of the Code.

[2] With these premises, I will proceed to answer the questions pro-

pounded by counsel for defendant under the title points involved.

The first has already been answered, that a war savings certificate, with a war savings certificate stamp or stamps affixed, which bears the name or names of the owner or owners written thereon, is an obligation of the United States within the meaning of the sections of the Code above designated.

Second. Such obligations must be deemed to be altered, within the meaning of such sections, when the stamps have been removed from the certificates to which they have been annexed, with intent to defraud, or to utter and pass the same (the stamps) as true and genuine. It is not significant whether the stamps so detached are transferable or not transferable. But it is significant that the person so having such altered obligations is attempting to deal with them with the intent to

defraud, or as true and genuine.

Third. I am of the opinion that it is not an alteration or forgery of such war savings certificates, fully made up, to erase or remove the serial number thereof, because such serial number is not a material element of the obligation. The obligation is just as potent in the hands of the holder without as with the serial number. But if the certificate has been registered, as provided by the departmental regulations, and given a registration number, it would, without question, constitute a forgery or an alteration to erase or remove the registration number with intent to defraud, within the meaning of the sections of the Penal Code referred to, because such number is made an essential element to the validity of the obligation. The purpose of affixing the number or numbers is for identification of the obligation at the post office where payable, and for the protection of the government, to ward against payment to the wrong person, or double payment, as well as for the protection of the lawful owner and holder of the certificate or certificates.

"That is a material alteration, which so changes the terms of the instrument as to give it a different legal effect from that which it originally had, and thus works some change in the rights, interest, or obligations of the parties." 1 R. C. L. 967.

[3] Fourth. It is an erroneous conception to affirm that the charges contained in the present indictment are predicated upon any violation of the departmental regulations respecting war savings certificates, or disobedience of any of such regulations. The charges are predicated alone upon a violation of the designated sections of the Penal Code. The regulations have to do with the regularity and validity of war savings certificates as obligations of the United States, and when the war savings certificates become such obligations, then the sections of the Code denouncing alteration, purchase, sale, transfer, possession, or utterance,

with the intent to defraud, or to pass as true and genuine, become applicable. If the validity of the paper itself were attacked, that would be quite another thing. Then it would be pertinent to examine the act and the regulations to determine whether the certificates were legal and valid obligations of the United States. It requires no pleading of the statute or the regulations for a regular presentation of the subject for consideration. The court takes judicial notice of these.

[4] Fifth. An indictment for forging or altering a government obligation, or for passing the same or having it in possession with intent to defraud, or to pass it as true and genuine, should set forth the obligation in hæc verba, or some potent reason should be alleged showing why that cannot be done. People v. Tilden, 242 Ill. 536, 90 N. E. 218, 31 L. R. A. (N. S.) 215, 134 Am. St. Rep. 341, 17 Ann. Cas. 496; United States v. Fisler, Case No. 15,105, 25 Fed. Cas. 1091.

[5] Measured by these conclusions, all the counts in the indictment are bad, by reason of not having set forth in hex verba the obligations of the government alleged to have been dealt with by defendant. And those counts purporting to charge the defendant with having erased or effaced the registration and identification number, to wit, No. 50819, are also bad, in not having alleged by appropriate averments that such certificates had been previously registered.

The demurrer will therefore be sustained to each count in the indictment.

SLOAN SHIPYARDS CORPORATION v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, W. D. Washington, N. D. October 4, 1920.)

No. 182-E.

United States 5-78—Not suable for tort of officer.
 The United States cannot be sued for a tort, though committed by its officers in the discharge of their duties.

Courts \$\infty 426\to United States \$\infty 125\to Suit against Emergency Fleet Corporation one against United States.

The United States Shipping Board Emergency Fleet Corporation, incorporated pursuant to act of Congress under the laws of the District of Columbia, held merely an instrumentality created by the United States, acting in its sovereign capacity for executing the purposes of Shipping Board Act Sept. 7, 1916 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8146a et seq.), and a suit against it held a suit against the United States, not maintainable in a District Court where the amount involved exceeds \$10,000.

In Equity. Suit by the Sloan Shipyards Corporation against the United States Shipping Board Emergency Fleet Corporation. On motion by the United States to dismiss bill. Motion sustained.

This is an action by a corporation of the state of Washington against the United States Shipping Board Emergency Fleet Corporation. It is alleged in substance that the plaintiff was in possession of a well-equipped shipbuilding plant, and of a well-equipped machine shop, for use in the preparation of machinery, appliances, etc., and equipment that was to go into the construc-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tion of ships, and on the 18th day of May, 1917, it entered into a contract with the defendant to construct 16 wood cargo-carrying steamers for a consideration named, with payments specified, and that it entered upon the execution of this contract and that it also had under construction 4 full-power motorships, and other vessels, from which, it is alleged, it could realize "a handsome profit"; that the plaintiff caused to be organized the Anacordes Shipbuilding Company, which constructed shipways and shipyards at Anacordes. Wash., so as to enable the plaintiff to speedily comply with its contract with the defendant, and that on December 1, 1917, the plaintiff had on the ways at Anacordes, Wash., and at Olympia, Wash., 6 ships under construction, and 2 additional keels laid, and was entitled to receive large payments in addition to payments theretofore made; that on said day the defendant wrongfully seized the possession and control of the plaintiffs' property at Anacordes and Olympia, and the Capital City Iron Works, owned by the plaintiffs, and retained exclusive control, possession, and management thereof; that prior to this time the plaintiff had contracted for about 15,000,000 feet of timber, and for all the engines and machine equipment, and all the material necessary for the construction of the entire 16 ships "at extremely low and advantageous prices," but after the seizure the defendant canceled all such contracts and purchased other materials at increased prices; that plaintiff was denied access to the books and records of the company and was denied the privilege of participation in the management and control of the business; that construction of the ships was deliberately delayed, extravagant prices were indulged in, and largely increased costs made in the construction of the ships by employment of unnecessary labor—and sets out many elements of damage occasioned to the plaintiff by the defendant, covering 15 pages of typewritten matter, and prays an order enjoining the defendant from removing the books, records, and files of the plaintiff from the offices of the plaintiff at Olympia and Anacordes, and from disposing of any property of the plaintiff, and for an order canceling certain mortgages set out in the complaint, quieting title to the property covered by the mortgages, and for an accounting, and for a decree determining and establishing the profits to which the complainant is entitled under its contract, alleging damage in excess of a million dollars.

The defendant moves to dismiss on the ground that, the suit being against the United States Shipping Board Emergency Fleet Corporation, which is simply an agency of the United States, is a suit against the United States, and therefore not cognizable in this court, in so far as this bill may allege breach of contract, and not cognizable in any court so far as the bill may allege the commission of a tort; that the court is without jurisdiction; that the bill does not state facts sufficient to constitute a valid cause of action; that there is a nonjoinder of parties defendant.

The United States appears "specially" and moves to dismiss on the ground that the action is against the United States in effect, and not cognizable in a court of equity, "but only in the Court of Claims at Washington, D. C., the

amount demanded being in excess of \$10,000,"

George H. Bailey, James Hamilton Lewis, and Kerr & McCord, all of Seattle, Wash., for plaintiff.

Robert C. Saunders, U. S. Atty., of Seattle, Wash., for intervener. Howard Cosgrove, of Seattle, Wash., for defendant Shipping Board.

NETERER, District Judge (after stating the facts as above). [1] That the United States cannot be sued for a tort, even though committed by its officers in the discharge of their duties, is well settled. Ballaine v. Alaska Northern Ry. Co. (U. S., Intervener) 259 Fed. 183, 170 C. C. A. 251, and cases cited. The relation of the United States to the defendant must be determined by the act creating the defendant, the objects of its creation, and the purposes to which the property is to be used.

Chief Justice Marshall, in the Dartmouth College Case, 4 Wheat. 518, at page 561 (4 L. Ed. 629), said:

"To determine the character of a corporation, the beneficial purposes to which the property of the corporation is to be used may be considered."

[2] The object and manner of organization and purposes and operation of the defendant are set forth in the Merchant Marine Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8146a-8146t). Concisely stated, the act creates a Shipping Board composed of five members, to be appointed by the President. The board, with the President's approval, is to have constructed and equipped in American shipyards and navy yards, etc., or to lease and purchase, vessels so far as commercial requirements of the trade of the United States may permit, for use as naval auxiliaries or army transports. A corporation may be formed under the laws of the District of Columbia, and have a capital stock not to exceed \$50,000,000, the board to subscribe and vote not less than a majority of the stock. The board, with the President's approval, may sell any or all of the stock, but at no time shall the government be a minority stockholder. The board to give public notice of the fact that vessels are offered, and the terms and conditions upon which the contract will be made, and shall invite competitive offers and make full report to the President. The corporation shall stand dissolved at the expiration of five years from the conclusion of the present European War, and all stock of such corporation owned by others at the time of dissolution shall be taken over by the board at a fair and reasonable value, and paid for with the funds to the credit of the board. The liability to be incurred under the provisions of sections 5 and 11 shall not exceed \$50,000,000; and the proceeds of the sale of bonds and any proceeds for sales, charters, and leases of vessels and all sales of stock made by the board and of all of the monies received from any source to be covered into the treasury to the credit of the board.

By Act Oct. 6, 1917 (section 251a, Comp. Stat. Annot.), section 5 of Act June 22, 1906, prohibiting the transfer of employees from one executive department to another, or to independent establishments, or vice versa, is made to apply to the United States Shipping Board Emergency Fleet Corporation, which by the act shall be considered a "government establishment for the purposes of this section." Executive Order of July 11, 1917, delegates to the Shipping Board and the Emergency Fleet Corporation the powers granted to the President by the merchant shipping legislation. Act March 1, 1918 (section 8146t, Comp. St. 1918, Comp. St. Ann. Supp. 1919), empowers the United States Shipping Board Emergency Fleet Corporation to purchase, lease, requisition, or otherwise acquire, and to sell or otherwise dispose of, improved or unimproved land, houses, buildings, etc. This act also requires the Fleet Corporation to report to the Congress on the first Monday of December of each year the names of all persons or corporations with whom it has made contracts, and all such subcontractors as may be employed in furtherance of this act, including a statement of purchases and amounts thereof, etc.

The Supreme Court, in The Lake Monroe, 250 U. S. 246, at pages

251, 252, 253, and 254, 39 Sup. Ct. 460, at page 463 (63 L. Ed. 962), sets out the pertinent provisions of the act, and says:

"But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers, and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds. The emergency shipping legislation evidently was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as its agencies to exercise the new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the Board." (Italics mine.)

Significance attaches to the fact that the Congress provided that the defendant corporation shall be formed under the laws of the District of Columbia, in view of the fact that the sovereign power of the District of Columbia is lodged in the government of the United States. Metropolitan Ry. Co. v. District of Columbia, 132 U. S. 1, 10 Sup. Ct. 19, 33 L. Ed. 231. The municipality of the District of Columbia is not a state, but a mere agency of the United States, and is invested with only such subordinate powers of local legislation and control as the Congress sees fit to confer upon it.

Justice Bradley, in Metropolitan Ry. Co. v. District of Columbia, supra, said at page 9 of 132 U. S., at page 22 of 10 Sup. Ct. (33 L.

Ed. 231):

"It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a state; but the sovereign power of this qualified state is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States."

The intent of the Congress in the agency employed and the directions given, the provisions of the act, and legislation with relation thereto, appear to be conclusive that the United States acted in its sovereign capacity, and in exercising entire control, possession, ownership, and management it has merely employed the corporate organization of its own creation so far as applicable as an instrumentality or "arm," with which to execute the purposes of this Statute, and in so doing it was not divested of its sovereignty.

It is also significant that the act—section 9 (8146e)—specifically exempts vessels "while employed solely as merchant vessels" from the ordinary legal liabilities and subjects them to admiralty jurisdiction. The Lake Monroe, supra. If it was the intention that the defendant was not a mere governmental instrumentality, then the exemption was

entirely superfluous.

This case, I think, is plainly distinguishable from U. S. Bank v. Planters' Bank, 22 U. S. (9 Wheat.) 904, 6 L. Ed. 244. In that case the state of Georgia and individuals—citizens of Georgia—engaged in the general banking business. The action was upon a promissory note held by the plaintiff, endorsed by the defendant, and the defendant bank pleaded immunity from suit because of its sovereign character.

The court held that having become a partner in a trading company, the state divested itself of its sovereign character and took that of a private citizen. In the instant case the defendant is not a trading company. The primary purpose of the act was to provide "army transports," and the commercial shipping was incidental. The act is a war measure; emergency is reflected in nearly every sentence. The purpose was to acquire vessels "for use as naval auxiliaries or army transports," and the "navy yards" were to be utilized. Of the great need for transports the Congress was advised, and the public later found out. Eyery detail of management, relation, and function of the defendant is prescribed and limited in the Marine Act, and the only use made of the incorporation act, the creation of the Congress, was the filing of articles to give it corporate entity as a matter of convenience, and nowhere is there apparent an intention to waive the sovereign privilege. On the contrary, exempting vessels from immunity and submitting them to admiralty seems conclusive that in all things else the sovereignty was asserted and retained.

I have read the decisions of Judge Hand in Gould Coupler Co. v. U. S. Shipping Board (D. C.) 261 Fed. 716, and Judge Page in Lord & Burnham Co. v. U. S. S. B. E. F. Corp. (D. C.) 265 Fed. 955. The opinion of Circuit Judge Hunt in Ballaine v. Alaska Northern Railway Co., 259 Fed. 183, 170 C. C. A. 251, I think is decisive here. Judge Hunt, for the Circuit Court of Appeals for this circuit, said (259 Fed. 185, 170 C. C. A. 253):

"Act March 12, 1914, c. 37, heretofore cited which authorizes the President to locate, construct, and operate railroads in Alaska expressly provides that the Alaska Railroad is for the settlement of public lands and for transportation of coal for the army and navy, for the transportation of troops, arms, munitions of war, the mails, and for 'other governmental and public uses,' and to transport passengers and property. The act (section 4) also confers authority upon the President, through such agencies as he may appoint or employ, to do all necessary acts, in addition to those especially authorized, to enable him to accomplish the purposes of the act. By section 1 the President is authorized to purchase or acquire other railroads to carry out the purposes of the act, and to employ officers and agents in order to accomplish the purpose of the legislation. Taking all these provisions together, they plainly show that the United States, in acquiring stocks and bonds and property in the Alaska Northern Railway Company, acted in its sovereign capacity, and in exercising entire control, possession, ownership, and management, has merely employed the corporate organization as an agency through which to execute the purposes of the statute."

This court in U. S. v. Union Timber Products Co., 259 Fed. 907, held that a conspiracy to defraud the Shipping Board is a fraud on the United States. That case, however, is distinguished from the issue here. Since the amount involved is more than \$10,000, this court has not jurisdiction. I also think that the Anacordes Shipbuilding Company and the Capital City Iron Works should be parties to the action. The motions to dismiss are granted.

I have conferred with Judge CUSHMAN of the Southern division, and he authorizes me to say that he concurs in this decision.

BERNHEIM DISTILLING CO. v. MAYES, Internal Revenue Collector, et al.

(District Court, W. D. Kentucky, October 11, 1920.)

No. 559.

1. Internal revenue \$\iii 38\to In action to recover tax paid, facts must be fully shown.

In an action to recover internal revenue taxes specially assessed by the Commissioner and paid under protest, the assessment is presumed prima facie to be correct; but, when such presumption is clearly over-come by plaintiff, it is incumbent on defendant to make a full and explicit showing of the facts on which the Commissioner acted.

2. Internal revenue =12—Special assessment against rectifier not warranted. A special assessment against a rectifier of spirits, based on its recovery of "soakage" from the barrels in which the spirits were removed from warehouse, held not sustainable on the facts shown.

3. Internal revenue \$\iiint 24\top"Soakage" defined.

The term "soakage," as used in the laws and regulations relating to withdrawal of liquors from bonded warehouses, means the spirits which in course of time in the warehouse had been absorbed by the staves of the barrel containing it.

At Law. Action by the Bernheim Distilling Company against T. Scott Mayes, Collector of Internal Revenue, and J. Rogers Gore, Deputy and Acting Collector. Trial to court. Judgment for plaintiff.

George Du Relle and Strother & Hamilton, all of Louisville, Ky., for plaintiff.

W. V. Gregory, U. S. Dist. Atty., of Louisville, Ky., for defendants.

WALTER EVANS, District Judge. This is an action at law to recover from the defendants \$5,333.68, the amount of certain taxes assessed by the Commissioner of Internal Revenue against the plaintiff on certain spirits it had rectified, and which taxes the plaintiff paid under protest to J. Rogers Gore, deputy and acting collector, after Mr. Mayes had resigned. A jury was waived by the parties, and by their agreement the case was tried by the court. All testimony offered by the parties was heard and very carefully analyzed and considered by the court, with the result that the facts were found to be as follows:

(1) From July 1, 1917, to the 17th day of February, 1918, both dates inclusive, and for at least 14 years previously, the plaintiff was a wholesale dealer and a rectifier of distilled spirits in the city of Louis-

ville, Ky.

(2) The process of rectifying distilled spirits at plaintiff's establishment was as follows: The taxes due the United States on the spirits to be rectified by plaintiff were always paid upon their withdrawal from the bonded warehouse, where, under the law of the United States, they had been deposited after distillation was completed, to remain until all taxes due thereon to the United States had been fully paid. After such full payment of all taxes due the plaintiff, as it was free to do, removed the distilled spirits to its rectifying establishment in said city. The process of rectification began on an upper floor of their establishment adapted to that purpose, when what was called a "dump," usually

made up of five barrels, was assembled near a trough. were removed from these barrels, and the contents of each barrel was. in succession, poured into the trough, from which the spirits ran through pipes to and into a large dumping tank on a lower floor. Two men were usually assigned to this work, one of whom usually removed the government stamps from the barrels after they were emptied, and after he had done this another of the men poured into each empty barrel about five gallons of distilled water, obtained from a nearby tank containing 150 or more gallons thereof, and, having done this. this man replaced the bung, shook each barrel in succession, and rolled it over to the dumping trough, where it was again dumped. The entire contents of the barrels thus treated, involving the water in the barrels; went into the dumping tank below, with the spirits previously there, and one of the objects of this was to lower the proof of the spirits in the tank, which was entirely lawful. This handling of five barrels took altogether 25 minutes, including the time taken for the spirits to run out of the barrels. The plaintiff, after this latter dumping, was free to treat the tax-paid contents of the dumping tank as it pleased, either by putting in more water, other tax-paid spirits, chemicals, and other ingredients, with the one exception of any untax-paid spirits; the use of the latter being altogether forbidden.

One object of this treatment was to rinse the inside of the barrels, where some parts of the spirits outside of the stayes would remain, so as to save those remnants of tax-paid spirits by taking them up in the water and carrying them into the dumping tank, together with any particles of charcoal which might have been separated from the inner surface of the charred stayes where such were used. This rinsing was entirely permissible under the law and practice at that time. Furthermore, all of this was preparatory to the re-use or sale of the barrels. The rectifying premises were always open to the visits of the internal

revenue officers, and they in fact very frequently visited them.

[3] (3) When distilled spirits, after years of storage in distillery warehouses, are finally gauged for tax payment on withdrawal from the warehouse, the law and the regulations require a certain allowance to be made for what is called "soakage," viz. spirits which, in course of time in the warehouse, had been absorbed by the staves of the barrel containing it. This "soakage" cannot be obtained or extracted from those staves by the use of water, unless that water is of very high temperature and kept in the barrel for a considerable length of time. Water, when used by the plaintiff to rinse its barrels in the way described, while sometimes hot when drawn from the tank soon after the latter had been refilled from the water-distilling apparatus, was usually cool, or only warm, and none of what was used to rinse any of the barrels involved in this case remained in the barrels for rinsing purposes long enough to extract any material part of the "soakage."

(4) A special gauger, early in 1918, in examining into the question of the quantity of spirits rectified by the plaintiff, with a view to the taxation of 15 cents per gallon thereon imposed by section 304 of the act approved October 3, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 5986c), had found that there was an excess of such spirits on

hand as against a usual deficit in such cases. While that fact is not important in the case before us, it led to an examination by a revenue agent and the special gauger into the manner of plaintiff's treatment of the barrels it had emptied for rectification.

On the 15th, 16th, and 17th days of February, 1918, these revenue officers visited the plaintiff's rectifying establishment and there took possession of certain of the barrels which the plaintiff had emptied into the trough and dumping tank. Thirty of such barrels were thus taken after they had been thus emptied by plaintiff of the spirits they had These revenue officers then poured hot water from the distilled water tank into these barrels and shook them about as long as plaintiff did in rinsing them. The barrels were then emptied by those officers, and thereafter the contents were subjected by them to such tests as they desired to make, and they reached the conclusion that the spirits contained in the water they had thus used was about one-third of a gallon per barrel, which would make 10 gallons recovered from the 30 barrels. The spirits thus recovered were not shown by the testimony of those officers nor claimed by them to be "soakage," and the court therefore finds that it was not "soakage," but remnants of tax-paid spirits left in the barrels, after those barrels had been rinsed by the revenue officers.

Neverthless, upon the conclusion reached by the two revenue officers as to recoveries from the barrels they tested in February, 1918, they examined the official records to ascertain the number of barrels the plaintiff had rectified since July 1, 1919, and without in any way disclosing to the court in their testimony the number of such barrels, or whether the spirits they had recovered in rinsing exceeded in quantity what plaintiff, when it rinsed the barrels, had obtained, the testimony did show, and the court finds that they reported the results of their tests and investigations to the Commissioner of Internal Revenue, and that that officer acted upon that undivulged report in making the assessment now in question, and which assessment was made on 2,012.3 gallons of recovered spirits at \$1.10 per gallon and 880.7 gallons of recovered spirits at \$3.20 per gallon, as stated in the assessment. In this situation, developed by the testimony, the court finds that no part of the 10 gallons was "soakage," but that all of it was tax-paid spirits. The court also finds that no part of this 10 gallons was delivered to the plaintiff, although all of it was tax-paid spirits, and not "soakage."

(5) That the defendant Mayes, then the collector of internal revenue, on August 26, 1918, made demand upon plaintiff for the payment within 10 days of the whole amount of the taxes so assessed against the plaintiff. Within 10 days of that date, viz. on September 3, 1918, plaintiff filed a claim on form 47, prepared by the Commissioner of Internal Revenue, for the abatement of all the taxes so assessed; but on February 27, 1919, the Commissioner of Internal Revenue overruled, rejected, and denied said claim for such abatement of said taxes or any part thereof. On March 5, 1919, the defendant J. Rogers Gore, deputy and acting collector of internal revenue (Mr. Mayes having resigned), gave notice to plaintiff and demanded the payment of all the taxes so assessed, with interest, and threatened that, unless plaintiff paid

said taxes so assessed and interest thereon at the rate of 1 per cent. per month from September 3, 1918, amounting in the aggregate to \$5,333.-68, he would collect the said sum, with 5 per cent. additional penalty, and interest at the rate of 1 per cent. per month until paid, by distraint and sale of the goods, chattels, and effects of the plaintiff. The plaintiff, on March 5, 1919, pursuant to said notice and because thereof, paid the said sum of \$5,333.68 to the defendant Gore as deputy and acting collector of internal revenue; but plaintiff made said payment under protest then made to said defendant Gore, and accompanied said payment with a letter of protest, addressed and then delivered to said defendant Gore, in which was stated its protest and the grounds thereof.

(6) That on March 9, 1919, on form 46, prepared for that purpose by the internal revenue authorities, plaintiff made application to the Commissioner of Internal Revenue for the refunding of said \$5,333.68, but that on August 2, 1919, the said Commissioner of Internal Revenue wholly rejected, overruled, and denied the plaintiff's claim and appeal for the refunding to it of the amount of the taxes so paid, viz. \$5,-333.68.

In this situation plaintiff brought this action in the form approved by such cases as Patton v. Brady, 184 U. S. 614, 22 Sup. Ct. 493, 46 L. Ed. 713, and Pacific Whaling Co. v. United States, 187 U. S. 452, 23 Sup. Ct. 154, 47 L. Ed. 253. It goes without saying that every one owing it should pay, either voluntarily or under compulsion, every dollar of the taxes he owes the United States on distilled spirits; but equally is it true that no more than every such dollar should arbitrarily or otherwise be exacted from the citizen. It will be remembered that the law provides elaborate ways for ascertaining the amount due upon distilled spirits. It requires, upon the completion of the distillation, that the whisky shall be put into some separate retainer (usually a barrel) and deposited in a bonded warehouse in charge of government officials. At the time of being deposited in this way, every gallon of it is gauged by the officers of the government. Ultimately, in course of years, when the spirits are to be withdrawn, a final regauge is made, the proper allowances given by law are estimated, and the tax on the whisky shown by this regauge is necessarily paid upon the withdrawal of the spirits from the bonded warehouse.

As all know, however, there are sometimes found ways for evading the payment of the taxes due on distilled spirits, and an assessment by the Commissioner therefor is one of the plans devised for remedying the results of such or any evasions of the applicable law. But those assessments are largely, if not altogether, based upon somewhat inquisitorial and secret investigations, and the way to obtain a full hearing of the questions raised after such inquiry and consequent assessment is a suit like this. Such a suit would be unavailing, if the assessment could not, as to its basis, be fully inquired into in a judicial proceeding to test its validity upon the real facts to be then fully ascertained. The question then is: Was the assessment based upon justice and real facts, or was it founded upon suspicion and mere inference? The object here, as in all such litigations, is to do justice

alike to the government (which is behind the defendant) and to the citizen, and this can only be done by a full development of all the facts.

Broadly speaking, the controversy here is not whether the taxes ascertained to be due from the plaintiff on the final regauge, when the spirits were withdrawn from bond, had been paid (there being no claim that that was not done when the spirits were permitted by the government to be removed from the bonded warehouse), but is over an assessment made much later, and which, when considered in connection with the findings of fact, shows on its face that it was based upon the idea that what is called "soakage" had been "recovered" by plaintiff after the spirits had been dumped for rectification. Though the word "soakage" is not used in the assessment, its presence is necessarily implied, because no other spirits could be "recovered" from any of the barrels thus emptied, inasmuch as any remnants which were obtained by mere rinsing were tax-paid spirits. We therefore say that all spirits left in the barrels outside the staves when the dumping took place were necessarily tax-paid. This being so, we repeat that any claim to the right to assess taxes thereon must be confined to what might have been recovered from the "soakage," as that word is explained in the findings of fact, because no other spirits were omitted from the final regauge, and all that were included in that regauge were tax-paid when the spirits were withdrawn. The testimony offered by the plaintiff seemed clearly to show this, and the fact was conformably found.

It probably might properly be taken as a fact judicially known, and certainly at the trial it was explicitly admitted to be true, that there had never been any regulation which forbade the use of hot water in rinsing out the barrels emptied for rectification. This fact is very suggestive in connection with the idea that "soakage" was not easily recoverable. During all the preceding half century rinsing was not forbidden, nor was the use of hot water for that purpose. This is most significant in connection with the proposition that, with all the long experience of the Internal Revenue Office, it was not deemed necessary to make regulations on either subject. This indicates rather conclusively the difficulty, if not the impossibility, of recovering the "soakage" in the brief few minutes' time the revenue agent and the special gauger kept the water in the plaintiff's 30 empty barrels as shown by the testimony of those officers, and may explain why they testified to nothing about its having, in fact, been recovered from any of the 30 barrels

[1] The Commissioner of Internal Revenue, having made the assessment, it was at the trial presumed, prima facie, to be accurate and proper. This presumption, however, was not conclusive, but was open to being overcome by adequate testimony. In this situation the burden, at the outset, was upon the plaintiff, and the testimony offered by it was clear and explicit. Unless refuted, it was sufficient to satisfy the court that this burden had been so far met as to make it, prima facie, certain that the assessment in question could not be sustained without further testimony in its support, so that the facts upon which the Commissioner had acted might be shown to be such as to justify what he did. In such circumstances, cases like this demand an explicit showing

of the real facts on both sides, so that the court can adequately understand the merits alike of the plaintiff's claim and the facts which tend

to support the assessment.

This litigation brought the necessity and the present opportunity to both litigants to show by testimony the exact facts upon each side of the issue involved. Notwithstanding the failure upon defendant's part to make such showing of the facts, it was contended that the assessment made by the Commissioner was correct, and should be enforced. Inasmuch as an action at law like this is the sole means afforded by law for testing the accuracy and correctness of such assessments, when, as here, they are called in question in a court of law in the regular way, it devolved upon defendant to show all the facts upon which the Commissioner acted—this testimony, prima facie, being entirely available, either from the Commissioner's office or in this city. The time for mere inferences had passed at this stage, and the demand was for a full showing of the facts. If those facts existed they should have been

given in testimony.

[2] The testimony offered by the defendant must be regarded as all that was available, and it is clear, therefore, that the assessment was based entirely upon a showing that on February 15, 16, and 17, 1918, an examination was made by the revenue officers mentioned of 30 barrels of spirits which had just been dumped into the rectifying trough by the plaintiff; that promptly 5 gallons of very hot water had then been poured into those empty barrels by the revenue agent and the special gauger; that the barrels were then shaken by them; that the then contents thereof were allowed to remain in the barrels about as long as plaintiff had shown that it had permitted it to remain in the other barrels when it rinsed them, viz. about 5 minutes; and that those revenue officers by this process obtained from the 30 barrels what they testified was an average of a third of a gallon of spirits from each. This would amount to 10 gallons for the 30 barrels; but, though this recovery might have seemed somewhat excessive, the testimony in no way shows this 10 gallons to have, in fact, been "soakage," or if it were so to any extent the testimony of the defendant did not mention it. nor attempt to explain it, although the burden was then upon him to do that very thing. If there were any "soakage" recovered by the revenue officers, its quantity was not mentioned in their testimony; nor did that testimony in any way positively suggest that it was "soakage."

Equally true is it in this connection, as we have seen, that everything in the barrels that was not "soakage" was tax-paid spirits, and the recoveries from the 30 barrels of a possible 10 gallons were never returned to the plaintiff, the owner of it (which ought to show that no tax should be imposed upon it), nor was there any suggestion made to plaintiff that it was claimed to be "soakage." On this showing, in the entire absence of any adequate testimony tending to prove the number of barrels plaintiff had dumped for rectification during the period from July 1, 1917, to February 15, 1918, we must conclude that the assessment was based upon inferences drawn from the recovery of those 10 gallons, without a showing of any fact to support the assessment of over \$5,000 made by the Commissioner on 2,893 gallons of "recovered"

spirits. Was not this, to say the least of it, a very broad inference from particularly restricted premises? It does not seem that there could be any but an affirmative answer to this inquiry. Consequently this does not seem to the court to be a case in which the testimony would

justify the sustaining of the assessment.

Accordingly we have concluded that the only way to reach the justice of this case, upon the facts found after full hearing and full consideration of the testimony, is to hold, as the court now does, that the plaintiff is entitled to the full relief it asks as against defendant Gore, who collected and received the money as deputy and acting collector, because the facts developed do not show that the assessment in this case was well founded, either upon fact or upon law. As to defendant Mayes, the action will be dismissed.

A judgment accordingly will be entered, awarding to the plaintiff the full amount claimed, with interest from the 5th day of March, 1919,

and its costs herein expended.

UNITED STATES, to Use of NORFOLK SOUTHERN RAILROAD CO. et al., v. D. L. TAYLOR CO. et al.

(District Court, E. D. North Carolina, Washington Division. October 25, 1920.)

1. Contracts \$\iff 316(4)\$—Principal and surety \$\iff 129(2)\$—Permitting subcontractor to do work is consent to subcontract.

The contractor and its surety cannot avoid liability to an assignee of subcontractor under a provision that the subcontract should not be sublet without the written consent of the principal contractor, where that contractor knowingly permitted the doing of the work required by subcontractor by one to whom the subcontractor had sublet the contract.

2. Contracts \$\iff 147(1)\$—Construed to ascertain intent of parties in situation.

In the construction of contracts the court seeks to ascertain the intention of the parties in view of the purpose to be accomplished, the situation of the parties at the time of its execution, and the subject-matter of the contract.

3. United States 67(2)—"Construction" of breakwater held to include

transporting stone to it.

Where the specifications and map for a proposed breakwater, with reference to which a contract for its construction was made, showed that the stone for the breakwater must be secured from distant quarries and transported by rail and barge to the site of the breakwater, the term "construction," as used in the contract, is not confined to the last act of putting the stone in place in the water, but includes the essential steps of getting it to that place, so that services in transporting the stone were protected by the contractor's bond.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Construction.]

4. United States ←67(2)—Dredging for transportation of stone held covered by bond for construction of breakwater.

Where it was necessary to dredge a harbor to enable barges to reach a pier where they could be loaded with stone for transportation to the site of the breakwater under construction, the work of such dredging was covered by a bond of the contractor given pursuant to Comp. St. § 6923, which required the contractor to pay all persons supplying labor or materials in prosecution of the work.

5. United States \$\iiint_67(2)\$—Bond of contractor for breakwater held to cover charges for barges for transporting stone.

Where it was necessary that stone for the construction of the breakwater covered by the contract be transported in barges from the railroad to the site, and there were no barges of sufficient size available in the vicinity, charges for the rent of barges from a distant city or their transportation to and from the place of work, and for their repairs while engaged in the work, are covered by the contractor's bond for the payment of those furnishing labor or materials for the prosecution of the work.

6. Evidence =12-Court takes judicial notice of size of towns.

The court will take notice of the fact that Beaufort and Morehead City, in North Carolina, are small towns at which it would have been impossible to secure the barges necessary to transport stone for the construction of a breakwater near them.

 Assignments \$\infty\$=48—Equitable assignment decreed only to effect intention of parties.

'While equity will, on sufficient evidence establishing a clear intention of the parties to make an assignment based on valuable consideration, treat the assignment as made to effectuate the intention of the parties, it will do so only when the evidence of such intention is clear and free from uncertainty.

Mechanics' liens \$\sim 315\$—Loan to pay laborer does not establish assignment of wage claimed.

One who loaned to a subcontractor money with which to pay his workmen, and which was used for that purpose, did not become the assignee of the wage claims paid with that money, so as to be entitled to recover it from the surety of the principal contractor.

Equitable subrogation is a legal fiction by which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of the third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another, but it is not applied in the absence of agreement where the payment is made by a mere volunteer, who is under no legal obligation to make the payment, and who is not compelled to do so for the preservation of any rights or property of his own.

[Ed. Note:—For other definitions, see Words and Phrases, First and Second Series, Subrogation.]

10. Subrogation \$\iftharpoonup 26\ldots Loan to pay laborer held volunteer payment.

One who had rented barges to a subcontractor, the rental for which was secured by the bond of the original contractor, had no financial interest in keeping the subcontractor at work, so that a loan by him to the subcontractor of money to pay wages to prevent the subcontractor from quitting work was a volunteer payment for which he was not entitled to be subrogated to the rights of the workmen paid therewith against the surety of the principal contractor.

11. United States \$\infty\$=67(2)—Contractor completing subcontract not required to pay higher rental for barges.

One who had rented barges to a subcontractor for use on the contract, and who recovered from the surety on the principal contractor's bond for repair charges and transportation to and from the work, cannot recover for the use of the barges by the principal contractor, after the subcontractor had failed, at a rate of compensation greater than that he was entitled to under his agreement with the subcontractor.

At Law. Action by the United States, to the use of the Norfolk Southern Railroad Company, against the D. L. Taylor Company and

the Fidelity & Deposit Company, in which the Delaware Dredging Company and another intervened. Judgment rendered for interveners against defendant Fidelity & Deposit Company, after claim of the Norfolk Southern Railroad Company was adjusted, and judgment rendered for the amount agreed.

Small, McLean, Bragaw & Rodman, of Washington, N. C., for plaintiff.

Edward R. Baird, Jr., and R. C. Dozier, both of Norfolk, Va., for

interveners.

Julius F. Duncan, of Beaufort, N. C., and Manning & Kitchin, of Raleigh, N. C., for defendants.

CONNOR, District Judge. This action was brought by the United States of America for the use of the Norfolk Southern Railroad Company against the defendants D. L. Taylor & Co. and Fidelity Deposit Company of Maryland for the recovery of \$22,000, alleged to be due from D. L. Taylor & Co. Jury trial was waived, and stipulation filed that the court find the facts.

Plaintiff alleged that D. L. Taylor & Co. on March 2, 1915, entered into a contract with the United States whereby said company undertook to construct for the United States, in accordance with certain plans and specifications, a breakwater and shore connection at Cape Lookout, N. C.; that, pursuant to the provisions of the statute (section 6923, Comp. St. 1916), the contractors executed a bond in the penal sum of \$315,000, with the defendant Fidelity & Deposit Company of Maryland surety, with the condition that said contractors should perform the covenants, conditions, and agreements contained in said contract, and "should promptly make full payment to all persons supplying them labor or materials in the prosecution of the work provided for in said contract." The bond is specifically referred to and made a part of the complaint.

The work provided for by the contract of March 2, 1915, between the United States and D. L. Taylor & Co., was completed by the contractors on or about August 31, 1917, and final payment was made on or about September 14, 1917. This action was brought within the time

prescribed by the statute.

The Norfolk Southern Railroad Company, pursuant to the provisions of a contract entered into with D. L. Taylor & Co., hauled large quantities of stone from the quarry near Neverson, N. C., to Morehead City, N. C. Plaintiff alleged that the contractors, D. L. Taylor & Co., were indebted to the said railroad company on account of the price stipulated for said service in the sum of \$22,930, for which the railroad company demanded judgment against the bonding company. The Delaware Dredging Company and L. R. Connett intervened and filed claims, to which specific reference will be hereafter made.

The claim of the Norfolk Southern Railroad Company was adjusted

and judgment rendered for the amount agreed upon.

Delaware Dredging Company.—The Delaware Dredging Company in its intervening petition alleges that Mitchell & Seely made a con-

tract with D. L. Taylor & Co. to dredge a channel from the railroad pier at Morehead City to deep water at Point Lookout, at which place the stone to be used in constructing the breakwater was to be brought on cars to Morehead City, so that the scows could be brought to the pier, and the stone loaded on them and towed to the site of the breakwater. Mitchell & Seely were to furnish the scows for the transportation of the stone. They sublet this contract to the Rickards Dredging Company, which performed the service, and assigned to the Delaware Dredging Company its claim for the amount due therefor.

The Delaware Dredging Company, assignee of the Rickards Dredging Company, filed a claim for removing 18,213 cubic yards of earth which, at the contract price of 18 cents per cubic yard, amounts to \$3,278.34. The basis of this claim is that, in the performance of their contract with the United States, D. L. Taylor & Co. were to receive the stone at the quarry at or near a point on the Norfolk Southern Railroad, and convey it in cars to the pier of said company at Morehead City, N. C. It was to be removed from the cars at the pier, placed on scows, and from that point towed to Point Lookout, the site of the breakwater, a distance of about 12 miles, and dumped into the water.

The depth of the water at the pier was not sufficient to permit the scows to be towed to the pier in a position to receive the stone from the railroad cars. To meet this condition and overcome this difficulty, it was necessary to dredge the channel to a depth sufficient to enable the scows to be placed at the pier to receive the stone. While the defendant D. L. Taylor & Co. and the Bonding Company deny such necessity, the evidence amply sustains the allegation in that respect. The dredging was done along the side of the pier to deep water.

After the dredging the scows were taken to the pier, and the stone was loaded on it, and the scows towed to the breakwater. D. L. Taylor was present when the dredging was done. He pointed out the place at which it was done. That was the method adopted by D. L. Taylor & Co. for getting the stone from the railroad pier to the breakwater.

[1] Defendants contend that because of a provision in the contract between Mitchell & Seely and D. L. Taylor & Co. that the contract should not be sublet without the written consent of D. L. Taylor & Co., the intervener Delaware Dredging Company cannot maintain its claim for the dredging. Whatever effect this provision may otherwise have had on the right of the intervener, the evidence shows conclusively that D. L. Taylor & Co. had notice of and knew that the work was being done by the Rickards Dredging Company, the assignors of the Delaware Company, and assented thereto. D. L. Taylor directed the place at which it was to be done, and used the channel after the dredging—unloaded stone on the scows at the pier. When the Rickards Dredging Company demanded payment for the dredging Taylor made no other objection than that Mitchell & Seely had not approved the bill. D. L. Taylor says that "the dredging was necessary in handling the stone from Morehead City. Seely advised us that he was going to have Rickards do the dredging there and we sent the telegram." The telegram was introduced. It is addressed to John A. Seely at New York. "Please answer immediately, will Rickards do pier dredging." Signed D. L. Taylor & Co. Taylor said it was sent "for the express purpose of rushing the work." Seely had advised Taylor, before the telegram was sent, that he had engaged Rickards Dredging Company to do the work. It is not open to D. L. Taylor & Co., in the light of this evidence, to deny that they consented to the employment of the Rickards Dredging Company. This contention is without merit.

It is next insisted that if Mitchell & Seely had done the dredging, under contract with Taylor & Co., it does not come within the condition of the bond. This is the only serious question raised by the defendants. It is suggested that the work to be done, under the terms of the contract between the United States and D. L. Taylor & Co., was the "construction of the breakwater, including shore connection at Cape Lookout, N. C.," and that this language excludes from the condition of the bond labor and materials performed or furnished in preparing for the construction of the breakwater.

As this contention is directed to other claims made by the interveners, and, if successful, destroys the validity of several of them, it

will be well to dispose of it at this time.

[2] An elementary rule invoked in the construction of contracts requires the court to ascertain the intention of the parties, and to do this note must be taken of the purpose to be accomplished, the situation of the parties when they made, and the subject-matter of the contract.

[3] We learn from an examination of the specifications which constituted the basis upon which the contract was made that the government desired to construct a breakwater at Cape Lookout, on the eastern coast of North Carolina, 12 miles east of Beaufort Inlet. map of the locality was in the office of the United States engineer at Wilmington, N. C., and at the suboffice at Newbern, N. C., "to be examined by prospective bidders." This map shows that Cape Lookout, the site of the proposed breakwater, is about 12 miles from Beaufort, on the Atlantic Coast; that the nearest point on the railroad from which stone of the character and size to be used could be loaded upon barges or scows is at Morehead City, about 2 miles from Beaufort. The breakwater was to be constructed of stone, extending from the high-water line, 2,200 feet, and connecting with the shore. quantity of stone necessary for the construction of the breakwater was fixed at 1,230,000 tons. It was manifest, and well understood by the parties to the contract, that this quantity of stone, of the character required, could be found or quarried only at some place quite a distance from the work; that it could be placed at the breakwater only by a long haul over a railroad to some point from which it could be carried in barges or scows and towed to the breakwater. was to be delivered at the breakwater in vessels or barges is manifest from the Twenty-Seventh section of the specifications, in which the character of the vessels, the manner of weighing in, etc., is specifically

provided. That these conditions were all well understood is further shown by the fact that the quarry from which the stone could be secured was located at or near Neverson, a depot on the Norfolk Southern Railroad, about 120 miles from Morehead City.

In the light of these and other well-understood conditions, it does violence to the language used to confine the word "construction" to the last act in the process, putting the stone in the water, and exclude the essential steps for getting it to the breakwater. The language of the contract which is to be "read into" the condition of the bond has been construed by the Supreme Court in a number of cases, in which it has been sought, without success, to give it a narrow construction.

Reference to a few of these cases will enable us to solve the questions presented by the contentions made by the parties in this case. The latest case is Brogan v. National Surety Co., 246 U. S. 257, 38 Sup. Ct. 250, 62 L. Ed. 703, L. R. A. 1918D, 776, October term, 1917. The contract in that case provided for the deepening of the channel of St. Marys river, Mich. The court notes that the place at which the work was to be done was "in a comparative wilderness at some distance from any settlement. There were no hotels or boarding houses; and the contractor 'was compelled to provide board and lodging for its laborers." Supplies were furnished by plaintiff for the laborers and used by them while engaged in the prosecution of the work. He sought to collect the amount due by the contractor from the surety company. The company contended that the words "in the prosecution of' the work were not used in the bond in their natural sense, but should be given a conventional meaning so as to exclude labor and materials which contribute to construction only indirectly, as do the supplies consumed by a contractor in operating his plant." In that case attention was called to the language of the original act of 1894, which imposed liability upon the surety "to all persons supplying labor and materials in the prosecution of the work," whereas the amended act of 1905 imposed such liability "for labor or materials used in the construction or repairs" of the work. Mr. Justice Brandeis. calling attention to decisions in other cases, holding that the change in the language of the statute was immaterial, said:

"This court has repeatedly refused to limit the application of the act to labor and materials directly incorporated into the public work. Thus in Title Guaranty & Trust Company v. Crane Company, 219 U. S. 24, 34, the claims for which recovery was allowed under the bond included not only cartage and towage of material, but also claims for drawings and patterns used by the contractor in making moulds for castings which entered into the construction of the ship. In United States Fidelity Company v. Bartlett, 231 U. S. 237, where the work contracted for was building a breakwater, recovery was allowed for all the labor at a quarry opened fifty miles away. This included, as the record shows, the labor not only of men who stripped the earth to get at the stone and who removed the débris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment, and who repaired the tracks upon which the cars moved. And the claims allowed included also the wages of stablemen who fed and drove the horses which moved the cars on those tracks.

"In Illinois Surety Company v. John Davis Co., 244 U. S. 376, recovery was allowed not only for the rental of cars, track, and other equipment used by

the contractor in facilitating his work, but also the expense of loading this equipment and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work."

In the last-cited case Justice Brandeis said:

"The purpose of the act was to provide security for the payment of all persons who provide labor and materials on public work. This was done by giving a claim under the bond in lieu of the lien upon land and buildings customary where property is owned by private persons. Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally in order to effectuate the purpose of Congress declared in the act. In every case which has come before this court, where labor and material were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed if the suit was brought within the period prescribed by the act. Technical rules otherwise protecting streties from liability have never been applied in proceedings under this statute."

The right to recover from the surety is secured to a subcontractor. The learned justice cites a number of cases illustrating the principle

upon which the language of the statute should be construed.

[4] It would seem that the undisputed facts in this record bring the claim of the Dredging Company clearly within the language of the statute and the bond, as construed in the cases cited. Whatever negotiations may have been had with the Norfolk Southern Railway Company, prior to the contract with Seely regarding the method of carrying the stone from Beaufort to the breakwater, were abandoned, and the method pursued by Seely was agreed upon and adopted by D. L. Taylor & Co. The dredging was necessary to carry the stone to the breakwater, and was therefore done in the prosecution of its construction and in performance of the work contemplated in the contract.

L. R. Connett.—The claims of the intervener L. R. Connett, while based upon the principles applicable to that of the Dredging Company, present more difficulty and will be treated separately. Mitchell & Seely's contract with D. L. Taylor & Co. obligated them to furnish the scows to receive the stone at the pier of the Norfolk Southern Railroad at Morehead City and unload it from the cars to the scows and tow them to the breakwater. For that purpose he rented from intervener L. R. Connett, of New York, four scows. They contracted with Connett to pay for two deck scows \$5.50 per day each, for one dumper \$8 per day, and for another dumper \$10 per day. He files, with his intervening petition, a statement showing the amount claimed for rent to be \$4,599.50. See "Statement of Account," sheet 1.

Connett testifies that Mitchell & Seely were to pay a certain price per day, as per statement—different prices for the scows—and was to tow them from New York to the work. They were to bring them back from the work and deliver them back to Connett in New York in substantially the same condition as they took them. They were to supply the captains and make all repairs for which they were liable. Connett introduced four letters, bearing date April 23, 1915, relating to the dumper scow; May 8, 1915, relating to the deck scow No. 12;

May 15, 1915, relating to deck scow No. 11; May 19, 1915, relating to dump scow "L. C. 1," setting out the terms of the charter or rental. The aggregate amount for the rental of the scows is \$4,599.50. Connett files an itemized statement of claim for \$1,519.01 for amount paid for towing the scows to Morehead City and Norfolk, aggregating, with the rental, \$6,118.51.

[5] Passing, for the present, the objection made by defendants to the amount charged, and considering the question of liability of the bond, it would seem, upon the authority of the cases cited, in regard to the claim of the Dredging Company, that this claim is within the

condition of the bond.

In United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409, it is said:

"It follows, therefore, that all of the claimants who supplied material

* * for the work covered by the contract, either to the original contractor or to the assignee, and whether with or without knowledge of the assignment, were entitled to the full benefit of the bonds, the statutory substitute for a lien, unless, by some act of his own, one or the other claimant may have released or waived or may be estopped from asserting his right."

Applying this rule of construction, the court said:

"The claim of the United States Equipment Company should be allowed. The statute is broader than many of the mechanic's lien acts. It covers not only labor and material that go directly into the completed structure, but all labor and material furnished in the prosecution of the work provided for in such contracts.' The work performed by this claimant, through the use of its equipment, was well within the statutory provision."

This ruling was affirmed on appeal in Illinois Surety Company v. John Davis Company, 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206. Referring to this claim, it is said:

"The surety company contends that this was not supplying labor and materials." The equipment was used in the prosecution of the work." Citing Title Guaranty Co. v. Crane Co., 219 U. S. 34, 31 Sup. Ct. 140, 55 L. Ed. 72.

[6] The court will take notice of the fact that Beaufort and Morehead City, the nearest points to the site of the breakwater, are small towns; that it would have been impossible to secure, at either of these towns, scows or barges of the number and character necessary to transport the large quantity of stone to the site of the breakwater.

The principle upon which claims of this character are held to be within the condition of the bond is illustrated in United States Fidelity Co. v. United States, 189 Fed. 339, 111 C. C. A. 73 (C. C. A. 2d Cir.), in which the contract was for the same character of work, constructing a breakwater. Discussing the contention made by the Bonding Company, Judge Noyes said:

"We find nothing in the statute to support the contention made in this case that the bond given in accordance with its provisions covered only the labor performed at the breakwater itself. Had there been a quarry at the shore end of the breakwater, and had the stone been wheeled out from such quarry in wheelbarrows and dumped, it could hardly be claimed that the laborers who got out the stone or hauled it were not engaged in the prosecution of the work. And the fact that a quarry might be fifty miles instead of fifty yards away from the dumping place should make no difference. We think that

the bond in question covered the labor which the contractor was obliged to furnish to fulfill his contract with the government, whether it was performed at the particular place where the stone was finally placed or elsewhere; that the quarrying of the stone, its transportation and dumping, should be regarded as a continuous operation, contributing in its entire progress to the prosecution of the work."

This case was affirmed in United States Fidelity Co. v. Bartlett, 231 U. S. 237, 34 Sup. Ct. 88, 58 L. Ed. 200, Mr. Justice Day saying:

"The object of the contract was to put the stone in place, much of it being merely dropped into the water, with a view to the construction of the breakwater. To accomplish this purpose it was of course necessary to have the material taken from the quarry, using tools and labor for that purpose, and transported to the location of the breakwater and there deposited. This material could not be had * * * at the breakwater."

In City Safe Deposit & Surety Co. v. United States, 147 Fed. 155, 77 C. C. A. 397 (C. C. A. 2d Cir.), the contract provided for the building of a dry dock. The intervener's claim was for coal furnished the contractor used in running locomotives, hoisting engines, and pumping engines in carrying on the work. Judge Lacombe said:

"No specially liberal construction is required to bring the materials supplied in this case within the protection of the act. The labor expended by men in wheeling barrows of material from the point of receipt to the place where it is to be used; in working hand pumps to clear an excavation of water; in turning the cranks of a hoisting derrick, so as to raise materials to a proper elevation—all such labor is manifestly in the prosecution of the work," etc.

It is difficult to make a distinction between these and the instant case. The contractors, D. L. Taylor & Co., as did the representatives of the United States, knew that in the construction of the breakwater it would be necessary to procure the stone at some considerable distance from the work; that it would be necessary to carry it by railroad to Morehead City, and that it would require the use of scows, or vessels for transporting it to the breakwater—they knew the conditions with respect to the geography of the country, and that scows could not be secured at Morehead City. That the use of the scows or vessels for this purpose was known to, and contemplated by, the parties to the contract is beyond the sphere of debate. The amount due Connett for the rental of the scows according to the terms of his contract is clearly within the condition of the bond. Seely concedes the terms of the contract and the amount due Connett according to such terms. The claim thus established is allowed.

I am not inadvertent to, nor have I failed to, examine decisions cited by defendants of an earlier date than those cited herein, in which a more rigid construction is given to language used in bonds of the same character as here than in the later cases. A manifest purpose is disclosed in the latest decisions to give to bonds executed pursuant to the statute, as in this case, a construction which secures to all persons who furnish labor or materials in the prosecution of the work. Defendants rely upon the decision in United States v. Conkling (1905) 135 Fed. 508, 68 C. C. A. 220. This decision does not appear to be

in harmony with those of the Supreme Court cited herein, and which are of controlling authority.

For Repairs on Account of Damages to Scows. L. R. Connett Preferred a Claim for \$1,795.23. See Detailed Statement (Exhibit A, Sheet 2).—He testifies that, by the terms of his contract leasing or chartering the scows, Seely "was to bring them back from the work and deliver them back to me in New York in substantially the same condition as he took them. He was to supply the captains and make all repairs for which he was liable."

This version of the contract is sustained by the letters in which its terms are set out. Connett testified that scow No. 11 sustained damage while in the possession of Seely, at Morehead City, and that he paid for repairing the damage \$1,905.63, for which he introduced and filed vouchers. This damage was covered by insurance to the amount of \$1,675, leaving a balance due Connett of \$230.63.

Scow No. 12 sustained damage while in Seely's possession for the repairing of which he paid \$1,225. He paid for necessary equipment for towing scows to New York, amounting to \$339.20, for all of which he filed vouchers. In the statement filed with his petition he credits amount recovered in suit against Taylor, \$330, which it is conceded should be credited on another claim (see Statement D), thus leaving the balance due on account of repairs and equipment \$1,795.23.

There is no controversy respecting the facts upon which this claim is based. Assuming that the bond is liable for the contract price of the rental of the scows, it would seem that these items come within the terms of the bond. They are clearly due Connett from Seely upon his contract.

Amounts Paid Wages of the Captains in Control of the Scows while being Towed from Morehead City to New York, as per Statement Filed (Exhibit A, Sheet 3), \$194.48.—Vouchers are filed showing the payment of these amounts. They come within the same rule of construction as the other items paid by reason of Seely's failure to comply with the terms of his contract.

Expenditures and Partial Repayment of Loans to John A. Seely. -In regard to these claims Connett says:

"We agreed to help Captain Seely out, Mr. Irons and myself, and Mr. Irons loaned Captain Seely \$3,750, and I agreed with Irons that I would stand onehalf, and that was to pay Captain Seely's August, 1915, pay roll, which was absolutely necessary to pay in order to have this work go along. The men had to be paid." Question: "I hand you Mr. Irons' assignment of that \$1,-074.09 and these checks of yours to Mr. Irons for the aggregate of that sum, \$1,074.09. Was that actually advanced by you to pay Mr. Seely's pay roll?" Answer: "It was."

Exhibit 3 is identified by the witness as follows:

"For and in consideration of the sum of one thousand seventy-four and $^{99}/_{100}$ dollars (\$1,074.09) to me in hand paid, receipt whereof is hereby acknowledged, I do sell, assign, transfer, and set over to L. R. Connett onehalf of my claim against John A. Seely or D. L. Taylor and Company, amounting to \$2,148.17; the said \$2,148.17 being the balance of \$3,750.00 loaned to John A. Seely to meet his pay roll on the breakwater contract at Beaufort,

North Carolina, with D. L. Taylor & Company, the said John A. Seely having returned to me \$1,601.83 of said amount of \$3,750.00.

"Dated at New York City this the 24th day of April, 1916.

"Henry C. Irons.

"Witness: John B. Allen."

In reply to the question why he made the loans, Connett said:

"Well, I was in pretty deep and I didn't want to see Captain Seely go under. I thought he might pull through and pay me."

The claim by Connett for \$1,236.72 is based upon the following facts:

Connett, on August 2, 1915, gave to John A. Seely his check on the American Exchange National Bank for \$1,250. Irons advanced to Seely the same amount. Seely indorsed the check given by Connett, and delivered it to J. M. Shellabarger, who indorsed it to the Irving

National Bank (Exhibit 4).

There is nothing in the record showing in what manner Irons paid or advanced the amount furnished by him to Seely. Checks drawn by the Seely Engineering Company, signed by John A. Seely, president, and W. C. Johnson, treasurer, on the American Exchange Bank, payable to various persons and firms in various amounts, together with vouchers receipted by the persons performing labor or furnishing material to John A. Seely, corresponding with the checks, amounting to \$1,630.50, are filed, together with a statement showing payments amounting to \$1,042.95, for which no vouchers are filed, aggregating \$2,673.43. From a statement filed it appears that these checks were drawn and payments made for pay bills "contracted against the Cape Lookout Breakwater Contract." (Exhibit 8.)

Connett presents a claim for which he contends the contractor's bond is liable for one-half of this amount, \$1,236.71. The statement filed (Exhibit 8) shows that this amount was "cash deposited with J. M. Shellabarger, attorney, to be disbursed by him for payment of bills approved by John A. Seely"; but there is nothing in the record showing that Shellabarger drew any checks or otherwise dealt with the money. The vouchers are approved by "W. C. Johnson, Accountant," and receipted as from John A. Seely. The only connection of Shellabarger shown by the papers (Exhibit 8) with the transaction is the open indorsement by John A. Seely, followed by an indorsement by Shellabarger to the Irving National Bank, while the checks are, as stated, drawn by the Seely Engineering Company, by John A. Seely, president, on the American Exchange Bank (see Exhibit 8).

John A. Seely says that he disbursed the funds (Exhibit C), one-half of which Connett supplied—used it to pay these bills, producing the checks. "I owed the pay roll, and I borrowed this money before I sent out my checks. I deposited their checks in my bank, and then

drew my checks against that account."

Connett bases his claim against the Surety Company, in respect to these claims, upon the contention that the amounts advanced were so advanced with the understanding with Seely that the amount was to be paid, and was in fact paid, to the laborers engaged in the prosecution of the work, and for amounts due for materials furnished Seely for the same purpose; that the transaction constituted an equitable assignment to him to the extent of the amounts advanced, and so applied, of the claims or pay rolls of the laborers and the bills of the materialmen.

The Surety Company insists that Connett furnished neither labor nor materials within the meaning of the statute or the condition of the bond, and denies that there was an equitable assignment of the

debts to the payment of which the money was applied.

There is no suggestion of any promise or agreement on the part of the laborers, or the materialmen, or of Seely, to assign their debts to Connett and Irons, or either of them; hence the claims of Connett must be sustained, if at all, upon the theory that a court of equity will create an equitable assignment because the money was advanced for the purpose and was in fact used in the payment of debts for which, if not paid, the Surety Company would have been liable.

[7] It is true that a court of equity will, upon sufficient evidence, establishing a clear intention of the parties to make an assignment of a chose in action, based upon a valuable consideration, treat the assignment as made—that is, effectuate the intention of the parties; but the court will do so only when the evidence is clear and free from uncer-

tainty. Pomeroy's Equity (3d Ed.) § 1280.

[8] In Smedley v. Speckman, 157 Fed. 815, 85 C. C. A. 179 (C. C. A. 3d Cir.), Judge Gray says:

"A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. To make an equitable assignment, there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right in the party meant to be provided for, even where the circumstances do not admit of its immediate exercise. If the holder of the fund retain control over it, it is fatal to the claim of the assignee." Christmas v. Russell, 14 Wall, 69, 20 L. Ed. 762.

In United States Fidelity Co. v. United States, 189 Fed. 339, 111 C. C. A. 71, reported in United States Fidelity Co. v. Bartlett, 231 U. S. 237, 34 Sup. Ct. 88, 58 L. Ed. 200, one Donovan made a contract with the United States for the construction of a breakwater, giving bond containing the statutory conditions, with the United States Fidelity & Guaranty Company as surety. Bartlett, to whose use the suit was brought, furnished supplies to the laborers at the quarry, under an agreement with Donovan that the amount of their monthly accounts should be deducted from the pay roll. At the end of each month the accounts, with such deductions, were submitted to the men and approved by them. The Bonding Company contended that no assignment of the men's wages was shown sufficient to sustain an action at law. Judge Noyes, dealing with this contention, said:

"While the original agreement * * * may have amounted only to an agreement to assign, the act of the laborers after the wages were earned in going over the accounts and in approving the deductions was sufficient, in connection with the original agreement, to amount to a legal assignment."

Justice Day, affirming the ruling, said:

"We think that the testimony discloses that so much of the laborers' wages as were necessary to satisfy Bartlett's advances were assigned to him with their consent, and deductions to that extent made from such wages with their approval in such wise as to consummate the assignment."

In United States v. Rundle, 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505 (C. C. A. 9th Cir.), Rundle entered into a contract with the United States to build a public building, and for the security of the performance of the contract executed a bond conditioned as the statute prescribed, with securities. The Fidelity National Bank advanced the money to Rundle to pay the wages of laborers employed on the work and for materials used in the building, for which suit was brought by the United States to the use of the bank against Rundle and the sureties on the bond. The bank alleged that the laborers and materialmen assigned their claims to it. Rundle made no defense. The sureties denied the assignment of the claims as alleged. The facts were:

An assignment was made by Rundle and the bank that the labor debts should be paid by time checks, and the bank should pay them subject to a small discount. "Nothing was said in any of the conversations concerning an assignment of the claims of the laborers and materialmen, and none of such claims were in fact assigned to the bank except three, which were formally assigned. The time checks for labor were in form certificates that the laborers had worked a designated number of days in a month named at a certain rate per day, stating the amount due, containing upon their face the words, 'Fidelity Bank, please pay,' signed by Rundle. When paid they were indorsed by the payees."

Circuit Judge Gilbert said:

"There is nothing in the circumstances to show an assignment to the bank of any of these time checks for labor, or the orders for the payment of materialmen, or that it was the intention of the bank to take such assignments, or to become substituted to the rights of such payees, * * * nor can it be claimed that the law will raise a presumption of an assignment upon the facts in the case. It is true that an assignment may in some cases be made by parol, and that under certain circumstances the presumption will arise that an assignment was intended solely from the nature of the transaction. But in the circumstances of the present case we discover nothing upon which to rest such a presumption. The agreement was wholly between the contractor and the bank. The laborers and the materialmen were not parties to it. They took their checks and their orders to the bank as directed, and were there paid. The checks and orders were indorsed as evidences of payment, and for no other purpose, and the bank retained them as vouchers. In this there was no assignment. * * * If there was no assignment to the bank of any of the claims save those mentioned in the verdict, there could be for the unassigned claims no liability to the bank upon the bond; for the protection afforded by the bend was to such only as might supply the contractor with labor and materials in the prosecution of his work. It did not extend to a bank which might lend money for the purpose of paying for such work and materials."

In Hardaway & Prowell v. National Surety Co., 150 Fed. 465, 80 C. C. A. 283 (C. C. A. 6th Cir.), plaintiffs advanced money to one who had taken over the performance of the contract. They sought to hold the surety on the bond liable. Judge Lurton said:

"The attitude of Hardaway & Prowell as mere money lenders is not, in substance, changed because that money was used in paying for labor and ma-

terials. Nor is the character of the claim, in its essence, changed by presenting it in the form of an account for the labor and materials which were procured by its application. Manifestiy, if the money had been loaned to Coyne, under the express agreement that he was to use it in supplying labor and materials to be used in this work, and it was so used, the debt would still be a debt for money advanced, and not a debt for labor and materials, though every dollar was so applied."

While, upon a rehearing, the facts were, in some respects, modified, and in that condition the case was before the Supreme Court, in 211 U. S. 552, 29 Sup. Ct. 202, 53 L. Ed. 321, the judgment was affirmed. Nothing was said drawing into debate the language used by Judge Lurton, quoted above. Illinois Surety Co. v. Galion (D. C.) 211 Fed. 161, is to the same effect, citing the foregoing decisions. The money advanced by Connett was applied to and discharged the wages of the laborers and others with no suggestion of any assignment by them to Connett, as in the Bartlett Case.

I am unable to find any evidence of an intention on the part of the laborers or materialmen, or of Seely, to assign the pay rolls or bills for material. Connett says that he loaned the money to Seely to help

him out, and thought that he would be able to pay him.

Counsel for Connett contends that if there was no equitable assignment of the claims that Connett is entitled to be subrogated to the claim which the persons whose debts were paid had against the Surety Company for their payment, being for labor and materials furnished in the prosecution of the work or the construction of the breakwater. Conceding that the money was advanced to Seely for that purpose, and that it was applied; that if Seely had not paid the laborers or those furnishing the materials, they were entitled to enforce their claims against the Surety Company; that unless Seely had, by breach of his contract or otherwise, forfeited his right, he would be entitled to call upon the Surety Company for payment of the amount due him under the provisions of his contract with D. L. Taylor & Co.—the question arises whether Connett has any equity which entitles him to enforce his claim for the money advanced to Seely against the Surety Company.

It is manifest that Connett has not furnished labor or material for the prosecution of the work. His claims, therefore, if sustained, must be worked out upon the contention that the rights of either the laborers and materialmen, whose claims were paid, or Seely, to whom the loan was made, have vested in him, or that, for the purpose of enforcing the claim against the Surety Company, he stands in their shoes.

shoes.

[9] This contention renders necessary an examination of the equitable doctrine of subrogation. Sheldon says that it is derived from the civil law, and—

"is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of the third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. * * * It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of a privilege or mortgage, being obliged

(268 F.)

to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another." Sheldon on Subrogation, §§ 2, 3.

"The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights

or property of his own."

This definition, with the limitation stated, is generally accepted as correct by the courts, both state and federal. In Sandford v. Mc-Lean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773, Chancellor Walworth said:

"It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

Applying the principle to the instant case, he said:

"If the complainant had actually advanced the money to pay off those judgments, it is doubtful whether he would have been equitably entitled to be substituted in their place without some conventional arrangement to that effect with those creditors."

In Opp v. Ward, 125 Ind. 241, 24 N. E. 974, 21 Am. St. Rep. 220, Mitchell, J., said:

"Subrogation is an equitable device, and rests upon the principles of justice and equity which it is intended to accomplish. The doctrine is well established that one who occupies the attitude of a surety will be subrogated to all the rights, remedies, and securities which the creditor held, in case the former has been compelled to pay a debt which, in equity and good conscience, should have been paid by another. Payment by the surety is equivalent to a purchase from the creditor, and operates as an equitable assignment of the debt, and all its incidents, to the former. * *

"The application of the doctrine of subrogation requires * * * that in paying the debt the person paying acted under the compulsion of saving him-

self from loss, and not as a mere volunteer."

The difficulty experienced by the courts is found in applying the doctrine to facts as they are presented in specific cases.

In Nolte & Co. v. Their Creditors, 7 Martin, N. S. (La.) 602, the Supreme Court of Louisiana thus stated the limitation to the persons who were entitled to invoke the equity:

"We are ignorant of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs, not to all who pay a debt, but only to him who, being bound for it, discharges it."

It is held in Bank of Commerce v. Lawrence County Bank, 80 Ark. 197, 96 S. W. 749, 117 Am. St. Rep. 85, 10 Ann. Cas. 211, 10 Am.

& Eng. Cases Anno. 211, that one who advances money to pay the wages of laborers of a corporation who would have had a lien for their wages is not subrogated to the lien of such laborers. 25 R. C. L. 1325; Ætna Life Ins. Co. v. Middleport, 124 U. S. 535, 8 Sup. Ct. 625, 31 L. Ed. 537.

[10] There is no suggestion that Connett was under any legal or other obligation to advance the money to Seely for the purpose of paying the laborers or those who furnished the material. He had no obligation respecting the performance of Seely's contract with D. L. Taylor & Co., or his liability to the laborers or those furnishing material. Conceding this, he contends that, having rented to Seely the scows and dumpers to be used in the prosecution of the work undertaken by him, he was interested in Seely's ability to secure labor and material to operate them; that the payment by Seely of the rental for the scows was dependent upon his success in performing his contract; that finding Seely unable to meet his pay roll, which was necessary to enable him to continue the work, he made the advancement; he "did not want Seely to go under"; he thought that Seely "would pay him."

It will be noted that one is entitled to be substituted or subrogated to the rights of those whose debts they have paid, who has paid the debt of a third person, being compelled to do so "to protect his own rights," or "for the preservation of his own rights."

Does Seely come within this class? It is true that it was to his interest, by reason of having rented the scows and dumper to Seely to be used in the performance of his contract, that Seely should perform his contract with D. L. Taylor & Co., but he had the same right to look to the bond given by Taylor & Co. for the rent of the scows, etc., as Seely and the laborers and materialmen had-they were all, in that respect, on equal footing and had the same security for their debts. The right of those who furnished labor and material in the prosecution of the work of constructing the breakwater to look to the bond was not dependent upon Taylor & Co. completing the work or of Seely's completing his contract with Taylor & Co. In other words, the measure of liability of the surety on the bond is that the contractor "shall perform the covenants, conditions, and agreements contained in said contract, and make prompt payment to all persons supplying them labor or materials in the work provided for in said contract." The purpose of the bond is primarily to secure the United States in the performance of the contract, and secondarily the payment of all persons supplying the contractor labor and material, etc. Hill v. Am. Surety Co., 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437. Of course, persons coming within the terms and conditions of the bond must establish their claims by showing either an express contract with the contractor, or the furnishing of labor and material upon an implied contract to pay the value thereof. Having met these conditions, the liability of the bond is clear. It is upon this basis that Connett is entitled to look to the bond for payment of the rental of his scows and dumps.

It follows, therefore, that it was entirely immaterial, in a financial

sense, to Connett whether Seely paid his laborers and those who furnished material or not. His rights against the bond were not changed or affected by Seely's failure to pay the laborers, nor was he compelled to advance the money to protect or preserve his remedies or security. It is manifest from his evidence that, when he advanced the money, he had no thought of looking to the bond for payment. He says: "I was in pretty deep water, and I did not want to see Captain Seely go under. I thought he might pull through and pay me."

The facts bring the case within the decision in United States v.

Rundle, supra, in which Judge Gilbert says:

"If there was no assignment to the bank of any of the claims, * * * there could be for the unassigned claims no liability to the bank upon the bond; for the protection afforded by the bond was to such only as might supply the contractor with labor and materials in the prosecution of his work. It did not extend to a bank which might lend money for the purpose of paying for such work and materials."

In the absence of an assignment of the claims discharged by the loans made by Connett and Irons, the former is not entitled to be subrogated to their claims against the bond. These two claims are not allowed.

[11] Hire of Scows when Seized by Taylor.—This claim for \$591 is based upon undisputed facts. Seely having failed to complete his contract, D. L. Taylor & Co. took possession of the scows and dumper rented by Connett to Seely and used them in the further prosecution of the work; dumper No. 1, 11 days; dumper No. 24, 13 days; and deck scow No. 12, 12 days.

Connett had rented these dumpers and scows to Seely at a price per day which, for the number of days during which they were used by Taylor & Co.; would have amounted to \$284. He explains this charge by saying that Seely was to use them for a long period of time and was to return them in good condition at his own cost. He also says that they would have yielded him a much larger rental in New York.

It is clear, however, that if Seely had continued the work under his contract, he would have used the dumpers and scow for the same period of time which Taylor & Co. did. I am unable to see why Connett should, in fairness, be entitled to charge them double the price per day which he had contracted to receive from Seely. He has received in the allowance of the charge for amount paid for repairs \$330.10, compensation for injury sustained in that respect. This claim is allowed for \$284, being the same price which he would have received from Seely under his contract.

Judgment will be signed that the Delaware Dredging Company, as assignee of the Rickards Dredging Company, recover of the defendant Fidelity & Deposit Company of Maryland for \$3,278.34; that L. R. Connett recover of the defendant Fidelity & Deposit Company \$8,-392.22; that interest be calculated from the date of the summons in this action, July 8, 1918; that plaintiffs recover their cost, to be taxed by the clerk. Judgment will be signed accordingly.

UNITED STATES v. MOZZONE et al.

(District Court, W. D. Washington, N. D. October 13, 1920.)

No. 5560.

Intoxicating liquors \$\insigma 137\$, 139—One licensed to operate perfumery still held not liable for manufacturing or possessing liquor.

Where one charged with violating the National Prohibition Act by unlawfully manufacturing and possessing intoxicating liquor was duly licensed under title 2, § 4, of the act to operate a perfumery still, and the information did not charge that he did "knowingly sell" intoxicating liquors, he was not liable where the notice, hearing, and command to desist, required by title 2, §§ 4, 5, of the act, had not been given.

P. Mozzone and others were charged with violating the National Prohibition Act, and filed plea in abatement. On demurrer to the plea. Demurrer overruled.

Robert C. Saunders, U. S. Atty., of Seattle, Wash. Lundin & Barto, of Seattle, Wash., for defendants.

NETERER, District Judge. The defendants are charged by information in count 1 with the unlawful manufacture of "certain intoxicating liquor, to wit, one pint of distilled spirits, containing more than one-half of 1 per centum by volume of alcohol, for beverage purposes," and in count 2 with unlawfully possessing the same liquor for the purpose of selling, etc., and in count 3, are charged with unlawfully having in their possession certain property, to wit, "a certain still and about nine barrels of grape mash designed for the manufacture of liquors, containing more than one-half of 1 per centum of alcohol by volume, fit for beverage purposes, all in violation of the National Prohibition Act [41 Stat. 305]."

The defendants file a plea in abatement, in which it is stated that on the 28th day of June, 1920, the Commissioner of Internal Revenue certified that the defendant Mary Mozzone had duly registered, as required by the Internal Revenue Regulations, one copper still of $2\frac{1}{2}$ gallon capacity, for use in the distillation of perfume at the place charged in the information; that a bond was filed as required by law, and the still was authorized for use in the distillation of perfume in accordance with section 4, title 2, of the National Prohibition Act.

It is further alleged that the defendants Mary Mozzone and P. Mozzone, her husband, owned and conducted a business for manufacturing and selling perfumes, under the name of Maison des Fleurs, at the place charged in the information; that in the building adjoining, the Flora Company, Incorporated, conducts its business of manufacturing nonalcoholic drinks, of which the defendant P. Mozzone is president and manager, and Mary Mozzone is vice president and secretary; that the defendant J. Giordano is an employé; that on March 18, 1920, bond was given "in accordance with law" for the sum of \$1,000, and on April 17 thereafter a permit was issued by the United States federal prohibition director to the said company to

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

operate a dealcoholizing plant and to use nonintoxicating liquor in the operation thereof, for nonbeverage purposes, and by virtue of said permit said nine barrels of grape mash referred to in count 3 of the information were in possession of the said Flora Company; that in June, 1920, a federal prohibition inspector, for the Commissioner of Internal Revenue, seized the still authorized as stated, and at a hearing before the United States commissioner testified that the pint of distilled spirits referred to in counts 1 and 2 of the information came from the still; that the Commissioner failed to give to the defendants notice as required by section 5, title 2, of the National Prohibition Act, and failed to comply with the requirements of that section, and because of these omissions and the facts therein stated there is no warrant or authority for proceeding against defendants under sections 29 or 25, title 2, of the National Prohibition Act, and that the prosecution is contrary to law; and prays that the information be quashed.

The government has demurred to the plea.

Section 4, National Prohibition Act, enumerates articles which shall not, after having been manufactured and prepared for market, be subject to the provisions of the act if they correspond with:

"The following description and limitations, namely:

"(a) Denatured alcohol or denatured rum produced and used as provided

by law and regulations now or hereafter in force.

"(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopæia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

"(c) Patented, patent, and proprietary medicines that are unfit for use for

beverage purposes.

"(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

"(e) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

"(f) Vinegar and preserved sweet cider.

"A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor."

Section 2, tit. 3, of the National Prohibition Act provides that:

"Any person now producing alcohol shall, within thirty days after passage of this act, make application to the Commissioner for registration of his industrial alcohol plant, and as soon thereafter as practicable the premises shall be bonded and permit may issue for the operation of such plant, and any person hereafter establishing a plant for the production of alcohol shall likewise before operation make application, file bond, and receive permit."

Section 25, art. 4, of the regulations relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchasing, possession, and use of alcoholic liquor, provides that:

"Alcohol may be manufactured for the purposes herein authorized on the premises of any industrial alcohol plant established under the provisions of title 3 of the National Prohibition Act, in accordance with the procedure outlined in regulation No. 61, without the necessity of obtaining further permit under these regulations. (a) Whisky, brandy, rum, * * * may be manufactured for such purposes on the premises of any duly registered distillery established under existing laws and regulations upon obtaining permit as required in article 3 hereof."

Section 46, article 6, of the same regulations, provides that:

"Duly qualified distillers operating fruit distilleries or industrial alcohol plants who have obtained permit, as provided herein in regulations No. 61, may procure liquids, such as beer, ale, porter, or wine, from duly qualified breweries, bonded wineries," etc.

Section 80, article 15, of the same regulations, provides that:

"All persons holding permits under these regulations to manufacture * * * intoxicating liquor are authorized to possess intoxicating liquor lawfully manufactured. * * * *"

Section 4 of title 2 of the National Prohibition Act also provides that:

"Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of one per centum or more of alcohol by volume in which any extract, strup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this title."

The specific act which brings the conduct of a party within the penalties provided in section 29, supra, is "knowingly sell." The information does not charge in either count the selling; in count 1 it charges unlawfully manufacturing, and in count 2 unlawfully possessing, intoxicating liquor. Section 5 of title 2 of the National Prohibition Act, supra, provides that:

"Whenever the Commissioner has reason to believe that any article mentioned in section 4 does not correspond with the description and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the Commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor, such notice to be served personally or by registered mail, as the Commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear."

Section 4 of the act, supra, in addition to the provision above quoted, provides that:

"If the Commissioner shall find, after notice and hearing as provided for in section 5 of this title, that any person has sold any flavoring extract, sirup, or beverage in violation of this paragraph, he shall notify such person, and any known principal for whom the sale was made, to desist from selling such article; and it shall thereupon be unlawful for a period of one year thereafter for any person so notified to sell any such extract, sirup, or beverage without making an application for, giving a bond, and obtaining a permit so to do, which permit may be issued upon such conditions as the Commissioner may deem necessary to prevent such illegal sales, and in addition the Commissioner shall require a record and report of sales."

Punishment for violation charged is specifically set forth in section 4, and is twofold: (a) For "knowingly selling" the penalties provided in section 29 of the act apply; and (b) revocation of the permit by the Commissioner by following the procedure therein outlined. In Lowndes v. Huntington, 153 U. S. 1, at page 22, 14 Sup. Ct. 758, 762 (38 L.

Ed. 615), the Supreme Court quotes with approval Long v. Culp, 14 Kan. 412-414, as follows:

"It is also a rule of construction that, when one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto. Not because one section has more force as a legislative enactment than another, but because the legislative mind having been, in the one section, directed to this matter, must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things."

From the defendants' plea it appears that they have complied with the National Prohibition Act by having a still registered and obtained a permit to operate a dealcoholizing plant, and there is no charge that any of the prohibited articles were knowingly sold. The provisions of sections 4 and 5 of the National Prohibition Act are applicable, and the demurrer to the plea should be overruled; and such will be the order.

UNITED STATES v. FREEDMAN et al.

(District Court, E. D. Pennsylvania. November 19, 1920.)

No. 100.

1. Receiving stolen goods \$\iiii 8(3)\$—Evidence sustaining verdict.

In prosecution for receiving goods stolen while the subject of interstate commerce, evidence held to show that the goods received by accused were the goods which had been stolen.

2. Criminal law \$\iii 381\text{-Effect of good reputation evidence stated.}

Good reputation does not exculpate a guilty defendant, but may persuade the jury not to find him guilty, and is evidence highly regarded by the law on the question of his guilt.

3. Criminal law \$\infty\$812—Instruction as to law enforcement held not error. An instruction dealing with the importance of the case, because of the "letting down of the bars" protecting property rights and the lowering of the standards of honesty, held not erroneous.

4. Criminal law \$\iiint_{508}(1)\$, 780(1)—Testimony of co-conspirator competent, but jury must be instructed to scrutinize such evidence.

In prosecution for receiving goods stolen while the subject of interstate commerce, it was not error to instruct the jury that they might found their verdict on the testimony of the thieves for such witnesses are competent; but the trial judge must warn the jury of the danger of giving credit to such testimony and of their duty to closely scrutinize it.

5. Criminal law \$\infty 786(3)\$—Instruction on defendant's testimony not error. Instruction telling the jury to listen to accused's testimony and to give it its full weight, but to weigh it with the thought in mind that he was interested, was not error.

Joseph Freedman and others were prosecuted for receiving stolen property, the subject of interstate commerce. Sur motion for new trial. Motion denied.

Chas. D. McAvoy, U. S. Atty., and Robert J. Sterrett, Special Asst. U. S. Atty., both of Philadelphia, Pa.

David Phillips, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. There were incidents connected with the trial of this cause from which the inference could be drawn, or which would at least induce one to suspect, that the defendant had refused to buy the stolen property from the thief, but was willing to buy it from a third party to whom it had been passed over by the thief. The thought back of the distinction thus made is that in the first case instanced the defendant would be guilty of receiving stolen property, which was the subject of interstate commerce, but that in the second instance, although he would be guilty of receiving stolen property, he would not be guilty of receiving stolen property which was the subject of interstate commerce, as the property would have passed beyond the domain of interstate commerce when he received it.

The jury were instructed that if the defendant had taken over the property, knowing it to have been stolen, and if, in point of fact, it had been stolen while the subject of interstate commerce, the defendant might be convicted. No complaint is now made of this ruling, and we pass to such comments as are called for by the other points raised. We feel the duty of doing this, because counsel for defendant has deemed these points worthy of discussion by submitting a well-considered and very satisfactory brief. We dispose of the points in the order discussed by counsel.

[1] 1. The first point is that there was no evidence that the goods received by the defendant were the goods which had been stolen. We accept the doctrine of law invoked that this fact must be found, and of course can only be found from the evidence. The jury, however, have found it, and we think the evidence justified the finding. The thieves testified that they had stolen goods, and that what they had stolen had been handed over to the first receiver. There was evidence that what this first receiver had received had been passed over to the defendant, and that the goods were stolen while in transit across state lines.

- 2. The second point made is that the court erroneously instructed the jury that they were the judges of the law as well as the facts. In a sense this was the effect of the charge. The charge, however, was to point out to the jury their duty to take the law from the court. This was made necessary by the argument which had been addressed to them, in which the jury had been reminded of their power and practical duty to render a general verdict of guilty or not guilty. The practical effect of this, of course, is to make them the judges of the law in case they acquit. The distinction, however, between what they had the power to do and what they ought to do was clearly stated, and they were as clearly told that they ought to take their law from the The charge is criticized as one drawing a distinction which the jury could neither comprehend nor grasp, so as to apply. We do not think so, and independently of this the defendant is fully protected against erroneous instruction on the law of the case if the jury followed the instructions, and was the beneficiary of their error if they
- [2] 3. Character Evidence.—We see no error in the charge of the court upon this branch of the case. The real test of the value of reputation was given the jury, and we still think correctly. The difference

between the charge to the jury in this case and the charges reviewed in the cited cases, we think, is indicated by a contrast of the charges. Good reputation does not exculpate a guilty defendant. It may persuade the jury not to find him guilty, and is evidence highly regarded by

the law upon the question of his guilt.

- [3] 4. Importance of the Case.—Strong objection is made to the part of the charge dealing with the importance of the case, because of the "letting down of the bars" protecting property rights and the lowering of the standards of honesty. Comments of the kind are necessarily left somewhat to the exercise of the discretion of the trial judge. Care was taken to couple the duty of law enforcement with the other duty of seeing to it that no innocent man was convicted. In point of fact this instruction was given in justice to the defendant. It is a matter of general comment that crimes of this kind are far too prevalent. It was proper to remind the jury not to permit the necessity for law enforcement to operate against the individual defendant on trial.
- 5. Technical Defense.—This refers to the defense suggested by certain incidents of the trial, but not made by counsel for the defendant. It rested upon the proposition of fact that the stolen goods, when the defendant dealt with them, were not the subject of interstate commerce; in other words, that if goods in transit in interstate commerce were stolen, the one who with guilty knowledge received them from the thief would be guilty of an offense against the laws of the United States, but if he received them from one who had himself received them from the thief, then he would not be guilty of any offense against the laws of the United States because the goods had ceased to partake of an interstate commerce character. The jury were flatly told that no defence could be based upon this distinction. If this instruction was erroneous, of course, there would be reversible error in it. As no complaint is now made of this as an error of law, we fail to see how the instruction could have prejudiced the defendant. The instruction then comes down to the simple proposition that the distinction should be disregarded, and the cause decided upon the substantial issues of whether the defendant had received the property knowing it to have been stolen, and that in fact it had been stolen when in transit as an interstate commerce commodity. As the point is not now made, we do not discuss the question of whether or not the instructions were in accordance with the law.
- [4] 6. Co-conspirators.—The jury were instructed, as complained of, that they might found their verdict upon the testimony of the thieves. We understand the law of the United States to be that such witnesses are competent and the testimony admissible, but it is the duty of the trial judge to warn the jury of the danger of giving credit to such testimony and of their duty to closely scrutinize it. This duty we think was performed.
- [5] 7. Defendant's Testimony.—The complaint made of the comments of the court upon the testimony of the defendant we think unfounded. They were told to listen to his testimony and give to it its

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full weight, but to weigh it with the thought in mind that he was interested.

8. Contrasts of Testimony.—The complaint that the court placed the co-conspirators and the defendant in the same boat is a just complaint, if well founded. The testimony of each was placed in juxtaposition, and the very implication of which defendant complains evidently presented itself to the mind of the trial judge, and the attempt was made, and we think successfully, to set the defendant right before the jury. The only difficulty, as we see it, which this case presents, is that of knowing how far it is safe to rely upon tainted testimony. When such testimony comes from a witness, who confesses that he has made statements, and indeed sworn to them, which were in point of fact false, this logical dilemma confronts us: A witness tells us that the things to which he is testifying on trial are true occurrences. But when, in the same breath, he also tells us that other things to which he has sworn were false, he must be characterized in the light most favorable to him as a witness who sometimes tells the truth, but who sometimes does not, and we are under the unsatisfying necessity of taking his word for it as to when he is telling the truth and when he is not.

This is the criticism which is made, and justly made, of the testimony of some of the witnesses against the defendant. The force of the criticism must be admitted, and due weight given to it. There is beyond all question a poison in such testimony. The only antidote, however, is to trust to the good sense and discriminating judgment of a jury. The law has made them the judges of the truth or falsity, and human ingenuity has not yet devised a better test of truth than that afforded by the verdict of a jury. There is, of course, always the possibility of error; but it never happens that any defendant is convicted upon such testimony, unless his own conduct has given it a credence and credibility which it would not otherwise possess. Usually, as in this case, the unquestioned evidence points directly and menacingly to the defendant, and the tainted testimony performs the part of making of a moral conviction a legal certainty.

The motion for a new trial is denied, and the United States has leave to move for sentence.

In re ROSENBERG et al.

(District Court, S. D. New York. April, 1920.)

Bankruptcy = 414(3) - Evidence does not sustain findings that bankrupt concealed assets.

Evidence that the bankrupt had conveyed certain real estate to his wife's brother-in-law, who already held a mortgage on the premises, and that the bankrupt offered the proceeds of such conveyance to the objecting creditor, held not to sustain the referee's finding that the failure to list the property in the bankrupt's schedules constituted a concealment of assets, preventing the bankrupt's discharge.

In Bankruptcy. In the matter of Joseph L. Rosenberg, individually and trading as the Rose Shop & Capitol Millinery, bankrupt. Ida

L. Frese filed objections to the bankrupt's discharge, and the referee recommended that such discharge be denied. Referee's recommendation not approved, and discharge ordered.

Glaze & Fine, of New York City, for objecting creditor.

Nathan N. Sanders, of New York City (C. Edward Benoit, of Brooklyn, of counsel), for bankrupt.

MAYER, District Judge. The referee has recommended that the bankrupt's application for discharge be denied. The objecting creditor, Ida L. Frese, filed six specifications of objections to the discharge sought by the bankrupt. The referee has reported in respect of the sixth specification, stating:

"While the whole character of the proceedings of the bankrupt are such as to excite nothing but suspicion on behalf of the creditor, the real gravamen of the charge, I think, is his concealment of his interest in the real estate in Floral Park, by the omission of any mention of the same or of any interest in the same from his schedules in bankruptcy, from which it follows that by said omission he made a false onth in his proceedings in bankruptcy."

As the evidence does not sustain any of the other specifications, it will be sufficient to confine attention to the sixth specification, which charged the bankrupt with knowingly, fraudulently, and willfully omitting from his schedules property belonging to his estate; i. e., the Floral Park property. The testimony consists of the examination of the bankrupt under Bankruptcy Act, § 21a (Comp. St. § 9605), and further examination of the bankrupt before the referee on the hearing

on the specifications of objections to discharge.

The uncontradicted testimony of the bankrupt sets forth a reasonable transaction, entirely worthy of belief, and completely inconsistent with any purpose to conceal an asset, and wholly lacking in proof of any agreement, actual or implied, of a secret trust or other arrangement whereby title, legal or equitable, to the Floral Park property remained in the bankrupt. The bankrupt owed \$3,500 rent to his landlord, the objecting creditor. On February 8, 1918, he received a letter from the landlord's attorney, demanding the rent. He called upon the attorney the next day—i. e., February 9—and arranged a settlement on the basis of \$500 cash and the remainder in notes of \$1,000 each, payable March, April, and May.

The bankrupt testified that the landlord's attorney said, in response to the bankrupt's request to wait until the 1st of the month (March):

"No; if you want to settle, Miss Frese [the objecting creditor and land-lord] told me she wants \$500 right now, and, no matter how you get it, get it."

It is entirely clear that the bankrupt wished to remain in business and was struggling hard so to do, and he was confronted with the necessity of raising \$500 in cash, else his landlord would not extend further indulgence. At this time, the bankrupt owned some unimproved suburban property, consisting of nine lots, each 20 feet by 100 feet, situate at Floral Park. He had bought these lots on installments for \$7,200, and they were subject to a mortgage of \$1,500, owned by his wife's brother-in-law, one Molineaux, and given for advances to the bankrupt in connection with the installment payments.

In trying to satisfy his landlord the bankrupt offered the lots to her. This is the testimony:

"Q. Did you offer those lots to Miss Frese, the objecting creditor in this proceeding, for sale? A. I did.

"Q. Did you also offer these lots as security for the money you owed her as rent? A. I did.

"Q. Did you also offer these lots to Mr. Fine, her attorney? A. I did, in his own office.

"Q. Did you have a conversation with Miss Frese about these lots? A. I did. "Q. State what conversation you had with Miss Frese about the value placed on those lots? A. I have given her the papers from the Title Guarantee Company, from those Floral Park lots, in both parcels, and I told her: 'Here are the parcels, and, if you desire, I will give you a guaranty for the rent of those lots, or I will make you a bill of sale but take it in as a mortgage for the rental that I owe you, or for any amount that you may desire."

"Mr. Fine (attorney for objecting creditor): You mean take a mortgage

on the lots for the rental?

"The Witness: For rental or sale, or any way she desires. I also offered

her 64 East Fourth street property.

"Q. Did she tell you that she had spoken to any real estate men, or any banks, with reference to placing a valuation on these lots? A. She had returned me those papers, and she said both the banks told her the lots ain't worth anything to her.

"Q. Did you, between the 8th day of February, 1918, and the 13th day of February, 1918, offer these lots for sale to anybody else, besides Mr. Mol-

ineaux? A. I offered in the office of Counsellor Fine."

The bankrupt further testified, without contradiction, that he had a talk with one Roson, an officer of the Floral Park Villa Company. "I asked him," testified the bankrupt, "to give us the value of those lots, and I also asked him whether he can get me a buyer to buy those lots; and his answer was that at present 'I can't give you any buyers, and I can't put any value on those lots.' He said, 'If you want a mortgage to build a house, you can have it; but anything but a mortgage I can't give you. We have trouble to sell our own real estate." He also offered the lots without success to one Oster, of Brooks & Brooks, Thirty-Fourth street, and Oster said he could not get a purchaser. Finally, as a natural and last resort he succeeded in inducing Molineaux to take a deed for \$500 and wipe out the mortgage—in reality, a consideration of \$2,000.

There was no testimony adduced by the landlord as to the value of these vacant lots at that time. The war was on, and I should be greatly surprised if any reputable real estate expert could be found who would be willing to testify that there was any market in February, 1918, for vacant lots in Floral Park. That Molineaux should finally have helped the bankrupt as he did is entirely normal.

The next step is briefly told in the following testimony:

"Q. When you got the check for \$500 from Mr. Molineaux in payment for these lots, did you speak to Miss Frese on the telephone? A. I did.

"Q. Did you tell her that you had the check ready for her? A. I did.

"Q. And what did she tell you? A. She referred me to the lawyer.

"Q. Did you speak to Mr. Fine on the telephone? A. I did.

"Q. And what did Mr. Fine tell you? A. Did I speak to Mr. Fine when?

"Q. On the 13th of February? A. I spoke to the office of Mr. Fine.
"By the Special Master: Q. What did you say? A. I asked Mr. Fine whether we shall come down to his office. I told Mr. Fine that I had a tele-

phone call from him, which my landlady has delivered to me, that it is all off; that Miss Frese would not accept the proposition, and therefore I can do nothing of the kind.

"Q. Now, I ask you again: What did you say to Mr. Fine, or his office, when you spoke to him on that day? A. I told him I had sold the lots, and I had a certified check still in my possession for \$500.

"Q. And you offered it to him, did you? A. I offered it to him.

"Q. Now what did he answer? A. He answered that he can't do it, because Miss Frese wouldn't stand for it.

"By Mr. Sanders: Q. How long did you keep this check in your possession? A. Several days.

"Q. Did you, during the interim that you had this check in your possession,

- have any conversation with Miss Frese? A. I saw Miss Frese personally. "Q. State what conversation you had. A. I said, 'I was at the office of Mr. Fine, and Mr. Fine spoke to you and made all the arrangements;' and I told her, 'I sold the lots which I offered you, and I have a certified check for \$500. and here you back out.' I said, 'I am going to try my best to make my payments, and give me a chance to remain in business.' She said, 'Mr. Fine was too lenient for you.'
- "Q. How long were you negotiating with Miss Frese with regard to the settlement of your rent? A. Right along she has carried me.
- "Q. No; I mean from the 13th of February? A. From the 13th of February right up to the 28th.

"Q. You spoke to her every day? A. I spoke to her every day.

"Q. With reference to settling up your back rent? A. With reference to settling up my back rent.

"Q. Did you at any time, Mr. Rosenberg, ever receive from Mr. Molineaux

\$1,500 back in cash for the mortgage that you gave him? A. I did not. "Q. Did you at any time receive back from Mr. Molineaux \$500 in cash for the check that he gave you? A. I did not.

"Q. Does Mr. Molineaux, or anybody else, hold any cash for you, subject to your order, or your demand? A. No, sir."

How, in the circumstances related supra, it can be said that the bankrupt concealed the Floral Park property as an asset, is beyond my understanding. When the bankrupt found that his landlord was pressing and would not carry out the settlement agreed to by her attorney, the bankrupt paid out the \$500 for merchandise and salaries. He aid not deposit the check in his bank account, but cashed it at his own bank, and paid legitimate bills with its proceeds.

"We bought a bill of goods from Elk Hat on the 19th of February for \$165, which we paid in cash, and the balance of \$335 I deposited in the bank in small amounts, to be payable small checks, and I give out my creditors head checks. I deposited small amounts to give them."

Much was made in argument as to an attempt in the 21a examination to conceal who Molineaux was. The following testimony sequen-' tially given shows that there is no significance in this contention:

- "(). Who is the man held that mortgage for \$1,500? A. Mr. Molineaux.
- "Q. Who is Mr. Molineaux? A. He is a neighbor.
- "Q. Any relative or friend of yours? A. Yes; a brother-in-law to my wife, "Q. When was this sale made for this \$500? A. That was made on February 13th."

From the foregoing outline, supplemented by all the testimony, it is plain that there is no evidence of a concealment of an asset, or of any agreement by which the bankrupt had or was to have any beneficial interest, legal or equitable, in the lots conveyed by him. On the contrary, the transaction appears in every way to have been as testified to by the bankrupt without contradiction, and his testimony is well corroborated by all the surrounding and uncontradicted circumstances.

The recommendation of the referee is not approved, and the bankrupt may have his discharge.

HERKET & MEISEL TRUNK CO. et al. v. UNITED LEATHERWORKERS' INTERNATIONAL UNION, LOCAL LODGE OR UNION, NO. 66.

(District Court, E. D. Missouri, E. D. November 26, 1920.)

No. 5353.

1. Commerce \$\insigma 16\$—Monopolies \$\insigma 14\$—Manufacturer of goods intended for interstate shipment is engaged in "interstate commerce," within federal anti-Trust Act.

Manufacturers engaged in the production of goods which they intend to ship in interstate commerce are engaged in such commerce, even before the goods are made, so that a conspiracy to interfere with the manufacture of such goods is a conspiracy in restraint of trade or commerce, under Act July 2, 1890, § 1 (Comp. St. § 8820), which may be enjoined by the District Court under section 4 of that act (section 8823), though there is no interference with any shipment of goods after they were actually manufactured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Monopolies
 [∞]21—Unions having control of pickets are responsible for unlawful acts.

Trade unions, which through their committees have control of the picketing of plants against which a strike has been declared, are responsible for the unlawful acts of the pickets of which they have knowledge, where they took no disciplinary action to control the unlawful acts, so that they can be found guilty of an unlawful conspiracy because of such acts.

 Monopolies 24(2)—Conspiracy to picket unlawfully need not be proved by direct evidence.

In a suit for injunction against a trade union, the existence of a conspiracy to picket unlawfully need not be proved by direct evidence; but it may be shown by circumstantial evidence.

In Equity. Suit for injunction by the Herket & Meisel Trunk Company and others against the United Leatherworkers' International Union, Local Lodge or Union, No. 66. On final hearing on the merits. Permanent injunction granted.

Mat. J. Holland, of St. Louis, Mo., for plaintiffs.

John P. Leahy and Lena Frank, both of St. Louis, Mo., for defendant.

FARIS, District Judge. Plaintiffs, and each of them, are engaged in the manufacture of trunks, values, handbags, and similar articles, which they sell on orders in the state of Missouri, and in divers other states of the Union. Some of the plaintiffs sell in foreign countries a part of their output. By far the larger proportion of plaintiffs' business consists in sales, on orders for their products, in other states than the state of Missouri.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Prior to, and at the time of, the issuance of the temporary restraining order herein, each of the plaintiffs had on file many unfilled orders from states other than the state of Missouri, for goods, which goods, when manufactured, were to be shipped in interstate commerce. A strike was called by the defendants, which are local labor unions, or officers and members of such unions, pursuant to a vote taken by the unions and in the regular way under the rules and by-laws of the unions. This strike was called after a fruitless effort to agree upon wages and upon a contract embracing the terms and conditions of future employment, which seems to have had therein the phase of collective bargaining.

Upon the calling of the strike, which followed immediately after the failure to agree on a new contract, practically all of the employees of the plaintiffs quit plaintiffs' employment. Thereafter, and until the temporary restraining order was issued herein, the several shops of plaintiffs were picketed by striking employees; in many cases there were from 3 to 20, or more, pickets employed around and about the shops of plaintiffs, or some of them. During this picketing many unlawful and unpeaceful acts were committed by the pickets, such as calling the various potential employees, and divers employees who continued in the employment of plaintiffs, vile and opprobrious names; there were instances of domiciliary visits, accompanied by threats, and various other things of a like nature too numerous to mention.

These unlawful acts prevented plaintiffs from employing other workmen to take the places of the strikers, so that plaintiffs were unable to manufacture the goods necessary to fill both the interstate and intrastate orders which they had on hand. Many of the goods-in fact, the larger proportion thereof—which plaintiffs would have made, but were in the mode above mentioned prevented from making, would have been shipped, when manufactured, to other states, to fill what is called in the record "interstate orders." There was no actual interference with, or hindrance of, any interstate movement, or shipment, of any goods made by plaintiffs, or by either of them, for the very simple reason that the goods designed for interstate shipment have never come into existence, on account of the interference mentioned; for, as forecast, these goods could not be manufactured, because the plaintiffs' former workmen struck and quit, and other workmen could not be obtained to manufacture them, these potential workmen being kept away by a too numerous picketing and by threats and intimidation. Such goods as were actually made by plaintiffs have been shipped in interstate commerce (when such was their destination) without let or hindrance. The methods used by defendants in preventing plaintiffs from obtaining other workmen have been, as stated, in numerous proven instances, unpeaceful and unlawful.

Barring the questions of jurisdiction, and the existence of a conspiracy, plaintiffs are unquestionably entitled to the relief by injunction for which they prayed. Indeed, counsel for defendants seemingly concede this in a tacit way, because the burden of counsel's contention is bottomed solely upon the alleged phases of jurisdiction and absence of a conspiracy. There is no diversity of citizenship involved in the

case. If this court has jurisdiction at all, it gets it solely perforce the provisions of section 1 of the so-called Sherman Anti-Trust Act (26

Stat. 209 [Comp. St. § 8820]).

[1] Upon this point it is urged that, since the goods of plaintiffs, which they intended to ship in interstate commerce when they came into existence, were not in existence at the time defendants unlawfully interfered with plaintiffs' business, the case does not fall either within the purview or protection of the Sherman Anti-Trust Act, supra, and therefore this court has no jurisdiction. Confessedly the point urged is at least, on principle, a close and difficult one. So much of the language of the Sherman Anti-Trust Act, supra, as seems pertinent to this question, reads thus:

"Every contract, combination, in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." Section 1, Act July 2, 1890, c. 647, 26 Stat. 209.

Pursuant to the provisions of section 4 of the Sherman Anti-Trust Act (Comp. St. § 8823), supra, jurisdiction to enforce compliance with the provisions of the act by injunction is conferred upon the federal District Courts, sitting as courts of equity. When we read sections 1 and 4 together, and convert the definitions of section 1 into plain and concise language, it is simply provided that every conspiracy in restraint of interstate commerce may be enjoined in a federal court, subject, of course, in a labor dispute to the qualifications set out in the Clayton Act. It is strenuously contended by learned counsel for defendants that, when Congress referred in the Sherman Anti-Trust Act to restraints of interstate commerce, it held in mind the usual and ordinary definition of such commerce, and that the questions of when such commerce begins and when it ends are referable to the well-known definitions of this commerce, which have long been well settled in the federal courts.

Illustrating this view, and this contention, it was held in the fairly early case of In re Greene (C. C.) 52 Fed. loc. cit. 113, in an opinion rendered by Judge (afterwards Mr. Justice) Jackson, that:

"When the [interstate] commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. * * * Neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of Congress."

This definition of interstate commerce, with reference to when it begins, learned counsel for defendants urge, has been very lately affirmed and followed by the Supreme Court of the United States in the case of Hammer v. Dagenhart, 247 U. S. loc. cit. 272, 38 Sup. Ct. 529, 531 (62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724), where it was said:

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. 'When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. Mr. Justice Jackson, In re Greene, 52 Fed. 113. This principle has been recognized often in this court. Coe v. Errol, 116 U. S. 517; Bacon v. Illinois, 227 U. S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control, to the practical exclusion of the authority of the states—a result certainly not contemplated by the framers of the Constitution, when they vested in Congress authority to regulate commerce among the states. Kidd v. Pearson, 128 U. S. 1."

The above well-known and well-settled definition, touching when articles made in one state and intended for sale in another begin their travels towards such other state, so as to bring them within the constitutional power of Congress to regulate interstate commerce, ordinarily would be regarded as conclusive upon the courts in construing the language used in the first section of the Sherman Anti-Trust Law. If the matter were one of first impression in this circuit, I would feel constrained to agree with counsel for defendants, and to hold that the above well-settled definition touching when interstate commerce begins ought to be applied to that term, as used in the Sherman Anti-Trust Act, supra. But the matter is not one of first impression in this circuit. Therefore it is my duty, regardless of any personal views or convictions which I may hold upon the subject, to defer to and follow what I am forced to consider the view taken by the Circuit Court of Appeals of the Eighth Circuit.

In the case of Dowd v. United Mine Workers of America et al., 235 Fed. 1, 7, 148 C. C. A. 495, loc. cit. 501, it was said by the

Circuit Court of Appeals of this Circuit that:

"Some of the coal companies were not actually engaged in interstate commerce at the time the alleged acts were committed by the defendants; but they were preparing to do so, and were prevented from so doing, as they allege, by the wrongs of the defendants. It was held in Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. et al., by the Circuit Court of Appeals of the Second Circuit, 166 Fed. 254, 92 C. C. A. 318, that: 'A conspiracy to prevent a manufacturer, who procures his supplies and disposes of his products by means of interstate commerce, from engaging in business at all, necessarily places restraints upon such commerce. Its flow is restricted and interrupted. The importation and exportation of articles of commerce are directly prevented, and none the less so because the conspiracy may be of so wide a scope as to interfere with interstate commerce also.' To the same effect is Thomsen et al. v. Union Castle Mail Steamship Co. et al., 166 Fed. 251, 92 C. C. A. 315 (2d Circuit).

"It is next objected that the alleged wrongs of the defendants do not constitute an interference with interstate trade or commerce. We do not think, since the cases of Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, and Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341, it can be said that this can be considered an open question. In rendering the opinion of the Supreme Court when the case was last before it, Justice Holmes said: "The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that, in pursuance of a general scheme to unionize the labor employed by the manufacturers of fur hats (a purpose previously made

effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs, and against all hats sold by the plaintiffs to dealers in other states and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other states.' This charge being proven, the learned justice further said (235 U. S. 534, 35 Sup. Ct. 172, 59 L. Ed. 341): 'We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named?"

Again, touching the far-reaching power of section 1 of the Sherman Anti-Trust Act, supra, it was said by the Supreme Court of the United States in Eastern States Lumber Association v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, that that section broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce. After the decision of the Circuit Court of Appeals of the Eighth Circuit, in the case of Dowd v. United Mine Workers, etc., supra, the latter case, under the style of United Mine Workers of America v. Coronado Coal Co., was again before the Circuit Court of Appeals of this Circuit in 258 Fed. 829, 169 C. C. A. 549. The question of jurisdiction was again raised and seemingly, strenuously urged. The court refused to re-examine the question of jurisdiction, bottomed there, as here, upon the construction of the provisions of the first section of the Sherman Anti-Trust Act, but contented itself with saying upon this point:

"The learned counsel for defendants neither in their voluminous brief (326 printed pages) nor in their oral argument questioned these statements of facts, nor did they seriously attack the sufficiency of the evidence, but they insist that they do not establish that the plaintiffs were engaged in interstate commerce, and therefore these acts were not in violation of the Sherman Act. The leading case relied on is United States v. Knight, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 320, but this case, if not expressly overruled, has been much weakened by the later decisions of the Supreme Court, and it was so held by this court when this case was here before. 235 Fed. 1, 8, 148 C. C. A. 495. As this court, when this case was here before, held that the alleged wrongs and torts of the defendants charged in the complaint, and which at the trial were established by substantial evidence, constituted an interference with interstate commerce, and violated the Sherman Act, that opinion is the law of the case, and cannot be again re-examined."

I need not go into the somewhat complicated facts before the court in the Dowd Case, supra. It will suffice to say that, if the coal companies which were the plaintiffs therein, were, upon the facts, engaged in interstate commerce, then the plaintiffs here are also, upon the facts, engaged, and were at the time of the happening of the matters and things herein complained of engaged, in interstate commerce. In the Dowd Case, the coal, or much of it, which was intended for interstate commerce, but which was prevented from flowing therein by the unlawful acts of the defendants there, had not been mined, and therefore was not in existence as a commodity of any sort of commerce for transportation; moreover, one of the plaintiffs had not engaged in business at all, but was preparing to do so, and was prevented by de-

fendants therein from so doing. So, also, here the goods for which plaintiffs had orders in interstate commerce, and which were to be manufactured for shipment therein, were not in existence. They were prevented from coming into existence by the conspiracy of defendants and by the unpeaceful and unlawful overt acts done and committed by defendants in the carrying out of the conspiracy. The broad language of the Dowd Case regarded, the additional fact in that case that a loaded car of coal was actually destroyed would seem too negligible a factor to call for a difference in the rule.

Therefore, following the rule so clearly announced in the Dowd Case and the Coronado Coal Company Case, as in duty bound, I am constrained, regardless of my own views, to hold that the plaintiffs here were engaged in interstate commerce, and that the acts of defendants operated as restraints upon that commerce within the purview of the

first section of the Sherman Anti-Trust Act.

- [2] I may dispose of the question of the existence of the conspiracy more briefly and with less difficulty, at least in my own mind. In order to do this logically, a brief reference may again be made to the facts. These facts substantially are that, efforts to agree with plaintiffs on a new contract of employment having failed, the local unions, who are the defendants here, immediately called a general strike against the shops of all of the plaintiffs, and thereupon practically all of the employees of plaintiffs quit work, and many of them began to picket plaintiffs' shops. This picketing was done in a way that was not lawful, and which is not legally permissible, even under the broad provisions of the Clayton Act. Defendant unions appointed committees to take charge of and manage this strike, which, of course, largely meant to manage the pickets who were engaged in picketing the shops of plaintiffs. No extra pay seems to have been given to those members of the union who did picket duty, though apparently the pickets (as were others of the striking employees) were paid strike benefits by the respective unions to which they belonged. The pickets volunteered for duty, but, as said above, they were in charge of the committees of the local unions. If these pickets committed unpeaceful and unlawful acts, therefore, absent any protest or disciplinary action by the local unions, the latter are liable for such acts. The unions cannot be heard to say that, having charge of and controlling these pickets, they are not to be held liable for the divers unlawful acts done by the pickets. If it be said that the unions in such case should have some knowledge or notice of the unlawful acts committed by pickets employed by them, and I think this ought to be conceded, the answer is that such knowledge and notice may be inferred from all the facts and circumstances shown by the evidence.
- [3] Neither is it necessary to prove the conspiracy alleged in the complaint by direct evidence. Such a conspiracy may be shown by circumstantial evidence. If the rule were otherwise, it would ordinarily be impossible to establish a conspiracy in any case; a fortiori, in a labor dispute.

I conclude that the facts and circumstances disclosed a conspiracy within the meaning of the law, and that the direct and positive effect

of that conspiracy was to hurt and injure the interstate commerce of plaintiffs, as that commerce has been defined in this circuit.

It follows that the permanent injunction prayed for by plaintiffs ought to be granted. Let a decree be drawn accordingly.

KAUSCH v. MOORE, Internal Revenue Collector.

(District Court, E. D. Missouri, E. D. December 9, 1920.) No. 5463.

1. Internal revenue \$\iiii 45\text{—Injunction may issue to restrain collection of}

penalties under Volstead Act. Rev. St. § 3224 (Comp. St. § 5947), forbidding an injunction against the collection of an internal revenue tax, does not apply to a collection by distress proceedings of the penalty, imposed by Volstead Act, tit. 2, § 35, of \$500, in addition to the double tax on one who unlawfully sells intoxicating liquor.

2. Constitutional law \$\iiins 318\$—Internal revenue \$\iiins 2\$—Collection of "penalty"

under Volstead Act by distraint without hearing violates due process.

Within Volstead Act, tit. 2, § 35, providing that a person unlawfully selling liquors shall be liable for double the internal revenue tax, with an additional penalty of \$500 on retail dealers, the word "penalty" is used in its ordinary legal meaning as a sum of money which the law exacts by way of punishment for the doing of some act which the law forbids, or for the failure to do some act which it requires to be done, not as a synonym for "fine," since the act elsewhere provides a fine for that offense, and if that section be construed to authorize Commissioner of Internal Revenue to collect the penalty by distraint of property without granting a day in court to the person charged with violation, it is invalid, as authorizing taking of property without due process of law.

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, Penalty.]

prevent injunction.

An injunction may be granted to restrain illegal distraint of property for collection of the penalty in addition to the double tax imposed for unlawful sale of liquor by Volstead Act, tit. 2, § 35, notwithstanding the right to pay such penalty under protest and bring suit to recover the payment since Rev. St. § 3224 (Comp. St. § 5947), does not apply to such penalty, and the remedy by payment of subsequent recovery is not adequate, especially where the person assessed has not sufficient funds to make payment, and the sale of his goods on distress would practically ruin his business.

4. Internal revenue € 45—Collection of double tax for violation of law cannot be enjoined.

Rev. St. § 3224 (Comp. St. § 5947), prohibits an injunction to restrain the collection of the double internal revenue tax imposed on one who illegally sells intoxicating liquor by Volstead Act, tit. 2, § 35, so that a bill to restrain the distraint of goods by the collector for the enforcement of that tax and the penalty in addition thereto must be dismissed, unless the plaintiff has paid or tendered the double tax imposed upon him.

In Equity. Bill by John Kausch against George H. Moore, Collector of Internal Revenue, First District of Missouri. On motion to dismiss plaintiff's bill. Motion sustained.

Walter N. Davis, of St. Louis, Mo., for plaintiff. James E. Carroll, U. S. Atty., of St. Louis, Mo., for defendant.

FARIS, District Judge. Plaintiff filed his bill in equity to enjoin the defendant, as collector of internal revenue of the First district of Missouri, from seizing and selling the property of plaintiff under distraint for the taxes and penalty, alleged to have been incurred by the plaintiff, pursuant to the provisions of section 35 of the Volstead Act (41 Stat. 305). Defendant moved to dismiss plaintiff's bill as being without equity.

All facts well pleaded in the bill are in consequence admitted for the purpose of determining this motion. These facts substantially are that defendant is threatening to seize and sell the property of the plaintiff to pay certain double taxes and the penalty which section 35 of the Volstead Act, supra, provides may be assessed and collected from those who engage in the sale of intoxicating liquors at retail, in violation of said act. In order that the precise situation may be appreciated I quote from plaintiff's bill:

"Plaintiff further states that on or about the 29th day of April, 1920, the Commissioner of Internal Revenue for the United States of America, basing his acts on reports of investigators acting for the United States, and statements contained in said reports, submitted to him, that plaintiff had violated some of the provisions of the National Prohibition Act, title 2, assessed on the March list, 1920, under section 35, title 2, of said act, the plaintiff a sum in double the amount heretofore required to be paid by a retail liquor dealer, to wit, \$20.48, with an additional penalty of \$500 on retail dealers, as provided by said section, and further sum as a penalty to wit, \$2.60.

"Plaintiff further states that the Commissioner of Internal Revenue, as aforesaid, has transmitted to the said George H. Moore, collector as aforesaid, the aforesaid assessment against plaintiff in a sum in double the amount heretofore required to be paid by retail liquor dealers, to wit, \$20.48, with an additional penalty of \$500 on retail liquor dealers, as provided by said section, and the further sum as penalty of \$2.60 for collection from plaintiff by a

warrant of distraint or otherwise.

"Your plaintiff further states that he is a person of small means and father of a large family, and that he is maintaining a small mercantile business in the city of St. Louis, Missouri, on which he owes a large sum of money secured by mortgage, and in addition thereto large sums of money

to his creditors for mercantile supplies.

"Plaintiff further states that defendant, George H. Moore, collector as aforesaid, upon the request and order of the Commissioner of Internal Revenue, and of his own volition, is threatening and it is his purpose to levy a warrant of distraint, and seize upon the business, goods and chattels, property, and effects of plaintiff for the purpose of collecting the aforesaid assessment and penalties amounting to \$———, for the purpose aforesaid.

"Plaintiff states that he has no adequate remedy at law, and that if defendant levies a warrant of distraint and seizes upon plaintiff's business, goods, and chattels, property, and effects, it will deprive plaintiff of his means of earning a livelihood, will ruin his business, and cause his wife and children to be in want and distress; that he has no ready money with which to pay said assessment and has been unable to procure the same."

The specific provisions of the Volstead Act invoked, as warranting the distraint threatened, read thus:

"No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person re-

sponsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of \$500 on retail dealers and \$1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or reneve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

"The Commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may com-

promise any such cause after action thereon has been commenced."

[1] Upon the motion to dismiss the bill, it is urged that injunction will not lie to restrain the collection of a tax. This contention, so far as it is applicable to the facts, is well taken and must needs be sustained. Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557. But this rule applies, in my opinion, only to so much of the amount threatened to be exacted as in fact constitutes a tax; it ought not to apply to a penalty even though such penalty could be paid under protest; and thereupon, if such payment be not warranted by law, be recovered back by an action at law directly against the collector. So much the more so, should injunction be not refused, when, as here, the payment thereof would be impossible without ruining plaintiff in business and property. If, then, the exaction of the penalty claimed should be held to be at this time, and in the mode threatened, unlawful, injunction ought to lie as against so much of the threatened exaction, if any, as is unlawful. As stated, injunction will not lie to prevent the collection of a tax, or even to prevent the collection of such tax, when, as here, the amount thereof is doubled upon the contingency of the violation of the law, by the forbidden sale, or manufacture of liquor. In such case section 3224, R. S. (Comp. St. § 5947), applies and forbids an injunction against the collector. Dodge v. Osborn, supra.

But it would seem to be fairly clear that a statute which merely forbids injunction as against a tax ought not to be so extended as to include injunction against the enforcement of a penalty. Certainly, this ought not to be done in a case wherein the manner of the collection, as here, is not warranted by law. In reaching this conclusion, I start with the assumption that the imposition of the penalty is clearly within the power of Congress under the provisions of the Eighteenth Amendment to the Constitution. So much being conceded, the question arises whether the Commissioner of Internal Revenue has the authority, merely upon reports of investigators to the effect that plaintiff has unlawfully sold liquor at retail, to assess such penalty, and without notice to the plaintiff, and without an opportunity anywhere given him to be heard, to empower the defendant collector to distrain plain-

tiff's property to pay the penalty so assessed?

The provisions of section 35 of the Volstead Act, supra, are regrettably meager as to the quantum of evidence required, and as to the details of the procedure to be followed. On this point the act merely says:

"Upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of \$500 on retail dealers.

[2] Nothing anywhere is provided as to the nature of the evidence on which the Commissioner of Internal Revenue may act in assessing such penalty, nor as to the manner of collecting such penalty after he has assessed it. The language of the act contains no express provision for the collection of the penalty by a civil action. Section 35 of the Volstead Act, supra, does contain in a separate clause, which I quote above, a provision whereby contingent permission is given to the Commissioner of Internal Revenue to "compromise any civil cause arising under this title (title 2) before bringing action in court." It is wholly impossible to say with certainty that the clause last above refers, among other things, to an action brought to recover the penalty provided for in the body of the section. The appositeness of the procedure, and the placing of the provision in the same section wherein the penalty is provided for, lend some color to the view that Congress meant to provide for the collection of the penalty by a civil action, which action could be, upon the contingency stated, compromised by the payment of a less amount than that written in the statute.

Pursuant to other provisions of the Volstead Act, the plaintiff here may, upon conviction on the criminal side of the court, "be fined not more than \$1,000, or imprisoned not more than six months." Section 29 of Act of October 28, 1919. The imposition of the double tax and of the penalty provided by section 35, supra, are therefore in the nature of additional punishments for the same offense. In short, there exist under this act a fine, a double tax, and a penalty, as punishments for one and the same offense. These considerations regarded, the word "penalty," as used in the act, would seem to have been used by Congress in the usual and ordinary legal meaning of this word, which meaning is fairly well-settled law. A penalty is a sum of money, which the law exacts by way of punishment, for the doing of some act, which the law forbids, or for the failure to do some act, which the law requires to be done. It is true, as the definition foreshadows, that sometimes the word "penalty" is undoubtedly used as a synonym of the word "fine"; but as used in the Volstead Act it cannot fairly be so construed, because by another provision of the act a fine as such is clearly provided for. Moreover, no authority can be conferred by Congress upon the Commissioner of Internal Revenue to impose a fine in the strict sense of that word (Wong Wing v. United States, 163 U. S. loc. cit. 237, 16 Sup. Ct. 977, 41 L. Ed. 140); a fortiori, without a trial, or any sort of hearing theretofore had, as here.

Ordinarily the well-settled procedure is that penalties are recoverable in only one of two ways; that is, either by a criminal prosecution, or by a civil action. Neither one of these methods has been or is being followed here, and so far as the Commissioner of Internal Revenue is concerned, he has no authority to follow the former. I think the law, the status of the case, and the circumstances, as well as the argument, eliminate recovery by the Commissioner of Internal Revenue or by his agent, the defendant here, by way of a criminal prosecution. If the plaintiff is to enjoy that due process of law which the Constitution guarantees to him, the inference seems obvious. It ought to follow that recovery of this penalty cannot be had by distraint under

the situation now presented. For it seems clear beyond much question that the plaintiff has not had his day in court; that no opportunity whatever has been afforded him to contest the truth of the reports on which the Commissioner of Internal Revenue acted in assessing the penalty of \$500 against him. Therefore to allow his property to be taken by distraint and sold, to pay this penalty, would in my opinion be to take it and sell it without due process of law. The questions presented do not call for a ruling as to whether the fact of a prior plea of guilty, or the fact of a conviction on the criminal side of the court, would constitute such evidence of an illegal sale as would warrant the assessment and collection by distraint as here attempted. This is so

because the case has not yet proceeded to that stage.

[3] It is urged that plaintiff has no standing in equity; that his remedy is upon the law side of the court; that he may pay this penalty under protest, and then sue at law to recover back the payment so made by him. As forecast above, this contention is bottomed largely upon the statute (section 3224, R. S.) cited. But I do not think that this statute has any application to the situation presented by the facts before me. It is, of course, true that plaintiff might if he had the means—that is, if he were financially able to do so—pay under protest the penalty here threatened to be exacted from him by distraint, and then sue at law to recover back the money so paid by him. But if the case does not fall within the provisions of the statute, supra, which expressly forbids injunction, then he is not bound to so pay and sue, and the well-known and ancient rules of equity ought to apply, and I am of opinion do apply, in such cases as this. Absent the compelling force of section 3224, R. S., the remedy at law is not adequate to afford relief to plaintiff.

It is also contended that the case of Oceanic Navigation Co. v. Stranahan, 214 U. S. 321, 29 Sup. Ct. 671, 53 L. Ed. 1013, is decisive of the question presented here. Section 9 of the act (32 Stat. p. 1213) held in judgment in the Stranahan Case, supra, conferred power on a merely administrative officer to assess a fine—synonymous with "penalty" as used in the act—of \$100 against any steamship company which might bring immigrants to the United States, when such immigrants were afflicted with certain diseases. The power was also conferred to refuse clearance papers to ships so offending till the penalty assessed should be paid. The latter power, of course, forced payment under the strongest duress. The power of an administrative officer to assess the penalty was there, as here, strenuously assailed. The action being at law to recover the money paid under duress exercised in the manner stated, the court denied the recovery. In the Stranahan Case, a hearing of a sort was provided for; here there is no hearing of any sort anywhere provided for before the assessment of the Commissioner of Internal Revenue is made. Nor thereafter is there any possible hearing open to plaintiff, till subsequent to payment, and then only by way of an action at law to recover back the sum exacted from him.

I am not able to construe the Stranahan Case as being so far-reaching in principle as to apply here. If the penalty here in question could

be viewed merely as an integral part of the taxes charged, or as in the nature of a surtax thereon, and not as merely punitory, some authority to uphold distraint for its summary collection might be found in the cases. But such a construction does palpable violence to the statutory facts. Among other things, the amount of the penalty is many times greater than the tax assessed, even when the latter is doubled. If a penalty can be added by doubling the tax, and then penalty after penalty thereafter again added, all in the name of taxation, and be so denominated, then the entire substance of the accused citizen can, without any trial, hearing, or conviction, be thus confiscated and sold under distraint.

[4] Against the collection of the taxes eo nomine, as provided by the statute, I am of the opinion no injunction will lie, for the reasons already stated. It was the duty, however, of the plaintiff to pay all such sums as are, in section 35 of the act in question, specifically called "taxes." He could have paid such under protest and have sued to recover them back. So much, then, of the threatened distraint was warranted; and since it was the duty of the plaintiff to pay, he cannot enjoin collection of the tax bill presented till he has paid all that is collectable by distraint. This is practically the universal rule in equity in all of the many jurisdictions, wherein the collection of alleged illegal taxes may be enjoined. Before plaintiff can be heard to apply for injunctive relief, he must pay or tender all lawful taxes; so here he must pay or tender all taxes eo nomine which said section 35 of the Volstead Act provides may be assessed against him. Plaintiff in his bill avers neither payment nor tender, nor does he even offer to do equity, by paying any sum or sums which may be found to be legally due from him, or collectable from him by distraint.

Summing up, therefore, I think he must, as a condition precedent to injunctive relief, either have paid or tendered to the defendant all taxes assessed against him. He may, of course, as forecast, pay under protest, and later sue to recover back such payment. But he need not, in my view, either tender or pay the penalty specifically provided in the statute in question under that name. Against the collection of this penalty, at this time and under the circumstances existing and by the mode threatened, injunction will lie on a sufficient bill. For the reason given, however, the motion to dismiss ought to be sustained to

the bill as filed.

Let it be so ordered.

In re GUNZBERGER.

(District Court, M. D. Pennsylvania. September 1, 1920.)

1. Bankruptcy \$\iff 396(1)\$—Exemption rights governed by state law.

Under the Bankruptcy Act (Comp. St. \$\\$ 9585-9656), the rights and practice relating to exemption are governed by the state law.

2. Exemptions \$\iiins\$88, 89—Debtor may waive, but not assign.

Under the law of Pennsylvania, the right of the debtor to claim property as exempt from the execution is a personal privilege, which he may waive, though he cannot assign it.

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3. Bankruptey \$\infty\$=400(3)—Exemption must be claimed in property, not in proceeds of sale.

Under the laws of Pennsylvania, a bankrupt can claim as exempt only the property itself, and cannot claim the exemption as to the proceeds of a sale of the property, which was exempt.

4. Bankruptcy \$\infty\$400(3)—Execution creditor cannot follow proceeds of

sale of exempt property.

A creditor in whose favor the debtor had before bankruptcy waived exemption, and who had secured an execution lien upon the property within four months before bankruptcy, cannot claim under his lien on the exempt property, which alone was unaffected by the bankruptcy proceedings, the difference in money between the value of the exempt property claimed by the bankrupt and the \$300 allowed by law, since he cannot follow the proceeds of exempt property, any more than the bankrupt himself could.

5. Bankruptcy \$\iiint 399(1)\$—Bankrupt waives exemption by failure to claim it.

Where a bankrupt fails to claim his exemption within time specified by Bankruptcy Act, § 7, cl. 8 (Comp. St. § 9591), or before a sale of his assets as required by the state law, his right thereto is waived.

6. Bankruptcy \$\infty\$ 395(1)—Exemption right cannot be assigned.

To permit an execution creditor to recover from the trustee in bankruptcy the difference between the value of the property claimed by the bankrupt as exempt and the amount of exemption allowed by state law would be to permit an assignment of the bankrupt's right of exemption, which is contrary to the state law.

In Bankruptcy. In the matter of the estate of William Gunzberger, bankrupt. Petition by the J. E. Dayton Company to have a sum of money awarded to them as a secured claim was denied by the referee, and petitioner asks for review. Decision of referee affirmed.

The following is the opinion of Crandall, Referee:

Prior to the adjudication in bankruptcy, J. E. Dayton Company entered judgment in the court of common pleas of Lycoming county against William Gunzberger, and issued a test, fi. fa. to Potter county. This judgment was entered upon a judgment note containing a waiver of exemption. Upon this execution a levy was made by the sheriff of Potter county upon the personal property of the bankrupt. Prior to the sale a petition in bankruptcy was filed in the District Court, and a restraining order issued and served upon the sheriff. Afterwards William Gunzberger was declared bankrupt.

The bankrupt filed the schedule required by law and the rules of the Supreme Court, and claimed as his exemption, under the Pennsylvania statute, certain specific property (household goods) which he valued at \$185. The bankrupt made no other or further claim for exemption. This property claimed as exempt was appraised and set apart by the trustee to the bankrupt. Subsequently, on the petition of J. E. Dayton Company, the restraining order was modified, so as to permit the sale by the sheriff of the said exempt prop-

erty awarded set aside to the bankrupt.

On February 4, 1920, J. E. Dayton Company filed a petition setting forth substantially the foregoing facts, and asked that the sum of \$115 be awarded to them as the difference between the \$300 exemption and the value of the property as claimed by the bankrupt for his exemption. A rule to show cause was granted upon this pecition, returnable at the office of the referee February 14, 1920. By consent of counsel this hearing was continued and A. F. Jones, attorney for Leon P. Root, trustee, filed an answer in the nature of a demurrer to the petition of the J. E. Dayton Company.

Before filing this petition, the said J. E. Dayton Company, after the sale of the exempt property, filed an amended claim, which was allowed by the referee so that the claim stood as \$300 secured and \$598.48 as an unsecured claim. It is upon the \$300 secured portion that this company bases its claim for the \$115 allowance.

No claim for exemption was filed by the bankrupt other than that in his original schedule listing household goods to the amount of \$185, nor has he made any claim for any proceeds derived from the sale of his property. The assets were entirely personal property and were converted into money by the trustee. The facts in the case are all shown by the records and conceded in the pleadings and arguments.

The question submitted to the referee was: Can an execution creditor, with a lien by levy on personal property prior to an adjudication in bankruptcy, claim funds secured by the trustee to the extent of the difference between the property set aside to the bankrupt, and his Pennsylvania \$300 exemption, when the bankrupt has not made any further claim for exemp-

tion?

[1, 2] There is no doubt that, under the Bankruptcy Act (Comp. St. §§ 9585-9656), the practice and exemption rights are governed by the Pennsylvania law. Under this law it is thoroughly settled that a person can waive his exemption in favor of his creditors, for the reason that it is recognized as a personal privilege. Appeal of the Overseers of the Poor of White Deer Township, 95 Pa. 191; Kyle and Dunlap's Appeal, 45 Pa. 353. In this case Mr. Justice Woodward uses this language on page 360: "A debtor is offered an exemption of \$300 by the act of 1849, if he claims it in due time. But because it is a personal right he may waive it. He is not compelled to accept the bounty of the statute. He is not permitted to assign it, but it is impossible to say that he may not release it, and that at any time before the money is actually in his pocket. Heller's conduct was capricious and unreasonable, beyond doubt, but the positive release of a personal right, even by a capricious and unreasonable man cannot be judicially set aside. And where a debtor fails to claim his exemption, or having claimed it afterwards releases it, he stands

as if there were no exemption statute. As to him it is a dead letter."

In Re Pfeiffer (D. C. Pa.) 19 Am. Bankr. Rep. 230, 155 Fed. 892, Ewing, District Judge of the Western District, said: "Under the Bankruptcy Act claims for exemption are to be allowed and administered under the state laws and in accordance with the decisions of the Supreme Courts of the respective states. Under the decision of the Supreme Court of this state in the case of Hammer v. Freese, 19 Pa. 255, the claim for exemption in this case could not be allowed as made in the bankrupt's schedules. The act of 1849 (P. L. 533) provides that 'property to the value of \$300 shall be exempt,' etc., and does not permit, under the decision aforesaid, the claimant for the exemption to take the proceeds of property to be subsequently sold. A debtor may waive his right to the exemption (Case v. Dunmore, 23 Pa. 93), but may not assign it (Bowyer's Appeal, 21 Pa. 210: Bogart v. Batterton, 6 Pa. Super. Ct. 468), and he may withdraw his claim (Appeal of Overseers of the Poor, etc., 95 Pa. 191; Kyle & Dunlap's Appeal, 45 Pa. 353)."

[3] It was also held in the Pfeiffer Case, last cited, that the claim under the Pennsylvania statute must be taken in property and cannot be claimed out of the proceeds of property subsequently sold. In the Freese Case, 19 Pa. 257, this language is used: "The act speaks of property, not money. It requires him to elect the goods he wishes to retain, and have them appraised; and property thus chosen and appraised shall be exempt from levy and sale. * * * There are sound reasons why he should take the

goods or take nothing."

To the same effect, in Bonsall et al. v. Comly, 44 Pa. 442, Justice Thompson on page 446 says: "The right of exemption is a personal privilege, and not an incident of property. If this were not so, the debtor might follow the proceeds of the property after the sale. This we know he cannot do, as it is property, in case of a levy on goods or chattels, and not money which he is entitled to claim. Hammer v. Freese, 7 Harris, 255."

To the same effect are the Pennsylvania bankruptcy cases of In re Staunton, 9 Am. Bankr. Rep. 79, 117 Fed. 507, In re Haskin (D. C.) 6 Am. Bankr. Rep. 485, 109 Fed. 789, In re Manning (D. C.) 7 Am. Bankr. Rep. 571, 112 Fed. 948, and In re Von Kerm (D. C.) 14 Am. Bankr. Rep. 403, 135 Fed. 447. These are all Pennsylvania bankruptcy cases and Judge Holland states in the latter case: "Where * * * the bankrupt files no schedule or makes no request upon the trustee to set aside specific articles of exemption until after the sale, he must be regarded as having waived his right of exemption, and he cannot claim \$300 out of the proceeds of sale."

[4] The referee has been shown no authority which will give any execution creditor rights superior to those of the bankrupt, and the conclusion is reached that an execution creditor cannot follow the proceeds from the sale of personal property after they are cash in the trustee's hands. The copy of the judgment entered by the J. E. Dayton Company against the bankrupt, on which the execution was issued, shows the date of entry to be March 22, 1919, on which date the test. fi. fa. was issued. The adjudication in this case was on April 5, 1919. The lien obtained by the sheriff accordingly was not four months old, and would be rendered void under the Bankruptcy Act as to all personal property except the exempt property of the bankrupt.

The bankruptcy court has no jurisdiction over the exempted property, except to make the appraisal and set it aside to the bankrupt. The right of creditors as to the exempted property must be determined by the state courts. 7 Corpus Juris, 363, § 643, citing Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107, and other cases.

[5] By claiming no other exemptions than the listed articles, this act of bankruptcy constituted a waiver in favor of the general creditors of all claims to exemption upon any other property than that specified. Where a bankrupt fails to make claim for his exemption in the manner and within the time provided by the Bankruptcy Act and General Orders in Bankruptcy, the right of exemption is waived. In re Exum (D. C. Ala.) 31 Am. Bankr. Rep. 691, 209 Fed. 716; In re Gerber, 26 Am. Bankr. Rep. 608, 186 Fed. 693, 108 C. C. A. 511. In Re Wunder (D. C.) 13 Am. Bankr. Rep. 701, 133 Fed. 821, it is held that, where an involuntary bankrupt neglects to file his claim for exemption within the time specified by section 7, clause 8, of the Bankruptcy Act, or before a sale of his assets as required by the state law, his rights thereto are waived.

[6] Furthermore, the position contended for by the petitioners in these proceedings will operate as if an assignment of the exemption right had been made to this company. The authorities above quoted show this to be clearly contrary to the Pennsylvania law. If the petitioner's contention is maintained, it will give it a preference over other creditors upon the property and proceeds clearly and distinctly within the jurisdiction of the bankruptcy court to administer.

Counsel for the petitioning company cites In re Goldberg (D. C.) 254 Fed. 440, 42 Am. Bankr. Rep. 299. A careful reading of the opinion in this case fails to disclose sufficiently the facts to ascertain whether it will rule the case at bar. From the conclusion reached by Judge Thompson we prefer to think that the facts distinguish that case from the case at bar. We are forced to this conclusion in deference to the opinion of Judge Thompson, rather than think he stated the rule of law to be applied in this case contrary to the Pennsylvania rules so well established by numerous cases.

The learned court did not discuss these principles in their application to the Goldberg Case, nor give any logical reasoning to distinguish the application of these principles, even if the facts in the Goldberg Case are similar to those before us. For the reasons above stated, the claim of J. E. Dayton Company for \$115 must be denied.

And now, April 30, 1920, it is ordered that the claim of J. E. Dayton Company for an allowance of \$1.15 out of funds in the trustee's hands be denied, and that an order of distribution be made, allowing said company to participate in the funds for distribution only to the extent of its unsecured claim pro rata with other unsecured creditors.

A. R. Jackson, of Williamsport, Pa., for claimant, Jones & Lewis, of Coudersport, Pa., for trustee,

WITMER, District Judge. The question presented in the certificate for review has been fully and well considered in an opinion filed by the learned referee, which has the approval of the court and may be considered as expressing the opinion of the court. It follows that the exceptions filed are set aside, and the order of the referee, disallowing the claim of J. E. Dayton Company for allowance of \$115 out of the funds in hands of the trustee in bankruptcy, except as an unsecured claim, is hereby affirmed.

ANDERS v. SECURITY MUT. LIFE INS. CO. OF BINGHAMTON, N. Y.

(District Court, E. D. Pennsylvania. November 13, 1920.)

No. 7286.

Courts \$\iftharpoonup 347\toperaction Defendant's time to plead governed by Judicial Code, \& 29, \dots instead of state Practice Act.

In a common-law action removed from the state to federal court, the defendant may file his affidavit of defense within 30 days after filing the record in the federal court, under Judicial Code, § 29 (Comp. St. § 1011), although the Pennsylvania Practice Act requires such affidavit to be filed within 15 days.

At Law. Action by James M. Anders against the Security Mutual Life Insurance Company of Binghamton, N. Y. On rule by plaintiff Rule discharged.

William Clarke Mason, of Philadelphia, Pa., for plaintiff. Joseph S. Conwell, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The act of the plaintiff in seeking to hold an advantage claimed to have been secured through an oversight of the defendant would seem to be an ungracious one, except for the circumstance that this case arises out of the fact that the defendant has done this very thing itself. In consequence, there is no complaint made because the plaintiff is seeking to hold the defendant to a strict compliance with all the laws regulating rights or remedies.

The action was begun in a state court. The defendant removed it to this court. The record was here filed on the thirtieth day. No point is made of this because it is conceded defendant in this was taking no more time than it had the right to take, although taking to the utmost all to which it was entitled. Having, however, taken this 30 days it claims the right to take 30 more before filing an affidavit of defense to the statement of claim. This right the plaintiff denies, and, on the contrary, has asserted his right to judgment by default, and, having taken his judgment, is now seeking to have his damages assessed.

The question involved is best presented by a recital of the record facts. The action having been brought and a statement filed, with the usual indorsement, under the state Practice Act of 1915 (P. L. Pa. 1915, 483), the plaintiff had the right to judgment by default, unless an affidavit of defense was filed. Before the time for filing this affi-

davit had expired, a petition for removal was granted. Nothing further could be done until the record was filed in this court or until the 30 days in which to file it had expired. The record having been filed in due course, all further proceedings must be had in this court "in the same manner as if [the action] had been originally commenced" here.

Thus far there is no dispute. If the action had been originally brought in this court, our jurisdiction to determine the cause would have been because of the diversity of citizenship. In common-law actions (as this would have been) the conformity statutes require the practice, pleadings, and procedure to follow the state practice. Practice Act of 1915 is in consequence our guide. Under that act the defendant must file an affidavit of defense within 15 days, and judgment may be entered for want of such affidavit, if it be not filed. No affidavit was filed, and plaintiff filed his præcipe for judgment. The record shows the filing of this præcipe and the entry of the present rule. The point sought to be made by the plaintiff is that he is entitled to judgment after 15 days. The defendant asserts its right to 30 days within which to answer, etc., planting its claim of right upon section 29 of the Judicial Code (Comp. St. § 1011), the requirement of which is that the plaintiff "shall within 30 days [after the record is filed in this court] answer," etc., "to the declaration or complaint in said cause, and the cause shall then proceed," etc. Within this time an affidavit of defense was filed, which the plaintiff asks to have stricken from the record.

The question involved is: Was this affidavit filed in time? It clearly was not, unless section 29 expands the 15 days given by the state law to 30 days given by that section. This thought of extension of the time limit is combated by the plaintiff, the position being taken that the Judicial Code leaves the state practice in control if it establishes a time limit, and itself establishes a time limit only in case the state practice does not. Cain v. Commercial Pub. Co., 232 U. S. 124, 34 Sup. Ct. 284, 58 L. Ed. 534, and Garvey v. Compania Metalurgica Mexicana (D. C.) 222 Fed. 732, are cited in support of the proposition advanced.

Neither of these cases is quite in point. In the Cain Case the real question involved was whether by a removal proceeding a defendant submitted himself to the jurisdiction of the court to which the cause was removed, and thereby forestalled all right to call in question the validity of the service of the original writ. The Garvey Case is to the like effect, and was ruled upon the authority of the Cain Case.

It may be true, as asserted by the plaintiff, that there is no statute, nor is there any decision of the courts, which expressly gives to a defendant who has removed a case from the state court a longer time within which to make answer to the statement of claim than he would have had, had the action been originally brought in the court to which it was removed; but the inference drawn that no extension of time results to such a defendant does not follow. Even upon the practical construction which plaintiff has himself given to the quoted section of the Judicial Code, the effect of this statute is to enlarge the time

within which the affidavit of defense must be filed. Had the suit originally been brought in this court, the affidavit of defense must have been filed within 15 days after service of the statement of the claim and rule to answer, and yet the plaintiff has conceded that a defendant may have as much as 60 days' time allowance after service of the rule in the state court.

The effect of the removal statute, therefore, is to extend the time, unless what is meant is to treat the filing of the record as if that were the commencement of the action in this court. In a sense, of course, it is; but to conclude that it is such commencement, in the sense of when the time within which the affidavit must be filed commences to run, is to beg the whole question, because it is the putting of a construction upon section 29 which is decisive of the point involved. If the position of the plaintiff be tenable, it is because a statement of claim, with a rule to answer, was filed when the record was filed in this court. The argument is that, as this court proceeds as a state court would proceed, and as the state court would give judgment after 15 days, this court should give judgment after 15 days, notwithstanding the fact that section 29 gives 30 days before judgment can be entered. This is for the reason that section 29 is to be construed as meaning, not that the defendant may plead within the 30 days, but that he shall plead within 15 days, if the state statute so requires, and in any event within 30 days. Section 29, however, only requires the defendant to plead within 30 days after the filing of the record, and that "the cause shall then proceed." If this means, as contended by the defendant, that the cause, after being brought here by removal proceedings, is treated as an action here brought and put at issue, but is not so treated until the time for filing the pleas has expired, the whole argument on behalf of the plaintiff fails.

The position advanced by the plaintiff, that the cause, when it proceeds, proceeds here in conformity with the state practice, we think is well taken. Section 29, however, undoubtedly gives a defendant 30 days within which to file an affidavit of defense or other plea or answer, which the state practice may require. If it had been intended by Congress not to give a defendant this 30 days' time allowance, when the state practice gave him a less time, this intention could have been expressed in a few words. Not only is there no such expression, but, on the contrary, the expiration of the 30 days is made the beginning of the time when this court can take action.

The argument ab inconvenienti is equally unconvincing. A petition for the removal of a cause undoubtedly results in delay. This is regrettable, but unavoidable. The industry of counsel has not been rewarded by the finding of any ruling upon the precise point now before us, nor do we know of any. As between the parties to this cause, the question is to be determined as one of strict right. We say this because, from the viewpoint of the defendant, the plaintiff is seeking to recover a snap judgment, and a ruling which would give the plaintiff such a judgment is pronounced to be "a travesty on justice." On the other hand, from the viewpoint of the plaintiff, the defendant has

already entered such a snap judgment in its own favor, and is seeking to delay an inquiry into its validity, if not its justice.

Without entering into this feature of the case, our conclusion is that, as it was the legal right of the defendant to delay filing its petition until a time just before an affidavit to the statement of the claim was required of it and after having had its petition for removal allowed, it had a legal right to delay the bringing of the record into this court until the last of the 30 days allowed for the purpose, it also had a like legal right to withhold an affidavit of defense until the end of the 30-day limit fixed by section 29.

We do not have access to the record, and it is not entirely clear from the paper books just what the formal motion before us is, but whether it is a rule for judgment, or for the assessment of damages, or to strike from the record the affidavit of defense filed, its disposition is dependent upon the construction before given to section 29 of the Judicial Code, and the rule taken by the plaintiff, whatever it is, is discharged.

UNITED STATES v. CORNWALL & L. R. CO.

(District Court, M. D. Pennsylvania. November 29, 1920.) No. 921.

1. Master and servant \$\infty\$=13—Hours of Service Act entitled to reasonable construction.

Hours of Service Act, § 2 (Comp. St. § 8678), limiting time on duty in telegraph offices, etc., must be given such reasonable, sensible construction as will promote its beneficial purpose.

 Master and servant = 13—Telegraph office held to be in "night and day" class, within Hours of Service Act.

A railroad telegraph office, operated 15 hours per day in winter and 16½ hours in summer, held continuously operated night and day, within the Hours of Service Act (Comp. St. §§ 8677-8680), limiting an employe's time on duty to nine consecutive hours in such offices.

Master and servant = 13—Periods allowed for meals not deducted in computing time under Hours of Service Act.

In a prosecution for violating the Hours of Service Act (Comp. St. §§ 8677-8680), periods ranging from 20 to 50 minutes, allowed a telegraph operator for meals, will not be deducted in computing his consecutive hours of service.

At Law. Suit to recover penalties by the United States against the Cornwall & Lebanon Railroad Company. Judgment for plaintiff.

R. L. Burnett, U. S. Atty., of Scranton, Pa.

E. E. McCurdy, of Lebanon, Pa., and Chas. H. Bergner, of Harrisburg, Pa., for defendant.

WITMER, District Judge. This suit is brought by the United States to recover penalties for alleged violations of the act of Congress approved March 4, 1907, known as the 'Hours of Service' Law, wherein (section 2 [Comp. St. § 8678]) it is provided:

"That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any 24-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime."

There are, practically, two cases involved in the 11 counts of the government's complaint. The first 6 counts allege that on six different days the defendant company required and permitted its certain telegraph operator and employee, J. H. Killinger, to be and remain on duty at Chestnut Street, Lebanon, Pa., station, for a longer period than 9 hours in a 24-hour period, to wit, from 5:55 a. m. to 5 p. m. It is admitted by the defendant that the station at Lebanon was open and operated daily from 6 a. m. to 9 p. m. during the winter months, and from 6 a. m. to 10:30 p. m. during the summer months. Killinger's hours were from 6 a. m. to 5 p. m., a period of 11 hours, when he was succeeded by another operator, who served from 5 p. m. until closing hour, at 9 p. m. or 10:30 p. m., depending upon the season.

The sole question presented as to Killinger, therefore, is whether he was employed in a 'daytime' office or a 'day and night' office. This question of an office operated only during the daytime and one operated continuously, night and day, was touched upon, but not decided, by the Supreme Court in the case of United States v. Atchison, Topeka & S. F. Railway Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361. In

that case the court said:

"The antithesis is between places continuously operated night and day and places operated only during the daytime. We think that the government is right in saying that the proviso is meant to deal with all offices, and, if so, we should go farther than otherwise we might in holding offices not operated only during the daytime as falling under the other head."

If, then, it was not a daytime office, it must fall within the class called 'night and day' offices. United States v. Grand Rapids & I. Ry. Co., 224 Fed. 669, 140 C. C. A. 177; U. S. v. Atlantic C. L. R. Co., 211 Fed. 897, 128 C. C. A. 278.

[1] In determining the question, the nature and purpose of the act must be borne in mind. In interpreting the proviso, it must be given such reasonable, sensible construction as will promote its beneficial purpose, and effect the intention of the Congress that enacted it. U. S. v. St. P. & S. S. M. Ry. Co., 250 Fed. 384, 162 C. C. A. 452.

"This is not a criminal statute, and therefore is not governed by the rule of strict construction. Johnson v. Southern Pacific Co., 196 U. S. 17, 25 Sup. Ct. 158, 49 L. Ed. 363; St. L. S. W. Ry. Co. v. U. S., 183 Fed. 771, 106 C. C. A. 136. It is rather a remedial statute, which should be so construed, if its language permits, as to best accomplish the protective purpose for which it was enacted. Stewart v. Bloom, 11 Wall. 493, 20 L. Ed. 176; Bechtel v. United States, 101 U. S. 597, 25 L. Ed. 1019. Obviously, that purpose was to promote the safety of employees and the traveling public by prohibiting hours of service which presumably result in impaired efficiency [of servants] for discharging their important duties." U. S. v. Atlantic Coast Line Railroad Co., 211 Fed. 900, 128 C. C. A. 275.

[2] It is reasonable to suppose that Congress intended in general to include in the "daytime" class such offices as had the lighter business,

which could be readily handled by one operator, and to include in the "night and day" class those offices which had such amount of business as would require several operators, in which case only would it be practical to have a 9-hour limit. Therefore in the former class the 13-hour period was allowed; in the latter, only a 9-hour period. U. S. v. M., St. P. & S. S. M., supra.

An office may be operated a portion of the night and a portion of the day, and yet fall beneath the class which is called "daytime" offices. As was said by Judge Knapp in the Atlantic Coast Line Case cited:

"The classification of an office is fixed by the length of time it is kept open, and not in the least by the nature of the duties performed, if only those duties include the handling of train orders as occasion may require."

It appears that, where an office is open such a length of time as to require more than one operator with a 13-hour period, then, there being two or more operators required to complete such period, 9-hour periods would become practicable. And such, indeed, was the view of the Interstate Commerce Commission, the administrative body charged with the enforcement of the act, who, on March 8, 1908, made a ruling—287(g):

"The commission interprets the phrase 'continuously operated night and day' as applying to all offices, places, and stations operated a portion of the day and a portion of the night, a total of more than 13 hours. The phrase 'operated only during the daytime' refers to stations which are operated not to exceed 13 hours in a 24-hour period, and is not considered as meaning that the operator thereat may be employed only during the daytime."

It has been repeatedly decided that the ruling of an administrative body charged with the enforcing of a law is not lightly to be disregarded, but is entitled to great weight. U. S. v. Moore, 95 U. S. 763, 24 L. Ed. 588; Heath v. Wallace, 138 U. S. 582, 11 Sup. Ct. 380, 34 L. Ed. 1063; United States v. T. F. A., 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; Pennell v. P. & R., 231 U. S. 675, 34 Sup. Ct. 220, 58 L. Ed. 430.

In the case of Killinger, his hours were from 6 a. m. until 5 p. m., or 11 hours, when he was succeeded by another operator, who served from 5 p. m. until 9 p. m. or 10:30 p. m. The office itself was open 15 hours in winter and 16½ hours in summer. It was not such an office as was contemplated by Congress in the term "operated only during the daytime," and the government's contention is consequently correct, that defendant violated the act in requiring Killinger to remain on duty more than 9 hours.

[3] The remaining five counts refer to A. W. Garman, defendant's telegraph operator at Bellaire, Pa. It appears that Garman began his period of duty at 6:40 a. m.; that at 6:55 a. m. he was relieved until 7:55 a. m., or a period of 50 minutes, and was further relieved between 7:45 a. m. and the completion of his period by other periods of from 20 to 30 minutes for dinner, and 30 to 45 minutes for supper. He completed his work at a time ranging between 8:59 p. m. and 9:03 p. m. The total period, from 6:40 a. m. to 9 p. m. would be about 14 hours 20 minutes.

It is contended by defendant that, if the period of 30 or 40 minutes for meals at noon and in the evening be deducted, together with a 50-minute period in the morning, it would bring the time Garman was on duty within the 13 hours. This presents a question, therefore, not arising in the Case of Killinger, viz.: Is a respite granted the operator during the period for meals to be deducted from his hours of duty? In the Atchison Case the Supreme Court said: "A trifling interruption would not be considered." It has been practically held, in the cases to which reference has already been made, that the defendant cannot break the continuity of working hours by closing the office for small periods of 30 or 40 minutes during the day, and in this manner avoid the statute. U. S. v. St. Louis Southwestern Railway Co. of Texas (D. C.) 189 Fed. 954.

The statute was intended to promote the safety of employees and the traveling public by affording sufficient time for recreation and rest, so that small periods during their hours of duty for meals would not offer any opportunity for rest as contemplated. Such intermission must be counted as a part of the continuous service. Brief periods allowed for meals should not be deducted from the time of service; they are "trifling interruptions," in the language used by the Supreme Court in the Atchison Case. It follows that Garman remained on duty more than 13 hours in a 24-hour period, in violation of that statute.

Defendant must accordingly be found guilty upon each of the 11 counts. In none of the cases does the violation appear aggravated; hence judgment will be entered against defendant for the minimum fine of \$100 on each of the counts, being a total of \$1,100. Defendant to pay the costs.

In re BHAGAT SINGH THIND.

(District Court, D. Oregon. October 18, 1920.)

No. 998.

Aliens 61—Hindu lawfully entering admissible to citizenship.

Rev. St. § 2169, as amended (Comp. St. § 4358), authorizing the naturalization of aliens who are "free white persons," held not repealed as to nations of India by Immigration Act Feb. 5, 1917, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289½b), which by territorial delimitations excludes such persons from entry, and a high-caste Hindu, native of India, who lawfully entered prior to the passage of that act, and possesses the requisite qualifications, held entitled to admission to citizenship.

In the matter of the petition of Bhagat Singh Thind for admission to citizenship. Petition granted.

Thomas Mannix, of Portland, Or., for applicant.

V. W. Tomlinson, of Portland, Or., U. S. Naturalization Examiner.

WOLVERTON, District Judge. The applicant is a high-caste Hindu, born in Armitsar, Punjab, in the northwestern part of India. He is 28 years of age, and was admitted into this country on July 4, 1913,

at Seattle, Wash. He entered the army, and served therein for six months at Camp Lewis, and was accorded an honorable discharge; his character being designated by the officer granting the discharge as "excellent." He was acting sergeant at the time of his discharge.

The testimony in the case tends to show that, since his entry into this country, the applicant's deportment has been that of a good citizen, attached to the Constitution of the United States, unless it be that his alleged connection with what is known as the Gadhr party or Gadhr Press, a publication put out in San Francisco, and the defendants Bhagwan Singh and others, prosecuted in the federal court in San Francisco for a conspiracy to violate the neutrality laws of this country, has rendered him an undesirable citizen. He was on friendly terms with Bhagwan Singh, Ram Chandra, and others who had to do with the Gadhr Press, and, after Bhagwan Singh's conviction, while the latter was on his way to the penitentiary at McNeil Island, met him at Portland, at the depot, and subsequently visited him at the penitentiary three or four times.

He stoutly denies, however, that he was in any way connected with the alleged propaganda of the Gadhr Press to violate the neutrality laws of this country, or that he was in sympathy with such a course. He frankly admits, nevertheless, that he is an advocate of the principle of India for the Indians, and would like to see India rid of British rule, but not that he favors an armed revolution for the accomplishment of this purpose. Obviously, he has modified somewhat his views on the subject, and now professes a genuine affection for the Constitution, laws, customs, and privileges of this country.

Were his allegiance to the laws and customs of this country dependent upon his protestations alone, I should not be inclined to give them credence. They are, however, strongly corroborated by disinterested citizens, who are most favorably impressed with his deportment, and manifestly believe in his attachment to the principles of this government. I have not attempted to analyze the testimony critically, because of its length, but, from a careful survey of it, I am impressed that his deportment here entitles him to become a citizen, unless it be that he is debarred from citizenship under the naturalization and immigration laws of Congress.

I am not disposed to discuss the question as one of first impression whether a high-class Hindu, coming from Punjab, is ethnologically a white person, within the meaning of section 2169 of the Revised Statutes, as amended (Comp. St. § 4358). I am content to rest my decision of the question upon a line of cases of which In re Mohan Singh (D. C.) 257 Fed. 209, In re Halladjian (C. C.) 174 Fed. 834, and United States v. Balsara, 180 Fed. 694, 103 C. C. A. 660, are illustrative. I am aware that there are decisions to the contrary, but am impressed that they are not in line with the greater weight of authority.

A crucial question presented is whether the third section of the Immigration Act of Congress of February 5, 1917 (39 Stat. 874, 875 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 42891/4b]), operates as a repeal of section 2169, R. S., in so far as it embraces the

words "white persons." Section 3 excludes Hindus from admission into this country by territorial delimitations. The act became effective May 1, 1917. Subsequently thereto, it became unlawful for a Hindu to enter the United States, and it may be confidently affirmed that no person who entered the United States unlawfully can be admitted to citizenship therein.

Bhagat Singh did not enter unlawfully. He came at a time when he had a right to enter, and was permitted to enter in pursuance of law. The act in question does not purport to disturb his present domicile here, nor does it impose any further duty upon him by which he may maintain such domicile. Neither does it require of him that he shall depart the country. Furthermore, I find nothing in the act that evinces an intendment that it should operate retrospectively; that is, to render his lawful entry presently unlawful. We may inquire, then, respecting the status of Hindus lawfully domiciled in this country. Shall they remain here as they please, without the privilege of becoming citizens, or shall they be deported whence they came? If the latter, how and when? As to these questions, the law is silent, unless section 2169 and the naturalization laws are still applicable.

Repeals by implication are not favored, and, unless there is manifest repugnancy between the later and the former act, the former must remain operative. The argument is that, as Congress eliminated the words "white persons" from the Immigration Act, the act in question, it must be inferred that it intended to eliminate these words also from section 2169, and thus to amend that section accordingly. This does not necessarily follow. Congress was dealing with the subject of immigration, and not of naturalization, and it may well be that Congress designed thenceforth to exclude Hindus from entry into the United States, and still permit such as were domiciled here the privilege of being naturalized. In this light, I see no repugnancy between the act and section 2169 and other naturalization regulations.

I see no analogy in this act to the Chinese Exclusion Act. To illustrate, by the sixth section of the Act of May 5, 1892 (27 Stat. 25, [Comp. St. § 4320]), it was made the duty of Chinese laborers within the limits of the United States at the time of the passage of the act, and who were entitled to remain therein, to apply to the collector of internal revenue of their respective districts, within one year, for certificates of residence; and it was further provided that any Chinese laborer who neglected or refused to comply with the provisions of the act, or who, after one year from its passage, was found within the United States without such certificate, should be deemed and adjudged to be unlawfully therein, and should be deported accordingly. This statute has been sustained, and the courts have held that the United States can forbid aliens coming within their boundaries, and expel them from their territory. Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.

So it has been held that a certificate issued to a Chinese laborer, under the fourth and fifth sections of the Act of May 6, 1882 (22 Stat. 58), as amended July 5, 1884 (23 Stat. 115), conferred upon him

no right to return to the United States of which he could not be deprived by a subsequent act of Congress. Chae Chan Ping v. United States, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. This case is illustrative.

The present act, however, does not deal with the Hindus and other races without the delimitations, other than to debar their further admission into this country. It does not require such as are here to depart, and, there being no manifest repugnancy between this and the naturalization laws, it must be concluded that Bhagat Singh is entitled to his naturalization.

Application of SHUMPKA.

(District Court, N. D. New York. November 29, 1920.)

Removal of causes \sim 22—Person indicted for violating state liquor tax law not entitled to remove case to federal court.

A person indicted for violating a state Liquor Tax Law, by selling a liquid which the federal Prohibition Commissioner had approved, is not entitled to have the case removed to the federal court, under Rev. St. § 643 (Comp. St. § 1015), providing that prosecutions commenced in a state court against revenue officers, or persons holding property under title derived from such officers, etc., may be removed.

Anthony Shumpka was indicted in a state court for violating the state Liquor Tax Law, and applies for removal of the proceedings to the United States District Court. Application denied.

Edwin J. Mizen, of Oswego, N. Y. (Charles N. Bulger, of Oswego, N. Y., of counsel), for petitioner.

Francis D. Culkin, Dist. Atty., of Oswego, N. Y., for the People of New York.

COOPER, District Judge. Anthony Shumpka was indicted in the county of Oswego, in the state of New York, in the Northern district of New York, by a grand jury of the Supreme Court of the state, for violation of the Liquor Tax Law of the state of New York (Consol. Laws, c. 34), under indictment claiming that he sold brandy, whisky, and gin. The matter was remanded to County Court of Oswego County for trial.

The defendant claims that he is entitled to have the case tried in the District Court of the United States, pursuant to the provisions of section 643 of the Revised Statutes (section 795, Barnes' Code; section 1015, Comp. Stat.). The defendant by his attorney, and the district attorney of Oswego county, come before the United States District Court of the Northern District of New York by consent for determination of the question whether or not the case is one properly triable in the federal court under the section referred to.

The defendant bases his claim on the ground that the liquid which he sold, and for which sale he is indicted, is a medical preparation known as "Bozak's Horko Vino," and that he was authorized to sell the same by virtue of a writing which the defendant claims is a per-

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mit, within the terms of the Volstead Act (41 Stat. 305), which is in the form of a letter from the federal Prohibition Commissioner to the manufacturer of the Horko Vino, and which reads as follows:

"Treasury Department, Bureau of Internal Revenue, Washington.

"Office of Federal Prohibition Commissioner, Pro-Tech-Div.

"JMD.

February 28, 1920.

"Bozak Manufacturing Company, Scranton, Penna.—Sirs: Inquiry has been made through your attorney, Mr. B. C. Keith, as to the status of your preparation known as Bozak's Horko Vino under the National Prohibition Act.

"An examination of the formula submitted at this time shows that a preparation made in strict conformity therewith would be properly classed as a medicine. No liability under the National Prohibition Act would be incurred by the sale thereof in good faith as a medicine.

"Approval of the formula is given, with the understanding that the finished product will contain the therapeutic properties such as would be imparted

thereto by the agents named in the amounts indicated.

"Respectfully

John F. Kramer, Prohibition Commissioner."

The determination of the question depends upon the interpretation of the scope and intent of section 643 of the Revised Statutes. This section was originally enacted for the protection of federal officers who are engaged in the enforcement of the federal internal revenue laws and persons assisting such officers in the enforcement of such laws. The act was passed in consequence of an attempt by one of the states to make penal the collection by United States officers within such state of duties under the revenue law. Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648. The scope of this section has since been enlarged, by preventing suits in the state courts, not only against those enforcing the revenue laws, but also officers of either house of Congress in the discharge of their official duties in executing any order of such house, and against any officer of the courts of the United States while engaged in any official act. The purpose of this act is, then, to remove from state courts to the federal courts civil actions or criminal prosecutions against any of these three sets of officers in the performance of their official duties, and against persons assisting the officers in the performance of official acts under the revenue laws. This section was interpreted in Johnson v. Wells Fargo & Co. (C C.) 98 Fed. 3, 8. The court said:

"The purpose of the statute is to protect the revenue officers of the government in the line of their official duties, and those who are employed to act under them in the performance of such duties; but, further than providing this necessary protection to the administration of its revenues, the federal government has no interest in the business affairs of the people incidentally brought within the range of the tariff system. The statute must be interpreted with reference to its manifest spirit and general purpose, and a word or phrase should not be extended beyond its proper relation to give jurisdiction where jurisdiction does not appear to have been intended. Moreover, where the question of jurisdiction is doubtful, the rule now is to resolve that doubt against the jurisdiction of the federal courts."

See, also, Findley v. Satterfield, Fed. Cas. No. 4,792.

Although a marshal or deputy marshal is not an officer appointed under a revenue law, yet, when engaged officially in attempts to enforce

the revenue law, he is an officer under that law, and entitled to the protection of section 643, and so are persons acting with him for the enforcement of the revenue law. So held in Davis v. South Carolina, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574.

It may be doubted whether the position of the defendant under his claim of right by virtue of the statement of the federal commissioner issued to the manufacturer of the Horko Vino sold by defendant is any stronger than that of one holding the license of the United States under internal revenue laws authorizing him to keep and sell liquors before the passage of the eighteenth amendment. This was held by the state court of Maine not to be a case removable to the United States court under the section aforesaid. State v. Elder, 54 Me. 381-383, citing Commonwealth v. Keenan, 11 Allen (Mass.) 262.

It is clear, therefore, that the instrument issued by the Prohibition Commissioner under date of February 28, 1920, to the manufacturer of this Horko Vino, relating to the sale of Horko Vino "in good faith as a medicine," does not bring the case within the provisions of section 643 of Revised Statutes of the United States, entitling the defendant to a trial of the indictment in the federal court.

AMERICAN NAT. BANK OF MACON v. COMMERCIAL NAT. BANK OF MACON et al.

(District Court, S. D. Georgia, W. D. November 2, 1920.)

No. 25.

1. Costs @ 0-Not apportioned at law.

At law there is no apportionment of costs, and the judgment runs in solido against all defendants

 Costs \$\iff 60\$—In equity in discretion of court.
 In equity the court has a discretion as to the costs, and may impose them all on one party, or divide them as it sees fit; but this power is not arbitrary, and must be exercised with sound discretion.

3. Costs \$\infty\$=60—In equity usual practice is to award in solido, but rule may be varied.

The usual practice in equity, where there are several defendants, all of whom are cast in the suit, is to award costs in solido against all; but the rule may be varied, when equity and good conscience require a different judgment.

4. Banks and banking \$\infty\$=250(7)\$—Costs of suit against stockholders ap-

portioned according to holdings of stock.

Under Rev. St. § 5151, as to the liability of national bank stockholders for debts, it is just and equitable, in a suit against a national bank and its stockholders, to apportion the costs between the stockholders in proportion to their holdings of stock; the costs resulting from litigation of the issues made by pleas being apportioned only between the litigating

In Equity. Suit by the American National Bank of Macon against the Commercial National Bank of Macon and others. On motion for apportionment of costs. Costs apportioned in accordance with the opinion.

See, also, 248 Fed. 187.

Hardeman, Jones, Park & Johnston, of Macon, Ga., for plaintiff. Hall & Grice, R. L. Berner, and Chas. L. Bartlett, all of Macon, Ga., for defendants.

BEVERLY D. EVANS, District Judge. A suit was brought by the American National Bank of Macon against the Commercial National Bank of Macon and its shareholders to enforce the collection of a debt, pursuant to the act of June 30, 1876 (19 Statutes at Large, 63). The suit eventuated in a decree against the defendant bank and against each of its shareholders to the extent of the amount of their stock. Some shareholders resided out of the state of Georgia, and were not parties to the action. Some shareholders, who were parties, did not defend. A motion is made to apportion the costs between the various shareholders, based on their several holdings of stock.

[1-3] The suit is in equity, and is in the nature of a creditors' bill. At law there is no apportionment of costs, and the judgment runs in solido against all the defendants. In equity the court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit. This power in the court over costs in equity cases is not arbitrary, and must be exercised with sound discretion. The usual practice in equity, where there are several defendants, all of whom are cast in the suit, is to award the complainant costs in solido against all of them, but the rule may be varied when the losing parties can show that equity and good conscience require a different judgment. Westfeldt v. N. C. Mining Co., 177 Fed. 132, 100 C. C. A. 552.

[4] As a general proposition, where various persons are severally and not jointly liable to a common creditor, each must be individually proceeded against. The act of 1876 permits a joinder of all shareholders of a national bank to enforce each shareholder's individual That liability is restricted by the statute which creates it; shareholders being individually responsible, equally and ratably, and not one for another, for debts of the bank, to the extent of the amount of their stock therein. R. S. § 5151. The dominant idea is the limitation of the liability of the shareholder to the amount of his stock. It would seem that the spirit of this restrictive liability would be violated by awarding judgment for costs in solido. Suppose there should be only five stockholders in a bank, holding, respectively, the following number of shares: One, 5, 10, 50, and 250, of the par value of \$100, and the costs should aggregate \$1,000. Would it be equitable and right to make the holder of one share pay the same as the holder of 250 shares? If such be the case, the shareholder with one share would pay in costs double the par value of his stock, and the holder of 250 shares would pay less than \$1 per share on his holding. Moreover, the holder of the 250 shares might be insolvent, and his burden would be cast on the minority stockholders, multiplying the liability of the holder of the single share of stock almost to the extent of oppression. Such a result would be repugnant to the spirit of the statute, that the extent of the stockholders' liability was gauged by the amount of their stock, ratably, and not as surety for one another.

If all the defendants were solvent, of course, the plaintiff could have no reasonable objection to an apportionment of the costs. But it is argued that, where some of the defendants may prove insolvent, the plaintiff, though recovering judgment against such insolvent defendants, would have to pay the costs assessed against them. This argument is urged against the contention that apportionment of costs would be equitable. The circumstance that the plaintiff will lose some of his costs is no more a hazard of litigation than that he will lose his judgment on account of the defendant's insolvency.

There is another consideration. Suppose, when the decree adjudicating the several shareholders' liability is entered, some shareholders desire to pay, and others wish to prosecute an appeal. If the costs have been apportioned, then a defendant could settle the judgment against him, and leave his more litigious codefendants to prosecute

appeal proceedings.

So that on the whole I think that it is within the power of the court, and that it is neither inequitable nor unjust to the plaintiff, that the costs be apportioned among the defendants, the basis to be as follows: All the costs at the time the case was at issue to be apportioned between all defendants at the ratio of their several holdings of stock. Costs subsequently accruing, brought about by reason of litigation on issues made by pleas, to be apportioned among litigating defendants at the ratio of their respective holdings of stock.

A judgment on the motion to apportion costs may be taken in ac-

cordance with the views herein expressed.

In re RIVAS.

(District Court, S. D. Florida. June, 1920.)

1. Bankruptcy 409(2)—Destruction of records without intent to conceal

does not prevent discharge.

Proof that the bankrupt destroyed his canceled checks and stubs in cleaning out his safe, after turning his business over to his principal creditor, but that thereafter he and his attorney stood ready to produce all books desired by the trustee, does not show an intent to conceal his financial condition, which intent is necessary to prevent his discharge for the destruction of the checks.

2. Bankruptcy \$\infty\$ 408(3)—Use of money for individual purposes is not concea'ment.

The use by the bankrupt of money taken from the business for his personal expenses, and for the discharge of individual debts, is not a concealment of his assets with intent to hinder or delay creditors, which prevents his discharge.

3. Bankruptcy \$\infty\$ 409(2)—Change of books, not made to conceal situation, does not prevent discharge.

Proof that two entries in one of the bankrupt's books had been changed by some one, without proof that it was done by the bankrupt, and where the change was obvious, and the true situation was apparent from other books, does not establish a falsification of the books with intent to conceal his financial condition, and does not prevent discharge in bankruptcy.

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In Bankruptcy. In the matter of the estate of Henry Rivas, bankrupt. On specifications of objection to the bankrupt's petition for discharge. Specifications not sustained, and bankrupt held entitled to discharge.

George C. Bedell and David H. Doig, both of Jacksonville, Fla., for bankrupt.

Frank J. Heintz and Haley & Heintz, all of Jacksonville, Fla., for

objecting creditors.

CALL, District Judge. This cause comes on for a hearing upon specifications of objection to the bankrupt's petition to be discharged. The specifications are 11 in number.

The first is that with intent to conceal his financial condition he failed to keep books of account or records from which such condi-

tion might be ascertained.

I find nothing in the evidence to sustain this specification. On the contrary, the testimony shows that he had a regularly employed bookkeeper for the purpose, and that two auditing concerns were able, from the books kept in the business, to make balance sheets showing the assets and liabilities of the business.

The second specification is that with intent to conceal his financial

condition he destroyed his canceled checks.

The third is that with like intent he destroyed or concealed his bank pass books.

The fourth is that with like intent he destroyed or concealed three

day books.

The fifth is that with like intent he concealed or destroyed one of his ledgers.

The ninth is that the bankrupt disobeyed an order to deliver all his

books and papers to his trustee.

[1] These five specifications may be disposed of together. There is no question that the canceled checks and stubs were destroyed when the bankrupt turned his business over to his largest creditor in part extinguishment of the debt due, when cleaning out the safe. There is no proof that any ledger was destroyed. There can be no doubt but that the bankrupt and his attorney stood ready at all times to produce any and all of the books of the business desired by the trustee. The circumstances surrounding the destruction of the canceled checks and stubs, and the attitude of the bankrupt in relation to the books and records of the business packed in a box, negatives any intent to conceal his financial condition, and this intent is necessary in order to prevent his discharge.

[2] The sixth specification is that the bankrupt did conceal certain moneys, within four months prior to his adjudication, with intent to

defraud or hinder his creditors.

The proofs do not sustain this specification. A consideration of the testimony convinces me that there was no concealment. The bankrupt lived upon the money collected and paid some individual debts unquestionably, but this does not constitute concealment of assets with intent to hinder or delay creditors.

[3] The seventh specification is that with intent to conceal his financial condition he falsified his books of account.

There seems little doubt that two items in the ledger account of "Rivas Loan Account," were changed by some one; a \$1,400 item being changed to \$400, and a \$1,000 item to \$100. As shown by the testimony this change in the ledger account, the cash book remaining unchanged, could not in any manner affect the status of the business as to its financial condition. The cash book showed the items correctly, a withdrawal of those amounts by the owner of the business. As I said, the change was attempted by some one, was patent from an examination of the items, but it seems to me to tax one's credulity to the breaking point to say that whoever made or attempted the change did so with intent to conceal the financial condition of the bankrupt. It was apparent from an examination that some erasure or change had been attempted in an account which had not been used in the business for some considerable time before the bankruptcy proceedings, and which change would have no effect upon the financial condition of the bankrupt. Nor does the proof show such change to have been made by the bankrupt.

The eighth, tenth, and eleventh specifications are admittedly not sustained, and therefore will not be noticed.

I therefore find the specifications of objection not sustained, and that the bankrupt is entitled to his discharge.

GAITHER v. MILES, Internal Revenue Collector.

(District Court, D. Maryland. October 23, 1920.)

1. Internal revenue S—Policy transferred, with reservation of right to change beneficiary, subject to estate tax.

Where decedent, in having a policy on his life made payable to his son and daughter, reserved the right to again change the beneficiary, the policy remained a part of his estate, and subject to the estate tax.

2. Internal revenue S—Endowment policy transferred, with reservation of right to amount, if maturing before insured's death, held taxable.

Where insured, in transferring an endowment policy to his son and daughter, provided that, if he were living at its maturity the amount should be paid to him, its proceeds were subject to the estate tax, as the transfer was not to take effect in possession or enjoyment until his death.

3. Internal revenue \$\iftharpoonup 28\$—Executor held not to have burden of showing transfer of policies was not in contemplation of death.

That a man, leaving an estate of over \$580,000, shortly before his death transferred insurance policies aggregating \$21,973.69, did not throw on his executor the burden of proving that they were not transferred in contemplation of death.

4. Internal revenue —8—Insurance policies, absolutely assigned, held not transferred in contemplation of death.

Insurance policies, assigned by insured within two years before his death at the age of 83, held not to have been transferred in contemplation of death, so as to be subject to the estate tax.

At Law. Action by Thomas H. Gaither, Jr., against Joshua W. Miles, Collector of Internal Revenue. Judgment for plaintiff for part of the amount sued for.

George R. Gaither, of Baltimore, Md., for plaintiff. Samuel K. Dennis, of Baltimore, Md., for defendant.

ROSE, District Judge. [1] The plaintiff, as executor of the late Thomas H. Gaither, is here suing to recover \$3,469.63, paid under protest as an estate tax upon \$34,695.25, the proceeds of five insurance policies upon the life of the testator, who, about two months before his death, had caused them to be made payable to his son and daughter. In the transfer of one of these policies, he reserved to himself the right to again change the beneficiary. That policy remained a part of his estate. Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143.

[2] Another of them was of the endowment class. It had about 19 months longer to run. He provided, if he were living at its maturity, the amount then becoming due under it should be paid to him. In neither of the above instances was the transfer intended to take effect in possession of enjoyment until the death of the assignor, and the proceeds of these policies, amounting to \$12,921.60, were accordingly sub-

ject to tax as part of his estate.

[3] In none of the other three policies did the testator reserve any interest, either to himself or to his personal representatives. The transfers of them were made without consideration, and within much less than two years before his death. They were for the aggregate amount of \$21,973.69. Substantial as that sum is, it is, however, less than 4 per cent. of his whole estate, which amounted to upwards of \$580,000, and they scarcely form such a material part of it as throws upon the plaintiff the burden of proving that they were not parted with in contemplation of death. Has the government shown that they were?

[4] At the time the transfers were made, the testator was 83 years of age. Some 3 years before, he had a very slight paralytic stroke. Its effects had largely, if not altogether, passed off, and for a man of his age he was in a fair state of health, until about 10 days before his Although his physician and neighbor kept an eye upon him, he was able to go wherever business or pleasure called him, and appears to have kept the management of his affairs in his own hands. About the time he transferred the policies in question, he unquestionably had on his mind the desirability of making provison for what would happen after he died. He made a new will, but one which did little more than confirm a number of other wills and codicils which he had executed in the course of the preceding quarter of a century. The essential scheme of all of them was the same; the difference in their terms being due to their having been from time to time adapted to changes in family conditions. He owned some warehouses in Baltimore, worth upwards of \$100,000. A part of the lot or lots upon which these buildings stood were subject to a ground rent, and in Maryland, as personalty, would have to be administered through the orphans' court. The balance was in fee simple, and, over that, that court would have no jurisdiction.

Some complications might result, and to avoid that possibility, some 6 or 8 weeks after he assigned his life insurance policies and made his latest will, he executed certain conveyances, the effect of which was to cut down his interest in these lots to a life estate, with remainder to his children.

Besides these warehouses and his life insurance, he had upwards of \$400,000 of other property. Although more than \$150,000 of this property was in the form of readily transferable stocks and bonds, he made no attempt to part with any of them. His care to reserve to himself a life estate in his warehouses, and to provide that, if he were living 19 months, later, when his endowment policy matured, what would then be due should be payable to him, tends to show that in the summer of 1919 he was not in expectation of immediate death.

Under all the circumstances, I do not feel justified in holding that the three policies, which were absolutely assigned, were within the statutory meaning of the phrase "transferred in contemplation of death."

It follows that the plaintiff is entitled to recover the sum of \$2,173.70 improperly levied upon these policies.

THE GOODHOPE.

(District Court, W. D. Washington, N. D. October 14, 1920.) No. 5417.

Customs duties \$\iiin\$ 133—Intoxicating liquors \$\iiin\$ 244—National Prohibition Act procedure for forfeiture of vehicles exclusive.

A gasoline launch, used to unlawfully import liquor from Canada, was not forfeitable under Rev. St. § 3061 et seq. (Comp. St. § 5763 et seq.), but only under the National Prohibition Act, § 26, as to forfeiture of vehicles when transporting liquor: the latter remedy being exclusive, and section 3061 et seq. applying only where the article imported is merchandise and can be entered at the custom house.

Libel for Forfeiture. Information by the United States against the Goodhope, a gasoline launch, her engines, etc. On exceptions to the sufficiency of the libel. Exceptions sustained.

Robert C. Saunders, U. S. Atty., of Seattle, Wash., and F. R. Conway, Asst. U. S. Atty., of Tacoma, Wash.

Bronson, Robinson & Jones, of Seattle, Wash., for claimant.

NETERER, District Judge. A libel of information has been filed against the gasoline launch Goodhope, 5 net tons burden, charging that on the 13th day of June, 1920, one Ernest Kruse, then in charge of said launch, did knowingly, willfully, fraudulently, and with intent to defraud the revenue of the United States, import and bring into the United States from the Dominion of Canada, a foreign place, 439 quarts of spirits, distilled from grain and other materials, merchandise of foreign manufacture, then subject to duty by law, and also 439 glass bottles, appraised by the collector of customs at \$21.95, and subject to

duty; that the launch was appraised under the direction of the collector of customs at \$1,900, and that the launch is in possession of the collector of customs; and it prays that the launch be condemned and forfeited to the United States, in accordance with the provisions of sections 3061-3082, 3095-3099 and 2865, Rev. Stat. (Comp. St. §§ 5763-5765, 5767-5785, 5807-5811, 5548).

The claimant has excepted to the sufficiency of the libel, on the ground that the statute upon which it is based does not authorize the forfeiture. It is contended by the claimant that the Eighteenth Amendment and the National Prohibition Act (41 Stat. 305) supersede the sections of the statute upon which the right to forfeit is predicated. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 64 L. Ed. 946, decided June 7, 1920.

The Eighteenth Amendment provides (section 1):

"After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited."

From this it appears that intoxicating liquors may be imported, except "for beverage purposes."

Section 3, title 2, National Prohibition Act, provides:

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this Act, * * * liquor for non-beverage purposes * * * may be * * * imported * * * but only as herein provided, and the Commissioner may, upon application, issue permits therefor. * * * "

Section 35, title 2, of the act, supra, provides:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall * * * not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor."

It is apparent from the provisions of this act that intoxicating liquor may be imported for nonbeverage purposes. It is likewise manifest that the provisions of this act shall not in any way interfere with the operation of existing law, except where it is inconsistent, and the act expressly provides that persons shall not be relieved from any taxes or other charges imposed upon the traffic in such liquor. Traffic means commerce, trade, sale, or exchange of merchandise; to buy, sell, or trade. Bouvier, Law Dict.; Levine v. State, 35 Tex. Cr. R. 647, 34 S. W. 969. Traffic may be state or interstate. Ft. Worth & D. C. Ry. Co. v. Whitehead, 6 Tex. Civ. App. 595, 26 S. W. 172. It is likewise manifestly apparent that traffic may be domestic or foreign.

In order, however, that intoxicating liquors may have a legal status as merchandise, it must come into the United States in harmony with the provisions of the Prohibition Act, supra, which requires as a prerequisite a permit from the Commissioner. No permit having been issued, it could not be entered at the custom house; it was contraband

the instant it came into the United States, and the vessel carrying it was subject to forfeiture under section 26 of the act, supra. Section 3061 et seq., supra, have application only where it is merchandise and can be entered at the custom house. U. S. v. One Ford Automobile, (C. C. A.) 262 Fed. 374. Forfeiture depends upon the statute. U. S. v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555. The taking and detention must be in harmony with the statute. U. S. v. 267 Gold Pieces, et al. (D.C.) 255 Fed. 217. The Prohibition Act, supra, provides a procedure for forfeiture of vehicles when transporting liquor, contrary to its provisions, and the remedy is exclusive. U. S. v. Hydes (D. C.) 267 Fed. 470, filed July 24, 1920.

Nor can subsection 83, § 5291, U. S. Comp. Stat., which makes dutiable glass bottles (containers of the contraband liquor), aid libelant, since section 25, title II, Prohibition Act, includes containers, together with the liquor, and makes all subject to disposition by the court.

The exceptions are sustained.

UNITED STATES v. ANDERSON.

(District Court, D. Montana. October 20, 1920.)

No. 3583.

Post office \$\infty\$=48(1)—Indictment for libelous matter on envelope need not allege character of contents.

Under Criminal Code, § 212 (Comp. St. § 10382), making it an offense to mail "matter otherwise mailable by law, upon the envelope or * * * wrapper of which, or any postal card upon which," is any language of a libelous or defamatory character, the contents of such an envelope is immaterial, and an indictment thereunder held not insufficient because it did not allege that the envelope contained "mailable matter."

Criminal prosecution by the United States against Art M. Anderson. On motion in arrest of judgment. Motion denied.

W. W. Patterson, U. S. Atty., of Helena, Mont. Wheeler & Baldwin, of Butte, Mont., for defendant.

BOURQUIN, District Judge. The indictment charges that defendant mailed "a certain envelope, upon and on the outside of which was then and there written a libelous, scurrilous, and defamatory epithet, * * * as follows: Liars"—following the address, "Montana Loyalty League," a voluntary association of persons. He objected to evidence, upon the ground that no offense is charged within section 212, Criminal Code (section 10382, West's Comp. Stats.).

Convicted on evidence also disclosing that the envelope contained mailable matter, though not alleged in the indictment, upon the same ground he moves in arrest. Said statute provides it is a punishable offense to mail "matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which," is any indecent, lewd, obscene, libelous, scurrilous, or defamatory

matter or epithet. U. S. v. Higgins (D. C.) 194 Fed. 539, and U. S. v. Gee (D. C.) 45 Fed. 194, would hold the indictment insufficient; U. S. v. Burnell (D. C.) 75 Fed. 824, sufficient.

It is believed the latter is the better doctrine. The evil at which the statute aims is not contents, but envelopes, neither greater nor less by reason of contents or absence of them. The object is not regulation of contents, but of envelopes. The intent is not to penalize mailing matter in denounced envelopes, but mailing the envelopes themselves; and all to the end that not only may postal patrons be protected from defamation exposed to postal employees, but also that postal employees may be protected from obscenity exposed to and thrust upon them. There may be none to defame; the address may be fictitious or absent; for matter is mailable, though not addressed.

The gist of the offense is the exposed objectionable matter itself in due course of mail, not that it is exposed inclosing other matter. The statutory words, "matter otherwise mailable," in view of the legislative intent and object, may reasonably be taken, not as defining the offense, but only as "words that are but circumstances and conveyance in the putting of the case," and not controlling construction. See Potter's Dwarris, 246 et seq. Strict construction is not absolute in the case of all penal statutes, nor in all terms thereof.

Intent and object ascertained, words may be given their fullest meaning, and common sense applied to avoid absurdity. Laws for the suppression of a public wrong, or to effect a public good, or to supply a remedy for a general mischief, are not always in the strict sense penal laws, to be given strict construction. Taylor v. U. S., 3 How. 210, 11 L. Ed. 559; Potter's Dwarris, 261; Endlich, Stats. § 337. An envelope without contents is in its nature so far a postal card that in that aspect it is within the statute. The instant case is within the mischief of the statute, and, having in mind the rule illustrated by Lacher's Case, 134 U. S. 624, is believed also sufficiently within the letter of the statute, unless construction that sticks in the bark be adopted.

Motion denied.

UNITED STATES V. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. November 28, 1916.)

Nos. 162, 163.

Criminal law \$\iffsigmo 641(1)\$—Right of defendant to have assistance of counsel.

Refusal of the clerk of a District Court to file a precipe for entry of appearance of counsel for a corporation defendant in a criminal case without payment of the statutory fee held not a violation of defendant's constitutional right "to have the assistance of counsel for his defense."

Criminal prosecution by the United States against the Philadelphia & Reading Railway Company. On rule to require clerk to file præcipe without payment of fee. Rule discharged.

See, also, 237 Fed. 292.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa. William Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This rule involves in money an inconsiderable sum, but the underlying principle involved is considered by defendant to be one of importance, at least as an abstract principle. The case is one of indictment. The defendant is a corporation. The latter attempted to put in an appearance, and presented a præcipe, signed by its counsel, for this purpose. The clerk demanded the required fee for the filing of this paper, which the defendant refused to pay. It may be interpolated that the action of the clerk followed the instructions from the United States authorities having in charge the accounting for such fees. The present rule is to require the clerk to file the paper without exacting either the payment of the costs or the entry of security therefor. The allowance of the rule is based upon the constitutional right of every defendant to the assistance of counsel, and the refusal to permit the appearance paper to be filed without the payment of the costs is averred to be a denial of this constitutional right.

We are of opinion that the rule should be discharged, and this opinion is based upon these two considerations. In the first place, we do not see that any question of constitutional right fairly arises. The right to the assistance of counsel is an undoubted one, but there is a wellmarked distinction between the denial of a right and the regulation of the practice to be followed in its assertion. The right of any litigant to process may well be admitted, without asserting a like right to free process. A defendant, for instance, is given the right "to have compulsory process for obtaining witnesses in his favor." Const. Amend. 6. Indeed, this is coupled in the same clause of the Constitution with the right "to have the assistance of counsel for his defense." The right is dealt with in these constitutional provisions; but the right to have such process without cost comes only through those statutory provisions dealing with litigants who appear in forma pauperis. Again, a party may have the undoubted right to the benefits of a writ of habeas corpus. Whether he has the further right to gratuitous services from the officials of the law is an entirely separate and distinct question resting upon different considerations.

In the second place, whatever there is of what may be called a right to file a written paper in the course of pleading in a criminal case resolves itself into a mere matter of convenience. Primarily considered, all pleadings, so far as concerns the defendant in a criminal case, are oral. The plea of a defendant as it appears by the record is merely the memorandum made by the clerk of the court of the plea which has been orally made. A defendant, by having the appearance of counsel for him filed, secures a privilege which may be of convenience, and thus be of benefit or advantage; but such formal appearance is not required and involves no question of right. An individual defendant may put in a physical appearance or be brought into court. What may be the effect of the absence of a præcipe for appearance of counsel in behalf of a corporation defendant is a question not now presented.

The rule is discharged.

COLLINS v. BARNER.

(Court of Appeals of District of Columbia. Submitted October 8, 1920. Decided November 8, 1920.)

No. 3357.

1. Master and servant = 190(17)—Hoisting engineer, acting under positive

instructions from employer, is vice principal.

Testimony by the employer that he had instructed his hoisting engineer to start the engine on signal from the top of the shaft, regardless of conditions, shows that the engineer, in complying with such instruction, though he knew the elevator was improperly loaded, was acting as a vice principal, for whose negligence the employer is liable.

2. Master and servant = 185(7)—Coservant's negligence in providing working p'ace actionable.

A master is liable for a negligent act in the discharge of his duty of exercising reasonable care to provide the servant with a reasonably safe place to work, though that act was performed through another servant.

3. Master and servant €=205(1)—Risk of negligence of master not assumed. An employé has a right to assume that his master would not violate his duty to use due care, and therefore does not assume the risk of injury from the negligent act of the master or his vice principal in hoisting an improperly loaded elevator, where there was no proof that the employé knew of the improper loading, or that it was so observable that he must be presumed to have known it.

Appeal from the Supreme Court of the District of Columbia.

Action by Plummer Barner against Joseph W. Collins to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

I. S. Easby-Smith and R. B. Fleharty, both of Washington, D. C., for appellant.

Irving Williamson and Thos. C. Taylor, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. This is a tort action, wherein Barner, an employé of Collins, recovered judgment for damages on account of injuries sustained by him while in the line of his service, through the negligence of one O'Brien, another employé.

Appellant assigns three errors, namely, failure to peremptorily instruct the jury in his favor; failure to charge that O'Brien and others were fellow servants of Barner; and the giving of an instruction that

O'Brien was not a fellow servant of Barner.

The jury based its verdict on the fifth count of the declaration, which charged that the negligence complained of was that of the engineer, O'Brien, who was, as alleged, the agent of Collins. If he was his agent, then the court did not err in the respects mentioned.

The fifth count alleged, and the proof showed, the following: The appellant at the time of the accident was engaged in the erection of a ten-story building in Washington, and the plaintiff was employed by him as a hod carrier in connection with the work. Appellant used an open hoisting shaft, containing elevators, by means of which building material was raised 80 feet to the points where it was needed. The movements up and down of the elevators were controlled by a hoisting engine, which was operated by O'Brien, the engineer. One of the elevators was carelessly and dangerously loaded. O'Brien knew it, yet he started the engine and sent the elevator upwards. When it reached a point about 70 feet from the ground, several pieces of iron fell in consequence of the careless manner in which the elevator had been loaded. One of them struck the appellee, inflicting the injuries sued for.

[1] Touching the question as to whether O'Brien stood in the position of vice principal, when he started the engine, knowing that the elevator was dangerously loaded, Collins, the appellant, testified:

That his "orders to O'Brien were to obey signals when they were given from the top; * * * that he could not and must not start the engine on his own initiative; * * * that it was the place of the man at the top of the building to see the conditions at the bottom, and if all was clear to ring the bell to start the elevator. * * * It was the duty of the engineer. on the sounding of the bell, to start the engine, no matter what the conditions were, and those were the instructions given him."

On redirect examination he said:

That he "did not instruct O'Brien that if he saw a dangerous condition there, he was to go ahead and start the elevator, nevertheless."

This is negative. But he did not deny the positive instruction just related. In view of this testimony from the appellant, there is no room for doubt that O'Brien was a vice principal, and not a fellow servant. In what he did he was obeying his employer's unmistakable instruction. Therefore he was acting for the employer and in his stead. The appellant is as much responsible for the act as if he himself had done it.

"A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work. * * * " Baltimore & Ohio Railway Co. v. Baugh, 149 U. S. 368, 387, 13 Sup. Ct. 914, 921 (37 L. Ed. 772).

Collins failed to perform that duty, but instead rendered the work place unsafe by the positive act of O'Brien who represented him.

[2] This court has ruled that—

"If an act is done in the discharge of some positive duty of the master to the servant, then negligence in the performance of the act is negligence of the master, notwithstanding that it was performed through another servant." Spates v. Wells Bros., 43 App. D. C. 555, 559.

See, also, Carter v. McDermott, 29 App. D. C. 145, 10 L. R. A. (N. S.) 1103, 10 Ann. Cas. 601; Collins v. John W. Danforth & Co., 36 App. D. C. 592; Thompson-Starrett Co. v. Wilson, 39 App. D. C. 211. We have also said that—

If the act complained of "is not performed in the discharge of a duty devolving upon the master, there can be no liability, unless he has been guilty of some personal wrong which contributed directly to produce the injury." Collins v. Danforth Co., supra, 36 App. D. C. 600.

He (Collins) was guilty of a personal wrong, through his representative. O'Brien. The doctrine of fellow servant has no application.

[3] It is urged that Barner assumed the risk. The evidence shows he approached the elevator shaft with a wheelbarrow full of brick for the purpose of placing it on the elevator, which was then ascending. He set the wheelbarrow down to await the return of the elevator, and as he did so some one spoke to him. He turned his head to reply, and at the same moment was struck. There is nothing in the record which tends to show that he knew the manner in which the elevator had been loaded, or anything about the instructions given to the engineer to start the engine, "no matter what the conditions were." The act of negligence, which the jury found caused the injury, was the act of a vice principal. Barner had a right to assume that his employer would not violate his duty towards him by doing, through his agent, the negligent act which resulted in the injury. An employé—

"is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it." Chesapeake & Ohio Railway Co. v. Proffitt, 241 U. S. 462, 468, 36 Sup. Ct. 620, 622 (60 L. Ed. 1102).

Consult, also, Yazoo & Miss. Railroad Co. v. Wright, 235 U. S. 376, 379, 35 Sup. Ct. 130, 59 L. Ed. 277, and Texas & Pacific Railway Co. v. Archibald, 170 U. S. 665, 672, 18 Sup. Ct. 777, 42 L. Ed. 1188.

We perceive no error in the record; therefore the judgment is affirmed with costs.

Affirmed.

COLEMAN v. SCHWARTZ.

(Court of Appeals of District of Columbia. Submitted October 13, 1920. Decided November 8, 1920.)

No. 3365.

1. Insane persons €=33(1)—Appointment of committee without hearing relatives voidable only.

Under Code of Law 1901, § 115b, giving the court authority to direct the affairs of insane persons and to appoint a committee for such persons after hearing the nearest relatives, the hearing of the relatives is not essential to the court's jurisdiction, so that an appointment of a committee without such hearing is an irregularity, and is voidable only, not void, and can be confirmed by the court after hearing a relative.

2. Insane persons ⋘34—Court has discretion to name committee, reviewable only for abuse.

Under Code of Law 1901, § 115b, no one has the right to be appointed committee of an insane person; but the court can name such person as it may think proper, and its action is subject to review only where its discretion has been abused.

3. Insane persons \$\iff 34\$—Appointment as committee of trustee under mother's will held not abuse of discretion.

It was not an abuse of discretion for the court to appoint as committee of an insane person the executor and trustee designated by the mother of the insane person, since the court has jurisdiction to supervise the Acts of the trustee and the committee, and there is no necessity that the duties be performed by separate persons.

Appeal from the Supreme Court of the District of Columbia.

Petition by Belle Coleman for the removal of Edward P. Schwartz as committee of a lunatic. Petition dismissed, and petitioner appeals. Affirmed.

E. Hilton Jackson, of Washington, D. C., for appellant.

C. W. Darr and R. J. Whiteford, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. Belle Coleman appeals from a decree of the Supreme Court of the District, dismissing her petition for the removal of Schwartz as committee of one Brumidi, a lunatic, and ratify-

ing and confirming his previous appointment.

In June, 1916, Brumidi was decreed to be of unsound mind and committed to St. Elizabeth's Hospital for the Insane. Schwartz, being the executor of the last will and testament of Brumidi's mother, and trustee of a life estate in his favor under her will, petitioned the court in March, 1919, to appoint him as a committee for Brumidi, and he was subsequently appointed. Some six months after this Coleman, claiming to be a first cousin of Brumidi, petitioned for the removal of Schwartz, on the ground, as alleged, that his appointment was made without notice to Brumidi's next of kin, who were residents of the District of Columbia. Schwartz, at the time he made his application, did not know that Brumidi had any relatives in the District. Coleman does not petition on behalf of the other relatives, although she names them. She speaks for herself only.

[1] The Code provides that the court—

"shall have full power and authority to superintend and direct the affairs of persons non compos mentis, and to appoint a committee or trustees for such persons after hearing the nearest relatives of such person or some of them if residing within the jurisdiction of the court, and to make such orders and decrees for the care of their persons and the management and preservation of their estates, * * * as to the court may seem proper." Section 115b.

It will be noticed that by the first part of the section the court is given jurisdiction of the affairs of insane persons, and by the second part is authorized to appoint a committee or trustee of such persons after hearing the nearest relatives of such person or *some* of them. Having jurisdiction, the failure to hear the relatives before making the appointment was merely an irregularity which at most rendered the appointment voidable, not void. Kimball v. Fisk, 39 N. H. 110, 75 Am. Dec. 213, and note.

Assuming that the appointment of Schwartz was voidable, the court had the right, after hearing from Coleman, one of the nearest relatives, to ratify and confirm the appointment. This is what the court did, for it says in its decree, after dismissing the Coleman petition:

"That the appointment of Edward P. Schwartz as committee herein be and the same is hereby ratified and confirmed."

[2, 3] There is nothing in the statute which gives to any one the right to be appointed the committee of an insane person. The court has power to name such person as it may think proper. Its action in that regard is subject to review only where discretion has been abused, and there is no suggestion of anything of that kind in the present proceeding. Mr. Schwartz had the confidence of Brumidi's mother. She named him as the executor of her will, and gave into his charge as trustee a life estate in favor of Brumidi. The manner in which he has gathered and preserved the estate of his ward, as indicated by the record, shows that the court made no mistake in his selection.

It is objected that, unless some other person is appointed as the committee of Brumidi, there will be nobody in existence to see that Schwartz discharges faithfully his trust under the terms of the will. But the answer to this is that he, both as testamentary trustee and committee, is under the control and direction of the court. The court would undoubtedly gladly listen to any one who knew that he was not faithful to his duty. Moreover, the question as to whether two persons should have been appointed, one for each position, or one person for both places, rested in the sound discretion of the court, and is not subject, on this record, to review by us.

We think the action of the court was right, and the judgment is affirmed with costs.

Affirmed.

HARDEBECK v. HAMILTON et al.

(Court of Appeals of District of Columbia. Submitted October 8, 1920. Decided November 8, 1920.)

No. 3359.

Landlord and tepant \$\iffightarrow\$94(4)—Delivery of notice to quit to tenant's wife, who delivered to tenant at landlord's request, sufficient personal service.

Where a landlord delivered a notice to quit to the tenant's wife, with request that she deliver it to the tenant, which she agreed to do and did do, there was sufficient service to comply with Code of Law 1901, \\$ 1223, which requires personal service, but does not specify by whom the service shall be made, since the notice was personally served on the tenant by his wife.

Appeal from the Supreme Court of the District of Columbia. Action by Richard E. Hamilton and another against E. G. Hardebeck. Judgment for plaintiffs, and defendant appeals. Affirmed.

F. J. Rice, of Washington, D. C. (Bell, Marshall & Rice, of Washington, D. C., on the brief), for appellant.

Geo. E. Hamilton and J. J. Hamilton, both of Washington, D. C. (Edmund Brady, of Washington, D. C., on the brief), for appellees.

SMYTH, Chief Justice. Hardebeck was in possession as tenant of a house which the Hamiltons desired. They, claiming to be the owners

of it and entitled to its possession, commenced action to oust Harde-

beck. From a judgment in their favor, Hardebeck appeals.

The only question argued is one affecting the sufficiency of the service of the notice to quit. Richard E. Hamilton went to the premises for the purpose of making the service. He found Mrs. Hardebeck there. She informed him that her husband was not at home, and that she did not know when he would be. Hamilton left the notice with her, and asked her to deliver it to her husband when he returned. This she did, according to the admission of her husband. Was this service sufficient?

The Code provides that-

"Every notice to the tenant to quit shall be served upon him personally, if he can be found, and if he can not be found it shall be sufficient service of said notice to deliver the same to some person of proper age upon the premises," etc. Section 1223.

There is nothing in this which requires that the landlord in person, or an officer, shall make the service. It may be made by any person acting for the landlord. In this case the wife, at the request of the landlord, handed the notice to the tenant, and thus he was personally served with it. The same exactness is not required in the serving of such a notice as in the serving of a summons or subpœna, where the Code points out by whom and how the service shall be made. Wilson v. Trenton, 53 N. J. Law, 645, 23 Atl. 278, 16 L. R. A. 200; Ewing v. O'Malley, 108 Mo. App. 117, 82 S. W. 1087. They must be served officially, because the statute requires it; but, in the case of a notice to quit, service by any person is enough, so long as the tenant receives the notice in time to allow him the statutory period to vacate.

We find nothing to the contrary in the cases cited by appellant. They say in effect that service of a notice not made in accordance with the statute, even though the notice subsequently reaches the defendant, is invalid. We may grant that, but here the service was made just as the statute requires.

The judgment is affirmed, with costs.

Affirmed.

NATIONAL HARNESS MFRS.' ASS'N v. FEDERAL TRADE COMMISSION et al.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1920.)

No. 3289.

1. Commerce 3—Congress can prevent unfair competition in interstate

Congress has the power to declare, as it did by the Federal Trade Commission Act (Comp. St. §§ 8836a-8836k), that unfair methods of competition in interstate commerce are unlawful, and to require that their practice cease.

 Constitutional law \$\infty\$-80(2)—Trade-marks and trade-names \$\infty\$-80\%, New, vol. 8A Key-No. Series—Federal Trade Commission not given judicial powers or invalid executive powers.

The authority given the Federal Trade Commission to determine what methods of competition a given trader employs, and, provisionally, to determine whether such methods are unfair, subject to right of review by the courts, does not confer on the commission judicial powers, or invalid executive or administrative authority, contrary to Const. arts. 1, 2, 3, in view of the fact that the commission's determination is not only subject to review, but is enforceable only by the courts.

3. Constitutional law \$\iiint 42\)—Party cannot complain of invalid sections not invoked against him.

A petitioner, seeking review of an order by the Federal Trade Commission requiring petitioner to desist from certain practices, cannot raise the question that the inquisitorial features of Federal Trade Commission Act, §§ 9, 10 (Comp. St. §§ 8836i, 8836j), violate Const. Amend. 4, which protects against unreasonable searches and seizures, where the commission did not attempt to exercise against petitioner the powers given by those sections.

4. Trade-marks and trade-names \$\infty\$80\%, New, vol. 8A Key-No. Series—Trade Commission has jurisdiction over incorporated association of manufacturers: "corporation."

Under Federal Trade Commission Act, § 5 (Comp. St. § 8836e), giving the commission jurisdiction when it has reason to believe that any person, partnership, or corporation is guilty of unfair competition, the commission has jurisdiction over methods of an association of manufacturers in a certain line, though the association is unincorporated, in view of section 4 of the act (section 8836d), defining a corporation as any company or association, incorporated or unincorporated, organized to carry on business for its own profit or that of its members.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corporation.]

Associations = 20(4)—Brought into court by service on officers and accessible members.

A voluntary association having many members may be brought into court by service on its officers and on such of its members as are known and can be conveniently reached; sufficient being served to represent all the diverse interests.

6. Trade-marks and trade-names €=30½, New, vol. 8A Key-No. Series—Association whose members are engaged in interstate commerce is subject to jurisdiction of Trade Commission.

An unincorporated association of manufacturers in a certain line of business is subject to the jurisdiction of the Federal Trade Commission, if its members are engaged in interstate commerce, and interstate commerce is directly affected by the alleged unfair methods of competition.

7. Trade-marks and trade-names \$\iiint\$80\frac{1}{2}, New, vol. 8A Key-No. Series_ Methods of competition which substantially affect conditions in harness

trade have public interest.

The activities of an association of harness manufacturers, which substantially affect conditions in the harness and saddlery trade, are such that proceedings by the Federal Trade Commission would be to the interest of the public, so that the commission has jurisdiction thereof, under section 5 of the Federal Trade Commission Act (Comp. St. § 8836e).

8. Trade-marks and trade-names 68-Trade Commission can prevent

coercion to separate jobbing and retail business.

Attempts by an association of harness manufacturers and by a saddle maker's association to coerce the separation of the wholesale and retail harness dealers, by refusing to recognize those who engage both in the wholesale and retail trade as authorized jobbers, and to prevent the sale by manufacturers of accessories to such persons, are unlawful, and may be restricted by order of the Federal Trade Commission.

9. Trade-marks and trade-names \$\iiins\$80\forall2. New, vol. 8A Key-No. Series—

Trade Commission Act is preventive.

The Federal Trade Commission Act (Comp. St. §§ 8836a-8836k) is intended to afford a preventive remedy, not a compensatory one, so that the suggestion that no damage has been shown by the practices complained of, is no defense to proceedings before the Federal Trade Commission.

Petition to Set Aside Order of the Federal Trade Commission.

Original petition by the National Harness Manufacturers' Association against the Federal Trade Commission and others, to review an order of the Commission requiring petitioner and its co-respondents to cease certain alleged unfair methods of competition in interstate commerce. Order of Commission affirmed.

See, also, 261 Fed. 170.

Leonard Garver, Jr., of Cincinnati, Ohio (Lorbach & Garver, of

Cincinnati, Ohio, on the brief), for petitioner.

Marvin Farrington, of Washington, D. C. (Claude R. Porter and Marvin Farrington, both of Washington, D. C., and Walter B. Wooden, of Chicago, Ill., on the brief), for respondents.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Original petition under section 5 of the Federal Trade Commission Act (Act Sept. 26, 1914, c. 311, U. S. Comp. Stat. § 8836a et seq.) to review an order of the commission requiring petitioner and its co-respondents to cease and desist from certain alleged unfair methods of competition in interstate commerce. The proceeding was brought against both petitioner, the National Harness Manufacturers' Association of the United States of America (hereinafter called the Harness Manufacturers' Association, or the petitioner), its officers and the members of its executive committee by name, as well as about 20 local associations composing the membership of the Harness Manufacturers' Association, and the Wholesale Saddlery Association of the United States (hereinafter called the Saddlery Association), its officers and the members of its executive committee by name, and a large number of named persons, firms, or corporations composing the membership of that association. The order to cease and desist included both associations. The Saddlery Association asks no review of the commission's order.

The petitioner here assails that order on the grounds, first, that the Federal Trade Commission Act is unconstitutional; second, that the commission had no jurisdiction in this particular case; and, third, that the order to cease and desist is not supported by the evidence.

[1, 2] 1. The constitutionality of the act is assailed, first, as assuming—

"to combine legislative, executive, and judicial powers and functions, and to confer them upon one and the same administrative body, contrary to articles I, II, and III of the Constitution, and because it assumes to authorize the commission, which is ostensibly an administrative body, to deprive persons of their property without due process of law, contrary to the Fifth Amendment of the Constitution."

This proposition is to our minds without merit. Congress plainly has power to declare unfair methods of competition unlawful and to require that their practice cease. This Congress has done by the act in question. It with equal clearness has the power to authorize an administrative commission to determine (a) the question what methods of competition the given trader employs, and (b) provisionally the mixed question of law and fact whether such methods are unfair. These questions being determined against the trader, the administrative requirement to cease and desist, prescribed by Congress, follows as matter of course, but only provisionally. The commission's determination of these questions is not final. Not only does the statute give a right of review thereon, upon application by an aggrieved trader, to a Circuit Court of Appeals of the United States, but the commission's order is not enforceable by the commission, but only by order of court. "It is for the courts, not the commission, ultimately to determine as matter of law" what the words "unfair methods of competition" include. Federal Trade Commission v. Gratz, 253 U. S. 421, 411 Sup. Ct. 572, 575, 64 L. Ed. 993.

Throughout the proceedings, not only before the commission, but before the court, the trader is given the right and opportunity to be heard. The act delegates to the commission no judicial powers, nor does it, in our opinion, confer invalid executive or administrative authority. Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Pennsylvania Railroad v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Coopersville Co. v. Lemon (C. C. A. 6) 163 Fed. 145, 147, et seq., 89 C. C. A. 595; National Pole Co. v. C. & N. W. Ry. Co. (C. C. A. 7) 211 Fed. 65, 127 C. C. A. 561. The criticism that the statute makes the commission both judge and prosecutor is too unsubstantial to justify discussion. The constitutionality of the act, against objections similar to those presented here, has recently been sustained by the Circuit Court of Appeals of the Seventh Circuit in a considered and persuasive opinion. Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307, 169 C. C. A. 323, 6 A. L. R. 358. None of the petitioner's citations contain, in our opinion, anything necessarily opposed thereto. Upon this record, we have no occasion to consider the construction or effect of the provision of the act which makes conclusive, if supported by testimony, the commission's findings as to facts as distinguished from conclusions of law, or of mixed fact and law. In saying so, however, we must not be understood to intimate that the provision referred to is invalid.¹

[3] The act is also assailed as violating the Fourth Amendment to the federal Constitution, which protects against "unreasonable searches and seizures," which petitioner asserts are provided for by the so-called inquisitorial feature of section 9 (Comp. St. § 8836i), in the declaration that "for the purposes of this act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against"; a provision whose enforcement is provided for by section 10 (section 8836j), which subjects any person to fine or imprisonment, or both, "who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control."

Of this criticism it is enough to say that the provisions in question of sections 9 and 10 are not before this court. The commission has not attempted to exercise them. Section 9 otherwise contains complete provision for enforcing, by subpœna, the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation. Beyond this the commission has not gone. That one attacking a statute as unconstitutional must show that the alleged unconstitutional feature injures him is settled by a long line of authorities, among which are Tyler v. Judges, 179 U. S. 405, 409, 21 Sup. Ct. 206, 45 L. Ed. 252; Turpin v. Lemon, 187 U. S. 51, 60, 61, 23 Sup. Ct. 20, 47 L. Ed. 70; Hooker v. Burr, 194 U. S. 415, 419, 24 Sup. Ct. 706, 48 L. Ed. 1046.

[4, 5] 2. By section 5 of the Federal Trade Commission Act (Comp. St. § 8836e) the commission is given jurisdiction, when it has reason to believe that "any * * * person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public." Section 4 of the act (section 8836d) defines a corporation as "any company or association, incorporated or unincorporated," which either (a) is organized to carry on business for profit and has shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members." The Harness Manufacturers' Association is a voluntary unincorporated association, and thus without capital stock. It is not itself engaged in business. Petitioner

¹ See the discussion in Buttfield v. Stranahan, supra, 192 U. S. at page 494 et seq., 24 Sup. Ct. 349, 48 L. Ed. 525; also in Union Bridge Co. v. United States, supra, 204 U. S. at pages 377–387, 27 Sup. Ct. 367, 51 L. Ed. 523; also in Coopersville Co. v. Lemon, supra, 163 Fed. at page 147 et seq., 89 C. C. A. 595.

contends that it therefore is not within the act. But this contention overlooks the fact that the association is not the only one proceeded against; but that its officers and the members of its executive committee, as well as its membership generally, are included in the proceedings as parties and made subject to the commission's order. The language of the act affords no support for the thought that individuals, partnerships, and corporations can escape restraint, under the act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated voluntary association, without capital and not itself engaged in commercial business. The order may be enforced by reaching the officers and members, personally and individually. A voluntary association, having many members, may be brought into court by service on its officers and such of its members as are known and can be conveniently reached, sufficient being served to represent all the diverse interests Evenson v. Spaulding (C. C. A. 9) 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. (N. S.) 904. Among the cases under the Anti-Trust Act which have enforced the liability of individual members for acts in violation of the statute, although done through a voluntary unincorporated association, are Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, Dowd v. United Mine Workers of America (C. C. A. 8) 235 Fed. 1, 5, 6, 148 C. C. A. 495, and (apparently) Eastern States Lumber Co. v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. These cases we think present a satisfactory analogy to the instant case.

[6,7] The contention that the Harness Manufacturers' Association is not engaged in commerce is answered by the consideration, first, that many of its members are so engaged; and, second, that interstate commerce is claimed to have been directly affected by the alleged unfair methods of competition. Loewe v. Lawlor, supra; Eastern States Lumber Co. v. United States, supra; Nash v. United States, 229 U. S. 373, 379, 33 Sup. Ct. 780, 57 L. Ed. 1232. The objection that the public is not interested in the activities of the association is answered by the fact that, if the commission's findings are to be accepted, trade conditions in the harness and saddlery trade have been substantially affected by the methods of competition in question. This subject will more fully appear by consideration of the nature and effect of the com-

mission's findings.

3. The harness and saddlery trade consists broadly of three divisions: (a) Manufacturers of saddlery hardware, harness goods and horse furnishing goods; (b) wholesalers and jobbers, who buy the last-mentioned classes of goods from the manufacturers and themselves manufacture harness in wholesale quantities, selling both classes of products to the retailer; (c) retail harness dealers, who sell saddlery goods at retail and to a small extent manufacture harness.

The commission's findings of fact, so far as now important, may be thus summarized: Prior to the organization of the Saddlery Association, it was the general custom for accessory manufacturers to sell direct to retailers, and in large and important sections of the United States the wholesale and retail saddlery business has long been

conducted as one operation. The Harness Manufacturers' Association is a voluntary unincorporated association, its membership being composed largely of city and district associations in various cities throughout the states of the Union; the membership of these associations being composed of concerns engaged in manufacturing and selling harness and saddlery goods at retail, and who purchase their supplies of harness and saddlery goods largely from wholesalers and jobbers in interstate commerce, including members of the Saddlery Association. The membership of the Saddlery Association, which comprised the greater part of the wholesale saddlery trade of the United States, consisted of persons and concerns engaged in selling at wholesale harness and saddlery goods in interstate commerce throughout the various states and territories of the United States to retail dealers, both members and nonmembers of the Harness Manufacturers' Association, and in direct competition with other persons or organizations similarly engaged—its declared policy being (at variance with the condition above set forth) to promote a system of trade by which the manufacturers should sell to jobbers only, the jobbers to retailers only, and the retailers alone direct to consumers; that the Saddlery Association accordingly adopted and established a rule that concerns doing a combined and closely affiliated wholesale and retail business were not eligible to new admission into the Saddlery Association (although some of its old members were still, in various parts of the United States, doing a combined wholesale and retail business), as well as a policy that such concerns were not entitled to recognition as legitimate jobbers, and that the adoption of such rule and policy was brought about in part by the influence and pressure, and in response to the overtures of the Harness Manufacturers' Association.

The commission further found that the officers, committees, and members of the Harness Manufacturers' Association and of the Saddlery Association have actively co-operated to establish the principle that a combined and closely affiliated wholesale and retail business was not a legitimate wholesale business; 2 that the secretary of the Saddlery Association has attempted to prevent accessory manufacturers from recognizing, as legitimate jobbers, wholesalers whose names were furnished by the Harness Manufacturers' Association to the Saddlery Association as complained of by retailers for competing with them; and that the Harness Manufacturers' Association has used its influence with the Saddlery Association to prevent the admission of specific concerns to membership in the latter association and the recognition of such concerns as legitimate jobbers. commission further found that the Harness Manufacturers' Association has requested and secured the co-operation of members of the Saddlery Association in a refusal to sell to mail order houses, hardware stores, general stores, and other competitors of retail harness

²It is to be noted that one of the objects of the Harness Manufacturers' Association, as stated in its constitution and by-laws, is "to protect the harness dealers from the unjust sale of goods by wholesale dealers direct to consumers."

manufacturers not recognized by the Harness Manufacturers' Association as legitimate: that the latter has refused the privilege of associate membership to accessory manufacturers and jobbers who sell to mail order houses, establishing, however, an associate membership, restricted to manufacturers, and jobbers who do not sell to consumers and to mail order houses, and who are otherwise in harmony with the policy of the association, and issuing credentials thereof to the traveling salesmen of associate members, and urging and encouraging the affiliated retailers to withdraw and withhold patronage from concerns whose salesmen were not so equipped, and have induced the members of the Saddlery Association to use their influence with the accessory manufacturers not to sell mail order houses; and that by reasons of refusals of accessory manufacturers, due to objections of the Saddlery Association, to recognize as jobbers certain competitors of members of that association, such competitors have been forced to buy from the Saddlery Association at prices higher than charged by manufacturers to recognized jobbers. The commission further found that, as a result of the opposition of the Harness Manufacturers' Association to sales by manufacturers and jobbers to the classes of competitors before mentioned, the latter had been prevented from purchasing as freely in interstate commerce as they would have been without such opposition. The findings detail many instances of specific means used to accomplish the various classes of alleged unfair methods of competition, and which we deem it unnecessary to set out.

Both the Saddlery and Harness Manufacturers' Association, its officers, committees, and members of its subsidiary and affiliated associations, were ordered to cease and desist from conspiring or combining between themselves to induce, coerce, and compel accessory manufacturers to refuse to recognize as legitimate jobbers, entitled to buy from manufacturers at jobbers' prices and terms, individuals and concerns doing or endeavoring to do a combined and closely affiliated wholesale and retail business, and from carrying on between themselves communications having the purpose, tendency, and effect of so inducing, coercing, and compelling accessory manufacturers

in the respect above referred to.

The Harness Manufacturers' Association, its officers, committees, and members of its subsidiary and affiliated associations were ordered to cease and desist from (a) conspiring or combining among themselves to induce, coerce, and compel manufacturers and jobbers to refuse to sell any of the competitors of retail harness manufacturers; (b) using any scheme whereby the active membership of the Harness Manufacturers' Association concerted to favor with or confine their patronage to manufacturers and jobbers comprising the associate membership of that association or who had not complied with its active membership by selling to certain competitors thereof; (c) using or continuing any system of credentials or other indication of manufacturers and jobbers sales policies with regard to certain competitors and consumers, and from encouraging and urging retailers to confine their patronage to or to patronize manufacturers and jobbers whose sales policy is in harmony with the Harness Man-

ufacturers' Association's requirements as before set out; (d) inducing members of the Saddlery Association to use their influence with accessory manufacturers not to sell to mail order houses or other

competitors of retail harness manufacturers.

[8] In our opinion, the commission's findings of fact, and the existence of the combinations, schemes, and practices directed to be discontinued, are amply sustained either by undisputed testimony or by the great preponderance of the evidence. This conclusion is not overcome by petitioner's criticisms addressed to specific features of the testimony. The findings of fact being so supported, the commission's order is, in our opinion, fully justified by the authorities to which attention has already been called, including especially Eastern States Lumber Co. v. United States, supra, where a state of facts quite similar to that found here was held to amount to a violation of the Sherman Anti-Trust Act. Comp. St. §§ 8820-8823, 8827-8830.

[9] In view of what has appeared, the criticism of lack of public injury is without force. The suggestion that no damage has been shown, even if true in fact, is answered by the consideration that the remedy afforded by the statute is preventive, not compensatory.

The order of the commission, so far as it relates to the Harness Manufacturers' Association, its officers, committees, and the members of its subsidiary and affiliated associations, is affirmed.

FIDELITY TRUST CO. v. MAYHUGH et al.

(Circuit Court of Appeals, Fifth Circuit. November 26, 1920.)

No. 3505.

Bil's and notes \$\infty\$=167—Provisions of mortgage do not affect negotiability
of note.

Provisions in a mortgage securing a note against waste, and requiring the mortgagor to pay taxes and maintain insurance, relate to the security only, and do not affect the negotiability of the note.

2. Bills and notes 337—Bad faith only will defeat title of purchaser of

negotiable note.

The title of a purchaser of negotiable paper in due course before maturity is not defeated by his suspicion of a defect of title, or knowledge of circumstances which would excite the suspicion of a prudent man, or gross negligence; but that result can be produced only by bad faith on his part.

3. Evidence —182—Existence of writing must be proved before secondary evidence of contents admissible.

The existence of a paper must be established before its contents may be proved by secondary evidence.

Mortgages \$\infty\$ 249 (3) — Bona fide purchaser takes free from mortgage appearing satisfied of record.

A bona fide purchaser of land held to take it free from the lien of a mortgage which had been satisfied of record by the mortgagee, although he had previously transferred the mortgage by an assignment not recorded.

Appeal from the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge.

Suit in equity by the Fidelity Trust Company against J. T. Mayhugh and others. Decree for defendants, and complainant appeals. Reversed.

Lewis M. Dabney and Robert Allan Ritchie, both of Dallas, Tex., for appellant.

Ben H. Stone, of Amarillo, Tex., and A. S. Rollins, of Dallas, Tex., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Appellant, herein designated as plaintiff, a Missouri corporation, brought suit and prayed for judgment on a promissory note and for foreclosure of a mortgage upon sections 13 and 14 of a designated survey, given to secure the note, against J. T. Mayhugh and Laura V. Mayhugh, his wife, makers of the note, and mortgagors, N. B. Mayhugh, their son, and subsequent grantee of section 13, and the Federal Land Bank of Houston, Tex., subsequent mortgagee. The note sued on is as follows:

"Number 261.

thereafter."

Amount, \$16,000.00.

"Woodward, Oklahoma, September 13, 1917.

"First Mortgage Coupon Bond.

"Negotiated by Offutt & Potter, Woodward, Oklahoma.

"On the 1st day of October, 1927, for value received, we promise to pay to the order of Offutt & Potter the principal sum of sixteen thousand dollars, lawful money of the United States of America, with interest thereon, at the rate of 6 per cent. per annum, from date until maturity, payable annually according to the tenor of ten interest coupons hereto attached, and of even date herewith; the first one being for one thousand dollars due October 1, 1918, and nine others, each for nine hundred sixty dollars, and due annually thereafter. Both principal and interest payable at the office of Offutt & Potter, Woodward, Oklahoma. All sums herein promised to be paid shall bear interest at 10 per cent, per annum, payable annually after maturity, whether the same become due according to the terms thereof, or by reason of default of any payment of principal or interest. This note is given for an actual loan of the above amount, and is secured by a mortgage, of even date herewith, which is a first lien on the property therein described. If this note is placed in the hands of an attorney for collection, we hereby agree to pay the legal holder of the same an amount equal to 10 per cent. thereof, additional, as attorney's fee. One hundred dollars, or any even multiple thereof, or the full amount, may be paid on this note on October 1, 1919, or annually

The mortgage is also to Offutt & Potter, bears the same date as the note, and contains the following provisions:

"The said first party shall not commit or suffer waste, shall pay all taxes and assessments upon said described real property, and any taxes or assessments made upon said loan or the legal holder of said note and mortgage on account of said loan, to whomsoever assessed, including personal taxes, before delinquent, shall keep the buildings thereon insured to the satisfaction of said second party for at least twenty-two hundred dollars, delivering all policies and renewal receipts to said second party, and upon satisfaction of this mortgage will accept from the mortgage a duly executed release of the same, having it recorded, and pay the cost of recording. A failure to comply with any of the agreements herein shall cause the whole debt secured hereby to at once become due and collectable, if said second party or assigns so elect."

Plaintiff alleges default in interest and other breaches not necessary to mention.

The defendants J. T. Mayhugh and Laura V. Mayhugh, his wife, in their answer admitted the execution of the note and mortgage, but averred that they had received no consideration therefor, that a written application, containing a clause constituting Offutt & Potter their agents to procur the loan, accompanied the note and mortgage, that said application was delivered by Offutt & Potter to plaintiff, and that plaintiff was aware of the contents of said application at the time it took the note and mortgage. The answer of these defendants further alleged a release by Offutt & Potter of the note and mortgage, and a deed to their son, N. B. Mayhugh, of section 14, for a valuable con-Defendant N. B. Mayhugh joined in the answer of the sideration. defendants J. T. Mayhugh and Laura V. Mayhugh. It is unnecessary to state the defense of the Federal Land Bank of Houston, inasmuch as it was stipulated at the trial that the liens of this defendant are superior to the lien asserted by plaintiff.

Plaintiff filed in evidence the note and mortgage sued on. The mortgage was indorsed by Offutt & Potter without recourse. The mortgage was filed for record September 14, 1917, the day after it was executed. Plaintiff also filed in evidence assignment of mortgage from Offutt & Potter to itself, dated October 15, 1917, and filed for record August 5, 1918. Plaintiff's vice president, Lester W. Hall, testified that on October 15, 1917, acting for plaintiff, he made a loan of \$10,000 to Offutt & Potter upon their note of that date and accepted the note and mortgage of Mayhugh and wife as collateral security and that there was a balance due on the note of Offutt & Potter of \$11,834.57, including principal and interest as of the date of his testimony. It is for this balance, together with interest and attorney's fees, that plaintiff sues.

On cross-examination the witness Hall admitted that he thought an application accompanied the Mayhugh note and mortgage, and that he told the attorney for defendants in Kansas City that he had had it, and thought he had forwarded it to his attorneys in Houston. This witness further testified, without objection, that upon examination of his correspondence with his attorneys he discovered that he only inclosed the note, mortgage, and assignment, that he then searched for the application, and could not find it, and that his impression at the time of testifying was that he had never had it. A blank application was shown this witness by defendants, and he was asked if it were not a copy of the form of application used by Offutt & Potter, and answered that, as nearly as he could remember, it was; that he was familiar with it; that plaintiff had made about 28 farm loans to Offutt & Potter, and that the form shown him accompanied practically all the loan papers. This form of application was admitted in evidence over plaintiff's objection, and to the ruling of the court admitting it an exception was noted. It contains two clauses which defendants contend preclude plaintiff from being considered a holder of the note in due course, but which, on the contrary, it is argued, were sufficient notice that Offutt & Potter were agents of the mortgagors to procure a loan for them. These clauses are as follows:

"I, ———, do hereby appoint Offutt & Potter, of Kansas City, Mo., my agents to procure or make a loan for me of \$———, * * secured by first mortgage, of approved form, on real estate, described as follows," etc.

"And I do hereby constitute and appoint Offutt Bros. my attorneys irrevocable, for me and in my name, place, and stead, to procure this loan from any person, persons, or corporations, and to forward, to the holders of notes for principal and interest, the interest money as the same becomes due from time to time, and the principal whenever it may, from any cause, become due and payable, hereby ratifying and confirming all that my said attorneys may do in the premises as fully as if done by myself."

The witness Hall further testified that he made no inquiry of Offutt & Potter as to the value of the security. At the request of defendants, this witness produced the checks of Offutt & Potter, drawn against the loan, from which it appeared that the entire proceeds were withdrawn on October 17, 1917; all the checks being certified and payable to another bank. On redirect examination, Hall testified that he had made two trips over the territory where the mortgaged land lies, with a view to lending money, within six months of the date of the loan in question; that these trips were made in company with other officials of the plaintiff corporation, and it was decided that they could afford to lend from \$8 to \$15 per acre on the land; that he first became acquainted with the firm of Offutt & Potter the latter part of 1916 or early in 1917; that he inquired of the Guaranty Title Company, of Kansas City, of which he was a director, about the standing of the firm of Offutt & Potter, and was informed that the Guaranty Title Company had investigated and found them well connected; and that all the information he acquired seemed to show they were reputable people.

The defendant J. T. Mayhugh testified that he resided in Plainview, Tex.; that at the date of the note and mortgage he owned the two sections of land, and that they were incumbered to the extent of over \$12,000; and that at the time of the execution of the note and mortgage he was not acquainted with either member of the firm of Offutt & Potter. This defendant gives the following account of the negotiations leading up to and accompanying the execution of the note and mort-

gage

"In September or thereabouts, 1917, my son, Norman, who had been authorized by me to secure a loan on the land, applied to Offutt & Potter, through their agent, Mr. Whisenant, for such loan. They agreed to make it, and September 13, 1917, I executed the deed of trust on the lands to secure notes to the amount of \$16,000, and delivered same to Mr. Whisenant, as agent for Offut & Potter. At the time the deed of trust and notes were executed, while in the office of L. R. Pearson, attorney, in the Grant Building, in Plainview, Tex., in the presence of Mr. Pearson, my son, Norman, Mr. Whisenant, and myself, Mr. Whisenant suggested that it would be necessary for these notes to be sent in to the office of Offutt & Potter, represented to be in Kansas City, Mo., for inspection, before any money could be had, and he represented that such was customary practice. He suggested that there would be plenty of time to do that and get the money back in time to take up the notes which were against the land, which was to be paid October 1st, I explained to him; the necessity of having the money by that time, and I let him have the notes to send in, with the distinct understanding that the money was to be back by October 1st. I delivered the deed of trust to Mr. Whisenant, who represented himself to be agent of Offutt & Potter. I delivered the deed of trust and notes to Mr. Whisenant, whose office is in the Grant Building, in Plainview, Tex., for

the purpose, as he represented it, that they might be inspected at headquarters office of Offutt & Potter, and with the distinct understanding that the money should be ready by October 1st, in order to take up the liens against the property. I never received any money at all on the notes and deed of trust, from Offutt & Potter, or either of them, or from any one for them."

April 15, 1918, Offutt & Potter executed satisfactions or releases of the mortgage, at which time J. T. Mayhugh refunded \$725, which represented the amount Offutt & Potter had paid the General Land Office for patent to section 14, including expenses in connection therewith. The defendants Mayhugh testified they did not learn until July, 1918, that Offutt & Potter had assigned the note and mortgage to plaintiff.

On or about May 7, 1918, J. T. Mayhugh and wife conveyed section 13, by deed, to their son, N. B. Mayhugh, and July 18, 1918, N. B. Mayhugh, as admitted by stipulation, executed a note for \$10,000, and mortgage to secure the same upon said section 13, and applied the proceeds in part payment of the purchase price. Both father and son testified that the balance of the purchase price of section 13 was represented by the services of the son theretofore rendered to the

father.

Upon this evidence the trial court found that plaintiff is not the holder in good faith or in due course of business of the note and mortgage, that defendant knew the contents of the application to Offutt & Potter for a loan, that the application actually accompanied the note, that plaintiff knew Offutt & Potter were agents, that plaintiff willfully refrained from inquiry as to the genuineness of the note, and that plaintiff knew the note was being misappropriated, and entered a decree dismissing the bill and canceling the note and mortgage.

The evidence shows, without conflict, a want of consideration. Of course, the note and mortgage were unenforceable in the hands of Offutt & Potter. Only the holder in due course of a negotiable instrument is protected against a defect of title to it. The questions for determination, therefore, are (1) whether the note is negotiable; and (2) whether plaintiff is a holder in due course. If the evidence requires that either of these question be answered in the negative, there is no

right of recovery in the plaintiff.

[1] The note, on its face, is negotiable; but defendants insist that it was rendered nonnegotiable because of the above-quoted provisions in the mortgage, against waste and requiring defendants to pay taxes and procure insurance. These provisions do not affect the negotiability of the note, because they relate only to the security, and not to the indebtedness. Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003; Farmers' National Bank of Tecumseh v. McCall, 25 Okl. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217; 3 R. C. L. 871; Chicago Railway Equipment Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349.

[2] In approaching the question of the rights of a holder in due course, it is well to keep in mind the following excerpt from Murray

v. Lardner, 2 Wall. 121, 17 L. Ed. 857:

"The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.' The party who takes it be-

fore due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud, there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence, and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder."

In First National Bank v. Wade, 27 Okl. 102, 111 Pac. 205, 35 L. R. A. (N. S.) 775, the Supreme Court of Oklahoma used this language:

"This court is committed to the doctrine that bad faith, not merely a notice of circumstances sufficient to put a prudent man on inquiry, is necessary to defeat recovery by the holder of negotiable paper, whose right accrued before maturity."

In the case of McPherrin v. Tittle, 36 Okl. 510, 129 Pac. 721, 44 L. R. A. (N. S.) 395, the court said:

"The question was one of good faith on his part; and knowledge of circumstances sufficient only to put an ordinarily prudent person upon inquiry was not sufficient to defeat his title and right of recovery."

This is an Oklahoma contract. Section 56 of the Negotiable Instruments Law (Laws 1909, c. 24, art. 5), which is in force in Oklahoma, is as follows:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The trial court found, as a matter of fact, that the plaintiff knew the notes had been misappropriated by Offutt & Potter. This finding could have been arrived at only by imputing to plaintiff knowledge of such facts as would justify the inference that it had actual knowledge of this ultimate fact. It becomes necessary to inquire whether actual knowledge or willful ignorance, which is the same thing, can be imputed to plaintiff from facts and circumstances developed by the evidence. The circumstances relied on to show knowledge are: (1) Plaintiff's failure to make inquiry into the financial responsibility of the mortgage; (2) plaintiff's failure to record the assignment of mortgage; (3) plaintiff's failure to investigate Offutt & Potter's title; and (4) the indorsement of the note without recourse.

The first and fourth circumstances are unimportant, because it is quite evident that plaintiff was not relying upon individual responsibility, but upon the value of the security, disclosed by the investigations of its own agents. The second and third circumstances do not indicate knowledge by plaintiff of the fraud perpetrated by Offutt & Potter. On the contrary, they afford strong corroboration of Hall's testi-

mony that he had confidence in the business integrity of Offutt & Potter. If Hall had suspected them of dishonesty it is not to be supposed that he would have failed to record the assignment of mortgage.

This is the circumstantial evidence which we are warranted in considering upon the issue of actual and implied knowledge, and bad faith. We recognize the principle that the circumstances ought all to be considered together, and not singly or separately. But, so considered, they show nothing more than carelessness and a too trusting disposition. We cannot escape the conclusion that these circumstances are insufficient, if taken separately, or together, to sustain the findings of the trial court.

[3] There is one other circumstance adverted to in the decree, the proof of which is practically assumed by counsel for defendants in their argument, and discussed in connection with the circumstances above considered: The form of application used by Offutt & Potter is dwelt upon at length and with much force, and, if it could be considered, would be more persuasive than all the other circumstances combined. Putting aside Hall's admission that he had a form of application at the time he took the note and mortgage as collateral security. and his testimony at the trial that he was, to the best of his belief, mistaken in his admission, we are confronted with the fact that it was nowhere shown by the evidence that any such or similar application was ever signed or executed by J. T. Mayhugh, or in his behalf, or by his authority. In their answer, defendants relied upon the existence of the so-called application, and pleaded that it constituted Offutt & Potter agents to procure a loan, was signed by the mortgagors, and delivered by Offutt & Potter to plaintiff. The testimony of both I. T. Mayhugh and N. B. Mayhugh is silent upon this question. Now, it is too well settled for discussion that the existence of a paper ought to be established before its contents can be proved by secondary evidence. The testimony of J. T. Mayhugh is in positive, direct contradiction of the idea that Offutt & Potter were agents to procure a loan. The defendants dealt with them as principals; they were seeking to borrow money, and understood that Offutt & Potter would lend it, and lend it promptly.

The similar case of Fidelity Trust Co. v. Fowler (Tex. Civ. App.) 217 S. W. 953, is urged in argument here; but in that case the application was signed, and the appellant had it at the time it acquired the note and mortgage. The construction of the application was necessarily before the court in the cited case, as was also the question of agency. Neither of these questions, for the reasons pointed out, is before us in this case. It follows that the trial court erred in admitting in evidence, over the objection of plaintiff, and in considering

the effect of, the so-called form of application.

[4] Having determined that the note is negotiable, and that plaintiff is the holder thereof in due course, it becomes necessary to consider whether the conveyance of section 13 by J. T. Mayhugh to his son, N. B. Mayhugh, is discharged from the lien of the mortgage. The grantee is a purchaser without notice; for, as we have seen, he accepted the deed after Offutt & Potter's satisfaction of mortgage was of record, and before he had knowledge of plaintiff's unrecorded assignment. Sufficient consideration is shown for the deed when the testimony as to services is taken in connection with the son's note and mortgage to the Federal Land Bank of Houston and the payment of the proceeds of \$10,000 to his father. The variance between the answer and the evidence as to the section N. B. Mayhugh owns can readily be corrected by appropriate proceedings in the court below.

The decree appealed from is reversed, and the case is remanded for

further proceedings not inconsistent with this opinion.

GILMORE v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 23, 1920.)

No. 3550.

1. Criminal law =1151-Refusal of continuance discretionary.

A motion for continuance is addressed to the discretion of the court, and its action in refusing to grant the same will ordinarily not be interfered with.

Criminal law 594(1)—Refusal of continuance for absent witness discretionary.

Refusal of a continuance because of the absence of a witness held, on the showing made, within the discretion of the court.

3. Criminal law €= 730(1)—Remarks of counsel not ground for reversal, in view of court's action.

Remarks of the district attorney in his argument to the jury held not ground for reversal, where, on its attention being called to them, the court ruled that they were improper, and admonished the attorney, and no further action was requested.

4. Internal revenue @==2-Harrison Anti-Narcotic Act constitutional.

Harrison Anti-Narcotic Act Dec. 17, 1914, § 1, as amended by Act Feb. 24, 1919, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g), making it unlawful to purchase, sell, or dispense designated drugs, except in or from the original stamped package, held constitutional, as within the revenue powers of Congress.

In Error to the District Court of the United States for the Western District of Texas; William R. Smith, Judge.

Criminal prosecution by the United States against John Gilmore. Tudgment of conviction, and defendant brings error. Affirmed.

George E. Wallace, A. J. Harper, E. F. Cameron, P. E. Gardner, and M. Scarborough, all of El Paso, Tex., for plaintiff in error.

Edmund B. Elfers, Asst. U. S. Atty., of El Paso, Tex.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The plaintiff in error, John Gilmore, was indicted jointly, with one Henry Araki, a Japanese, for purchase of 41 ounces of morphine sulphate not in or from the original stamped packages, in violation of the Act of Congress of December 17, 1914, known as the Harrison Anti-Narcotic Act, as amended by Revenue Act 1918, §§ 1006, 1007 (Comp. St. Ann. Supp. 1919, §§ 6287g, 6287l).

This act, as amended, levies a tax of one cent on each ounce or fraction thereof of opium, coca leaves, or any compound, salt, or derivative, or preparation thereof, produced, or imported into the United States, the same to be represented by stamps affixed to the bottle or other container, so as to securely seal the stopper, covering, or wrapper thereof. The Act makes it a criminal offense—

"for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs, except in the original stamped package, or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession the same may be found."

The record shows that the defendants were indicted twice; the first indictment consisting of three counts, and the second indictment of one. The case was finally submitted to the jury on the first count of the first indictment, charging the defendant with illegally purchasing, on or about January 9, 1920, in the county of El Paso, in the Western district of Texas, 41 ounces of morphine sulphate not in or from the original stamped packages. The defendants were found guilty (Araki

pleading guilty) as charged in said first count.

The evidence offered by the prosecution tended to show that Gilmore purchased this morphine through his codefendant Araki; that he gave Araki \$2,000 in money, told him to use his automobile, and that he would find a Mexican on Stanton street, near Fourth, to whom he should give the money and receive a grip or suit case with this morphine; that this conversation took place inside of the Capes Building and not on the street. Araki did get the automobile in front of the building. The evidence of Gilmore showed that he and Araki had had previous dealings concerning other matters and were well acquainted. Araki testified that Gilmore had prior to this time urged him to engage in illicit dealing in morphine. Gilmore denied this. The proof showed without contradiction that Araki took Gilmore's automobile from the Capes Building with his knowledge and brought back this suit case in said automobile to the Capes Building; that Gilmore got into the automobile and rode to the Lockie Hotel, took out the suit case, and carried it to room 31 of the Lockie Hotel.

Gilmore in his evidence admitted this, but denied he had given Araki any sum of money, and offered as an explanation of his carrying this suit case up to said room 31 that Araki had asked him to take the suit case to this room because he (Araki) had on dirty clothes, and did not care to go into a nice hotel. Gilmore denied knowing what were the contents of the suit case. In room 31 was a man named Rebentish, a Secret Service agent. He testified to having had quite a considerable preliminary conversation with Gilmore about the purchase of this morphine, and that they had arranged to meet at the Lockie Hotel, for the purpose of a delivery of the morphine being made to him by Gilmore; that Gilmore met him in room 31 with the suit case containing a number of bottles of morphine, which was opened, and he and Gilmore were counting the number of bottles when the officers arrested Gilmore. The arresting officers, who were in a closet, overheard the conversation and fully corroborated Rebentish's statements. Gilmore ad-

mitted having drawn \$2,000 from the bank that day, but denied having

let Araki have any part of it.

The plaintiff in error assigns as error that the court erred in overruling a motion to continue said case, or postpone its consideration to a later day in the term, because of the absence of Alvin Hessen, a witness, who was stated to reside in Eastland county, Tex. The showing as to the evidence of Hessen was that defendant was talking to Hessen on the streets of El Paso, in front of the Capes Building, on January 9, 1920, when the defendant Araki came up, and in the presence and hearing of Hessen requested a loan of defendant's automobile to go to a place on South Stanton street, in El Paso, that defendant did lend his automobile to said Araki, and that Hessen was present when Araki returned with said automobile; that on January 9, 1920, said Hessen told defendant he was going to Ranger, in Eastland county, Tex., to work on the pipe lines there. Defendant believes said Hessen is in Eastland county. The indictment was found on January 23d. Defendant got a copy of it on January 24th. On January 26th he applied for a subpœna, returnable instanter. No further showing was made as to the whereabouts of Hessen, or as to his testimony. court overruled the motion.

[1] A motion for a continuance is addressed to the discretion of the court, and the action of the court in refusing to grant the same will not be ordinarily interfered with. Franklin v. South Carolina, 218 U. S. 161, 30 Sup. Ct. 640, 54 L. Ed. 980; Goldsby v. United States,

160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343.

[2] In view of the fact that the testimony of Hessen, if procured, would not have contradicted the testimony of Araki, as to his receiving this money and the directions of Gilmore inside of the Capes Building, and was consistent with the fact that a conversation, as claimed, could have occurred on the outside thereof; in view of the further fact that no effort seems to have been made to ascertain whether Hessen was in Eastland county, nor does it appear that a subpœna sent to such county would have produced the witness; and taking into consideration the admitted connection of Gilmore with the handling of the suit case containing the morphine—this court cannot say that the District Judge abused his discretion in overruling the motion for continuance or postponement.

[3] The next error insisted upon is that certain remarks were made by the district attorney in his concluding argument to the jury. The attention of the court was called by counsel for the defendant to this language of the district attorney, and the judge held that said remarks were improper and admonished the district attorney. No request for any further action on the part of the court seems to have been made. This is a sufficient reply to this assignment of error. Chadwick v. United States, 141 Fed. 225, 72 C. C. A. 343. In view of the testimony in the record, which fully sustains the verdict, it cannot be said that the defendant was prejudiced by the failure of the court to take any

further action in regard to said remarks.

Error is also assigned that the court erred in failing to instruct the jury, as requested by defendant in writing, that if the morphine sul-

phate was purchased by the defendant in the republic of Mexico, or otherwise than in the state of Texas, the jury should return a verdict of not guilty. The only testimony in this case as to the place of purchase was the testimony of Araki, who testified that he received a suit case containing the morphine from a Mexican in the city of El Paso, Tex., and there paid him the \$2,000; that he did not go to Juarez that day. There was no evidence whatever on which to base such charge. The court in his charge plainly stated to the jury that to find the defendant guilty they would have to find, among other things, that the morphine in question was purchased by the defendant on or about January 9, 1920, in El Paso, Tex.

[4] The last assignment of error complained that the court should have sustained the motion of the defendant to withdraw the case from the jury, or instruct the jury to return a verdict of not guilty, because that, even if the defendant purchased the morphine sulphate after it was smuggled into the United States, and into Texas, he would be guilty of no offense, as said act of Congress, attempting to make the purchase of the morphine sulphate within a state an offense against the United

States, would be unconstitutional and void.

The act in question provides for the levy of an internal revenue tax upon each ounce, or fraction of an ounce, to be paid by the importer, manufacturer, producer, or compounder of the opium, coca leaves, compound, salt, derivative, or preparation thereof, produced in or imported into the United States and sold, or removed for consumption or sale, such tax to be represented by appropriate stamps to be so affixed to the bottle or container as to securely seal the stopper, covering, or wrapper thereof. It is made unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs, except in the original stamped package, or from the original stamped package. Under the decision in the case of United States v. Doremus, 249 U. S. 86, 94, 39 Sup. Ct. 214, 63 L. Ed. 493, we think that this act is constitutional. This provision, by confining purchases to the drugs in the packages, or from the packages stamped, clearly tends to confine the purchases and dealings in such drugs to those which have paid the internal revenue tax levied. A compliance with this law by all purchasers would extend all transactions to such drugs as had paid the internal revenue tax. As stated in the case last cited:

"Considering the full power of Congress over excise taxation, the decisive question here is: Have the provisions in question any relation to the raising of revenue?"

We think that they have quite as effective a relation to the raising of revenue as the prohibition in section 2 of said Anti-Narcotic Drug Act (Comp. St. § 6287h) prohibiting the making of sales, etc., except to persons who give orders on the forms issued by the Commissioner of Internal Revenue, and forbidding any person to obtain the drugs by means of such order forms for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business therein, or in the legitimate practice of his profession, with the exceptions in favor of prescriptions by physicians or sales upon prescriptions.

No other assignment of error in the record has been presented in the brief for plaintiff of error found in this case, and the foregoing covers all material questions in the case.

For the reasons above given, the judgment of the District Court is

affirmed.

PEOPLE OF PORTO RICO v. RUSSELL & CO.

(Circuit Court of Appeals, First Circuit. October 28, 1920.)

No. 1401.

 Waters and water courses \$\iiint 240\$—Contract held to suspend former water concessions.

A contract between the claimant of water concessions and Porto Rico, whereby the claimant agreed to accept in place of the water under its concessions stated quantities of water from improved works constructed by Porto Rico, together with certain additional water, suspended the concessions while the contract remained in force, so that any right to the water during that time must be based on the contract.

2. Waters and water courses \$\iiii 240\$—Water contract construed to ascertain intent, whether to be regarded as a grant of a simple contract.

A contract whereby the claimant of water concessions agreed to accept in place of the water claimed under its concessions a stated quantity from the irrigation works of Porto Rico, with certain surplus waters, is to be construed to ascertain the intent of the parties, and whether it be a grant or a contract is immaterial to such construction.

3. Waters and water courses \$\infty\$240—Contract held to give plaintiffs all surplus waters covered by existing concessions or contracts thereunder.

A contract by the people of Porto Rico, on the authority of Act Aug. 8, 1913 (Acts Sp. Sess. p. 38) § 13, whereby they agreed to give the claimant of certain concessions, as the equivalent of the concessions, a specified quantity of water, and in addition all water of a river available at a pumping station for irrigation of any of its said lands, gave the right to take all the surplus waters available, provided such taking should not deprive owners of subsisting water rights of water to which they were entitled, either by virtue of such water rights or by virtue of any existing or future agreement in regard thereto; this right to continue down to the time the people of Porto Rico shall undertake the utilization of the surplus waters of the river.

 Waters and water courses 247(1)—Defense that corporation, not party and not entitled to own land, was real owner, held not available.

In an action to determine the right to water under a contract, a defense by the people of Porto Rico that the water was in fact owned by a corporation, which was not a party to the action, and which owned land in excess of the amount permitted by Joint Resolution May 1, 1900, was properly stricken.

5. Appeal and error = 1050(1)—Admission of evidence as to construction of

contract not considered is not prejudicial.

Error in admitting evidence as to the proper construction of the contract is not prejudicial, where the Circuit Court of Appeals construed the contract without reference to such evidence and reached the same conclusion as the court below.

Anderson, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

EmFor other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit by the Fortuna Estates against Rafaela Castillo Veitia and others, in which Russell & Co. were substituted as plaintiffs, and in which the People of Porto Rico intervened. Decree for the plaintiffs, and the intervener appeals. Decree modified and affirmed.

The affirmative defense set up in the intervener's answer alleged that the rights which plaintiffs claimed belonged in effect to the South Porto Rican Sugar Company, a corporation which owned more than 500 acres of land in the island of Porto Rico, in violation of Joint Resolution May 1, 1900 (31 Stat. 715).

Charles Marvin, of Washington, D. C. (Dana T. Gallup, of Boston, Mass., and Richard J. Van Deusen, of San Juan, P. R., on the brief), for the People of Porto Rico.

Francis E. Neagle, of New York City (Rounds, Hatch, Dillingham & Debevoise, of New York City, on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is the same controversy over water rights in the Jacaguas river in Porto Rico which was before this court, under the name Veitia v. Fortuna Estates, 240 Fed. 256, 153 C. C. A. 182, decided December 29, 1916. The present appellees, hereinafter referred to as plaintiffs, are a partnership and are the successors in title of the original plaintiff, the Fortuna Estates.

Both the Fortuna Estates and the original defendants had entered into contracts with the people of Porto Rico pursuant to its irrigation laws. The Fortuna Estates had the earlier contract, and in the District Court sought and obtained a preliminary injunction against the exercise by the defendants of certain rights claimed under their contract, but asserted by Fortuna Estates to cover water already contracted to it. The defendants appealed to this court, which held that it was then unnecessary to determine the true construction of the Fortuna Estates' contract with Porto Rico; that all questions of interpretation should be left unprejudiced until passed upon by the District Court at a hearing wherein Porto Rico had an opportunity to be heard; and remanded the case with directions to afford Porto Rico an opportunity to intervene. Porto Rico intervened, waiving its immunity as sovereign. Porto Rico v. Rosaly, 227 U. S. 270, 273, 33 Sup. Ct. 352, 57 L. Ed. 507, Russell & Co., having become the successors in title to the Fortuna Estates, were allowed to intervene and file a supplemental complaint, and the original defendants and the people of Porto Rico respectively filed answers thereto, after which the case proceeded to trial.

Under an order of August 24, 1917, pendente lite, the plaintiffs and original defendants, by agreement, divided the water in controversy, each paying one-half the amount claimed by Porto Rico as rent or otherwise, without prejudice and subject to the result of this litigation.

On July 16, 1918, the District Court filed an opinion in favor of the plaintiffs on all issues, entered a decree affirming the validity of all the old water rights or cessions claimed by the plaintiffs, adopted the plaintiffs' construction of their contract with Porto Rico, enjoined both the original defendants and the intervener from diverting or obstrucing the flow of the water claimed by the plaintiffs, and ordered the money deposited by the plaintiff and defendants, pendente lite, paid over to the plaintiffs. As the original defendants did not desire to appeal from this decree, on motion of Porto Rico the suit was severed, and Porto Rico appealed to this court, specifying 31 assignments of error.

The Jacaguas river rises in a mountainous ridge paralleling the southern coast of Porto Rico and runs some 10 miles southerly into the sea. In the rainy season it carries a considerable volume of water. In dry times it entirely disappears from the surface for 2 or 3 miles; but lower down, in what is known as the Maturi Pool, water reappears in substantial quantities, coming down by filtration through

the sandy, porous bed of the stream.

The successful cultivation of sugar cane requires an annual water supply of about 96 inches, delivered as regularly as possible. The rainfall on the south side of the ridge is about one-half that amount. Hence for many years attempts have been made to supplement the rainfall by irrigation from the streams and also from wells. Water rights based on prescription, concessions, and royal decrees of the king of Spain were the actual or alleged appurtenances of most of the estates along the Jacaguas Valley. These concessions and claimed rights exceeded, in the aggregate, the amount of water ordinarily available during parts of the season. Consequently it was necessary to provide for the order in which water takings should be suspended as between the various competing estates. For the efficient and profitable development of sugar raising, a general public irrigation system became necessary. Such a system was provided for by the statute of February 29, 1908, amended by the act of March 9, 1911, and also of August 8, 1913. Acts Sp. Sess. 1913, p. 23. In brief these acts constituted an irrigation commission, provided for irrigation districts, to consist of lands which could be profitably and successfully irrigated, and authorized the construction of dams. reservoirs, canals, etc. These statutes provide various ways for disposing of outstanding actual or claimed water rights; one of which is condemnation, another voluntary relinquishment or agreed compensation in new water rights, and another—the one now pertinent authorized by section 13 of the act of August 8, 1913, as follows:

"In the case of any land carrying a water right or concession of which the source of supply is destroyed or impaired by the construction or operation of the irrigation system, which shall not have been relinquished or surrendered to the people of Porto Rico, such land shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of the said water right or concession.

"The commissioner of the interior is hereby authorized to negotiate with the owner or owners of such water rights or concessions, and with the owner or owners of any water rights or concessions heretofore relinquished or surrendered on condition that the lands to which they are appurtenant should form part of the irrigation district, and which lands have not been included by the irrigation commission, and the said commissioner of the interior shall be empowered to enter into agreements with such owner or owners as to the

amount of water and the time, place and conditions of delivery thereof, which shall be delivered to the lands to which the said water rights or concessions are appurtenant as the fair equivalent in value thereof, with the power on behalf of the irrigation service to enter into agreement with such owner or owners for the relinquishment to the people of Porto Rico of such water rights or concessions, and for the delivery to the lands to which the said water rights or concessions are appurtenant of such fair equivalent. Before entering into any such agreement the commissioner of the interior shall consult the Attorney General of Porto Rico as to the validity and legal status of the water rights or concessions involved."

The power of the government officials to contract with the owners of water rights was, under this section of the statute, limited to giving in exchange for the old water rights water which would be a fair equivalent in value.

The irrigation development of the Jacaguas river involved damming the river by the Guayabal Dam, about six miles from Maturi Pool, and also bringing into its reservoir the waters of the Toro Negro river from the north side of the watershed, where the normal rainfall appears to be about 100 inches a year, double the rainfall on the south side of the watershed. How much Toro Negro water was thus brought into the Guayabal Reservoir this record does not show.

The Guayabal Dam and other irrigation appurtenances were substantially completed in March, 1914. Under date of August 26, 1914, a contract was entered into between the plaintiffs' predecessor in title and Porto Rico, upon the construction of which, under all surrounding circumstances, the rights of the parties depend. The contract is lengthy, consisting of 16 paragraphs, but for present purposes may be much abbreviated. It recites that Fortuna Estates owns 4 tracts, called Fortuna, Cristina, Luciana, and Serrano, which claim to have appurtenant thereto old water rights aggregating 11,032.79 acre feet of water per year, beside an unlimited right to take torrential waters; that Porto Rico has undertaken the construction of a public irrigation system and erected the Guayabal Dam for the purpose of storing the waters of the Jacaguas and Toro Negro, "a stream arising on the north side of the main watershed," by which construction the use of the rights claimed "may be interrupted and impaired." The old rights are stated not to have been relinquished and surrendered; and further, verbatim:

"Whereas, the amount of water taken by the Fortuna Estates and its predecessors in title for the irrigation of said four tracts of land under its said claims of water rights varies from month to month in accordance with the rainfall in the watershed of the said Jacaguas river, so that it is impossible to determine in advance the exact amount of water to which the Fortuna Estates is entitled under the said claimed water rights for any fixed period of time, and the people of Porto Rico (notwithstanding the construction and operation of said Guayabal Dam) is ready to deliver from the said Jacaguas river to the said Fortuna Estates the amount of water to which the latter may be entitled under its said concessions, but, in order to facilitate and make more certain the operation of the said dam and the irrigation system of which it is a part, desires to determine and agree upon an amount of water which, delivered regularly, may, under all attending circumstances, be considered to be the fair equivalent in value for irrigation purposes of the amount of

water which the Fortuna Estates would under ordinary circumstances take and use under the said water rights and concessions; and"

It is then recited that the commissioner has authority, after consulting with the Attorney General, to agree—

"upon an amount of water equivalent to the water taken and used under said water rights and concessions and as to the time, place and conditions of delivery thereof to the lands to which the said water rights or concessions are appurtenant."

The parties, therefore, agree:

"First. The parties hereto hereby agree that the quantities of water specified in this paragraph, delivered uniformly through the year, subject to the terms and conditions specified in this agreement, together with the additional water the right to take which is provided for or reserved in paragraphs third and fourth hereof, are the fair equivalent in value of the water which the said Fortuna Estates takes under and pursuant to the concessions and water rights claimed by it, and the people of Porto Rico will, subject to the conditions and limitations hereinafter specified and at the times, places and subject to the conditions of delivery hereinafter provided for, make delivery to the Fortuna Estates for the irrigation of the said tracts of land hereinabove referred to, of the said amounts of water to wit" (summarizing):

For Fortuna, 3,306.45 acre feet per year, which is about 92 per cent. of

the old claim of 3,572.91 acre feet per year.

For Cristina, 1,312.48 acre feet per year, which is about 48 per cent. of the old claim for 2,728.969.

For Luciana, 1,260.22 acre feet per year, which is about 59 per cent. of the old claim for 2,111.42.

For Serrano, 2,379.63 acre feet per year, which is about 90 per cent. of the old claim for 2,619.769.

The reduction in the amounts allowed from an aggregate of 11,032.78 to 8,258.98 (about 75 per cent.) is grounded on the principle of equivalence, and the variation in the percentage to the different estates obviously rests on the order of suspension in times of shortage.

The contract then provides for the details of regular daily deliveries and of points of delivery—not now pertinent, except that Cristina is to receive 571.27 acre feet or .79 second feet per year of the amount above assigned to it at the Aruz pumping station. This water seems to have been regularly received. The Aruz pumping station is in the Maturi Pool, 774 feet below the Maturi intake, where, by a later contract, the original defendants were authorized to take alleged excess water, the subject-matter of this controversy, for the Boca-Chica estate.

The case turns largely upon the interpretation and application of the third paragraph of the contract, the material part of which is as follows:

"Third. Fortuna Estates is hereby granted the right while this agreement remains in force to take in addition to all amounts of water above specified, from the Jacaguas river by pump at the said Aruz pumping station, water which may be available there for irrigation of any of its said lands, to the extent that such taking shall not deprive any owners or users of subsisting water rights or concessions upon the Jacaguas river of the water to which such owners or users may be entitled, either by virtue of such water rights or concessions or by virtue of any agreement or agreements in regard thereto entered into or to be entered into by them with the people of Porto Rico: Provided, however, that should the people of Porto Rico at any time under-

take the development and utilization of the surplus waters of this part of the Jacaguas river, this right shall be understood to be limited to a maximum usage of 3.86 second feet."

The fourth paragraph, referred to in the first paragraph, deals only with torrential waters, not in controversy, and is not now material.

The contract also contains elaborate recitals by the plaintiffs' predecessor in title of the validity of its old water rights and a provision for a yearly brief use of those rights, in order that the same may not be claimed to have lapsed.

As above stated, the Guayabal Dam was completed in March, 1914, and the contract between the plaintiffs' predecessor in title and the people of Porto Rico was entered into on the 26th of August, 1914. On December 14, 1915, the people of Porto Rico entered into a contract with the original defendants, owners of the Boca-Chica estate, "to sell or lease excess water" to them for \$6 per day, or, if less than 3 acre feet per day, at the rate of \$2 per acre foot, delivered at the Maturi intake. This contract was ratified by the Executive Council on February 15, 1916.

Prior to August, 1915, the people of Porto Rico constructed a dam across the Maturi Pool at the Maturi intake, 774 feet above the Aruz pump, and about the 15th of August, 1915, began to divert the water through the Maturi intake to the Boca-Chica estate, and continued to do so from that time down to the granting of the preliminary injunction May 18, 1916. In the dam thus constructed at the Maturi intake means was provided for letting down to the Aruz pump the .79 second feet, or 571.27 acre feet, per year, which the people of Porto Rico had contracted with the plaintiffs' predecessor to deliver there regularly, so that the diversion complained of by the plaintiffs was not of all the water from the Aruz pump, but only of that which they claim the right to take in excess of .79 second feet. That the defendants diverted by means of the Maturi Dam all the water from Aruz pump in excess of .79 second feet is conceded by counsel for the people of Porto Rico in their brief, and the evidence in the case fully substantiates this concession, for the witness Hanson testified as follows:

"Since that intake was opened, and when the dam was placed in the river, I did not get any water at the Aruz pump over an excess of .79 second feet to which we are entitled, but before the dam was placed there we did receive more water than the .79 second feet that the irrigation service delivered to us regularly. * * * While this dam was in existence we were not obtaining at the Aruz pump any more than the .79 second feet of water which was delivered to us by the daily service. The effect of the construction of that dam was to prevent us from getting any water from the Aruz above the daily amount, and while that dam was in existence water passed through the Maturi Canal going to the hacienda Boca-Chica, owned by the defendants Henna and Cabrera in this case."

He further testified:

"I remember that subsequent to the time when the dam was destroyed an injunction was granted by Judge Hamilton restraining the defendants from taking water at that Maturi Canal, and after that injunction was granted, the old Maturi concession intake was sealed by the marshal of the United

States court, so that water could not pass in the canal. After that injunction was granted and that canal had been sealed up, we again received at the Aruz pump more than the .79 second feet of water to which we are entitled as a regular daily delivery, and, although I don't remember the figures, I think that we got three or four times the amount of water that we were getting, three or four times the .79 second feet. After the Circuit Court of Appeals had reversed the order granting an injunction, the old intake was not re-opened; but they constructed a dam across the river to raise the water high enough to divert it into the Maturi Canal. The canal which they were using as a result of that dam was a canal which had been opened for the purpose of taking torrential waters. This canal was not an ordinary canal. It was at some distance above the ordinary flow of the river. The dam which was built was from 31/2 to 4 feet high above the bed of the river, and in order to throw the water into the Maturi torrential intake they raised the water in the Maturi Pool at one time about 4 feet high. The water in the Maturi Pool was about 4 feet deep. While the dam was in operation, and the water running into the Maturi torrential intake, we did not get at the Aruz pump more than .79 second feet daily."

It thus appears that by the construction of the Maturi Dam the defendants took and diverted through the Maturi intake all the water otherwise available at the Aruz pump in excess of the .79 second feet which, under its contract, the people of Porto Rico was required to deliver there regularly, and the questions are: What is the right which the plaintiffs acquired by paragraph third of the contract permitting them to take at Aruz pump in Maturi Pool additional waters to those specifically contracted for in paragraphs 1 and 2? and whether that right has been violated by the diversion which took place at the Maturi Dam.

[1] The plaintiffs take two positions with reference to their claimed right to the surplus water above .79 second feet at the Aruz pump in Maturi Pool: First, that they are entitled to this water by virtue of their old Spanish concessions, which they claim are not suspended by the contract of August 26, 1914; and, second, that they are entitled to it as additional water under paragraph third of the contract. But we think it is apparent from a reading of the contract that their old concessions are suspended while the contract remains in force, and that, as it is still in force, their right to the water in question depends upon the contract. There is, therefore, no occasion for considering the concessions or determining their validity. This was the view entertained by this court when the case was here before. In Judge Dodge's opinion, referring to the excess water, he said:

"If the plaintiff had any such prior right, it was superseded while the contract was in force, and could be asserted only to the extent that the terms of the contract permitted the taking of such water." 240 Fed. 261, 153 C. C. A. 182.

The claims of the parties as to the validity, nature, and extent of the old concessions and of prescriptive rights are material only so far as they assist in the interpretation to be put upon the contract. The contract—made under a statute which limited the powers of Porto Rico to contract to grant water rights, described as "the fair equivalent in value" of the old rights or concessions—is the basis upon which the rights of the parties must rest.

Under the contract the Fortuna Estates contracted to take, and Porto Rico contracted to furnish, 8,258.98 acre feet per year, delivered regularly as above set forth, and in addition thereto "water which may be available" at the said Aruz pumping station for the irrigation of any of its said lands under the provisions of paragraph third of the contract, as "the fair equivalent in value" of its old rights thereby suspended.

- [2] Much discussion has been indulged in, both in brief and argument, as to whether the contract and particularly paragraph third should be construed as a grant or as a contract; the contention being that, if it was a grant, it should be construed more strictly as respects the grantee than it otherwise would. We do not regard it material whether this provision of the contract be regarded as a grant or as a simple contract, as in either event we are called upon to ascertain, if we can, what the parties intended by the language used, viewed in the light of the circumstances surrounding them at the time the contract was made. The evidence shows that, prior to the construction of the Guayabal Dam, there was excess water at the Maturi Pool during the dry season, or a portion thereof, when the bed of the stream from the Pool to the Ursula intake, some 3 miles above, was dry. It also appears that, after the Guayabal Dam was built, the amount of water in the Maturi Pool at such times was somewhat increased, and that this was probably due to seepage caused by pressure of the water stored behind the dam. It further appears that the plaintiffs' predecessor in title obtained more water at Aruz pump prior to the construction of the Guayabal Dam than it obtained there after its construction and the diversion of the water by the Maturi Dam to the Boca-Chica estate, when it received no surplus water, and that the parties, before and at the time of making the contract, August 26, 1914, knew that the amount of water in Maturi Pool in the dry season was somewhat greater by reason of the storage of water in Guayabal Dam than it had been at a like season of the year prior to the construction of that dam.
- [3] In view of the circumstances here narrated as existing at the time the contract was made, we think that the people of Porto Rico. by stipulating in the third paragraph of the contract that Fortuna Estates should have the right to "take in addition to all amounts of water above specified, from the Jacaguas river by pump at the said Aruz pumping station, water which may be available there for irrigation of any of its said lands," intended to give, in addition to the quantities specified in paragraphs first and second, the right to take all the surplus water available at the Aruz pumping station under the physical conditions then existing on this part of the stream for conserving and handling the water, provided such taking should not interfere with water rights or concessions then subsisting on the river or with contracts made or to be made in regard to such subsisting concessions, and that this right should continue down to the time the people of Porto Rico should undertake the development and utilization of the surplus waters of Jacaguas river, when it should be limited to a maximum usage of 3.86 second feet.

It was conceded at the trial and found by the court below that the people of Porto Rico have not undertaken the development and utilization of the waters on this part of the river, so that the latter

proviso is now of no consequence.

The additional or surplus waters stipulated for in paragraph third of the contract are not waters that Porto Rico is required to deliver at Maturi Pool in regular daily deliveries, but are waters that are there because of rainfall or seepage and the physical conditions existing on that part of the river. The amount available may be great or little. In dry seasons it is practically certain to be small. But whether great or small, and whether of no particular value when plentiful, and of much value when scarce, it is nevertheless a part of the additional waters stipulated for in the contract going to make up the consideration (the fair equivalent in value) for the old concessions which the contract suspended.

If the people of Porto Rico could maintain a dam near the head of the Maturi Pool, and divert all the water in excess of the .79 second feet which it is required to deliver there regularly, it would be taking away from the plaintiffs the additional or surplus waters which constitute a part of the consideration for the suspension of the plaintiffs' concessions. We think it is not entitled to do this and that, by erecting the Maturi Dam and diverting all the water in excess

of .79 second feet, it has invaded the plaintiffs' rights.

[4] We are also of the opinion that the court below was right in directing that the affirmative defense set up in the answer should be stricken out. The South Porto Rico Sugar Company is not a party to the action, so that the issue sought to be raised could not be properly determined; and, if it were a party to the suit, it would then be very doubtful whether the issue could be raised except in a direct proceeding instituted for the purpose.

[5] If at the trial evidence was received relating to the construction of the contract which should not have been, we do not find it necessary to consider the defendants' exceptions to it in detail, for, in the conclusion we have reached, we have not found it necessary to make use of any evidence, the introduction of which could

be in any way questioned.

We are also of the opinion that the decree entered in the court below is too broad and should be modified to read:

"It is hereby ordered, adjudged, and decreed as follows:

"1. That the plaintiffs are the owners of four tracts of land situated in the municipal district of Juana Diaz, island of Porto Rico, known as 'Fortuna,'

'Cristina,' 'Luciana' and 'Serrano.'

"2. That by virtue of a certain contract entered into by the plaintiffs' predecessor in title with the acting commissioner of the interior and with the commissioner of the interior of Porto Rico, dated August 26, 1914, and June 8, 1915, set out in the bill, the plaintiffs are entitled to take at Aruz pumping station for the irrigation of their said estates, the surplus water in the Jacaguas river at that point; that is, all the waters in Maturi Pool not necessary for supplying any owners or users of water rights or concessions on the river subsisting August 26, 1914, to which such owners or users may be entitled either by virtue of such water rights or concessions or by virtue of any agreement or agreements in regard thereto entered into or to be entered into by them with the people of Porto Rico.

"3. That by virtue of said contract the plaintiffs are entitled to have the surplus waters in the Jacaguas river as above defined flow down the bed of said river from below the Guayabal Dam to the said Aruz pumping station without diversion or interference by the defendants or the intervener.

"4. That the defendants have obstructed and diverted the flow of the surplus waters of the Jacaguas river to which the plaintiffs are entitled by

virtue of the said contract and to their damage.

- "5. That a permanent injunction issue directed to the defendants Emilia V. Henna, viuda de Cabrera, Gustavo M. Cabrera y Henna, William Joseph Cabrera y Henna, Mary Cabrera y Henna, Maud Cabrera y Henna, Rafaela Castillo Veitia, viuda de Cabrera, Maria Cabrera, Enrique Cabrera, and Manuel Leon Parra, and to the intervener, the people of Porto Rico, restraining and enjoining each of them, their servants, agents and employés, from diverting or obstructing the surplus waters of Jacaguas river as above defined.
- "6. That the plaintiffs are entitled to recover from the intervener, the people of Porto Rico, and the people of Porto Rico is ordered to pay to the plaintiffs, the sum of \$441.82 deposited with the clerk of the court by the defendants pursuant to the order of this court dated August 24, 1917, and the sum of \$442.01 deposited with the clerk of the court by the plaintiff pursuant to the said order, said sums having been withdrawn by the said intervener, the people of Porto Rico.

"7. That the plaintiffs recover of the defendants their costs in this action, to be taxed by the clerk of the court."

The decree of the District Court of the United States for Porto Rico, modified as above stated, is affirmed, with costs in this court.

ANDERSON, Circuit Judge (dissenting). With the opinion of the majority and its result I regret that I cannot concur. No detailed analysis of the long record and elaborate exposition of my views would be of probable value. I outline merely the main grounds of my dissent.

(1) The opinion of the majority is inconsistent with the opinion of the court, consisting of Judges Dodge, Bingham, and Aldrich, when the case was here before. I agree with the former opinion written by Judge Dodge. In that it was held that the contract between the plaintiffs and Porto Rico is to be construed as a grant of water belonging to Porto Rico, to be interpreted under the usual rule of strict construction against the grantee. Russell v. Sebastian, 233 U. S. 195, 205, 34 Sup. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E, 882, Ann. Cas. 1914C, 1282. The court then said concerning the plaintiffs' rights (240 Fed. 261, 153 C. C. A. 182):

"Its rights under the contract were rights granted directly by said people. It could claim no rights as riparian owner merely. See Trujillo et al. v. Succession of Rodriguez (heretofore decided in this court) 233 Fed. 208, 147 C. C. A. 214. The water which both the plaintiff and those defendants who were operating the 'Boca-Chica' estate were taking when the bill was filed was then being delivered to them respectively by said people, in pursuance of agreements on its behalf through the proper authorities. To interfere with the agreed deliveries to the defendants was also to interfere with the agreed payment to be made therefor to said people. Interference with the defendants' intake as reconstructed to receive said agreed deliveries was interference with structures which the people had expressly required and authorized the defendants to erect for the purpose of receiving the excess water to be received and paid for as above. The invalidity of the grant made and the authority given by said people to the defendants, asserted by the plaintiff,

could be found by the court to exist only in case it adopted the construction claimed by the plaintiff, but disputed by the defendants, of certain provisions in said people's prior grant to the plaintiff. The construction contended for materially affected the administration of the irrigation service maintained by said people."

And again (240 Fed. 263, 153 C. C. A. 182):

"Aside from the above question of parties, the court could not justifiably disturb such a situation by injunction at the instance of a party asserting rights under an earlier contract with the same public authorities, unless the earlier contract clearly appeared to have covered what they were permitting

the defendants to receive under their subsequent grant.

'It cannot be said that the plaintiff's contract of August 26, 1914, plainly vested in the plaintiff such rights to excess water as it now claims. The terms of the third paragraph, whereon the plaintiff relies, do not, in express terms, grant any right to excess or surplus water. Neither expression is used, and the burden was on the plaintiff to establish the construction for which it contends as the true construction, in view of all the other provisions of the contract and the circumstances therein referred to." (Italics mine.)

But in the majority opinion it is now stated:

"We do not regard it material whether this provision of the contract be regarded as a grant or as a simple contract, as in either event we are called upon to ascertain, if we can, what the parties intended by the language used, viewed in the light of the circumstances surrounding them at the time the contract was made."

Obviously, the latter part of this sentence adds nothing to the first part, which asserts it to be immaterial whether the contract be a grant or not. Intent, of course, always governs both in grants and in simple contracts, if plainly expressed. But when, as in this case, the contract is so hazy and ambiguous as to cause the differences disclosed in the majority opinion from the views expressed when the case was here before, as well as the differences of view in the court as now constituted, it is very material whether the contract is to be regarded as a grant, and subject to the rule of strict construction, or is to be construed as a simple contract.

While it may be technically true that the former decision was limited to deciding that Porto Rico was entitled to be heard, yet, in reaching that conclusion, views were necessarily formed and expressed as to the rights and relations of the parties, including the interpretation of the contract as a grant. The present record is, in no important legal aspect, distinguishable from the former record. Practically, therefore, if not technically, the situation is within the important principle of stare decisis. I think the court should now adhere to the former interpretation of the contract as a grant, and should also apply the sound and well-established rule that public grants are to be strictly construed against the grantee. Long experience and conclusive authority show that only thus are public rights adequately safeguarded.

That the plaintiffs have no case, if the contract is construed as a grant, is, in effect, conceded by the plaintiffs' own able counsel. For, near the close of their lengthy brief, in which they carefully review the evidence and urge every conceivable consideration in favor of

their view, they find themselves driven by the paucity of supporting evidence to take the utterly untenable position that the burden is upon Porto Rico to show the plaintiffs are not entitled to have the water in question flow down to the Aruz pump. This is a perhaps unconscious, but practically conclusive, admission that, construing the contract as a grant, they have failed to sustain the burden of showing that it plainly covers the water contracted to be sold to the Boca-Chica estate.

(2) I cannot construe the record as showing, or the lengthy brief of counsel for Porto Rico, when read as a whole, as conceding, that "the defendants diverted by means of the Maturi Dam all the water from Aruz pump in excess of .79 second feet." Counsel in their brief quote as uncontradicted evidence the testimony of Giles, chief engineer of the irrigation service, that—

"After the construction of the Maturi Dam some water was allowed to flow down to the Aruz pump through an opening which was provided in the dam when it was constructed, so that the water could flow down. The amount of water that flowed down was not less than one cubic foot per second during the time there was water in that part of the river." (Record, p. 183.)

Obviously, "not less than one cubic foot per second" is substantially more than the .79 second feet; and this was water flowing over the Maturi Dam at the upper end of Maturi Pool. But even if the majority are correct, and not in error as I think, in construing the brief of counsel as conceding the diversion of all the water beyond .79 second feet, this court has no right to deal with substantial public interests on the basis of concessions of counsel, who simply briefed a record already made. It is the record, not the brief, which must determine the action of this court. Concessions of counsel, constituting a part of a record, are on a very different basis; fre-

quently they bind.

But this overflow at the Maturi Dam was not all the water available at the Aruz pump; for the undisputed facts as to the physical situation show conclusively that underground or seepage water gathered in the lower parts of the pool, when the stream was dry for long distances above the pool; i. e., when there was no surface water to flow over the Maturi Dam or for diversion to Boca-Chica. Maturi Dam was 774 feet above the Aruz pump, and at a grade 2.9 feet higher than the Aruz pump, which was at the lowest point in the pool. Plainly, the Maturi Dam could not cut off the filtration water appearing in this slope of 774 feet below the dam. While it is true that Engineer Giles testified that the irrigation officials did "not with conscious intent" let down through the Guayabal Dam more than enough to supply the .79 second feet required for regular deliveries, yet it is very plain, both from the physical conditions and from the record as a whole, that substantial amounts of water must and did appear at Maturi Pool, derived in large part from the filtration water most abundant at the lowest point (viz. the Aruz pump), and under ordinary conditions increased substantially by excess overflow at the Maturi Dam, over which the irrigation officials allowed enough to flow, when there was water in that part of the river, to

make certain full delivery of the .79 second feet required under the contract. As absolute accuracy would, under the conditions, be impossible, it is plain that substantial quantities of water would be available at the Aruz pump. While such total diversion may have temporarily occurred, as Hanson's evidence, quoted by the majority, indicates, the record as a whole, as I construe it, shows such diversion to be accidental, or only during a period of excessive drought.

Water thus derived from these two sources—filtration and some overflow at the Maturi Dam—was, in my view, the water contemplated as "available at the Aruz pump," in the language used in

paragraph 3 of the contract.

Such was the construction put upon the contract by the irrigation officials after more than a year's experience of the changed and changing conditions caused by the operation of the irrigation system. I do not think the plaintiffs have sustained the burden of showing that the officials were wrong, and that the water diverted at the Maturi Dam was not excess water which it was the right and duty of Porto Rico to sell. The record is singularly obscure and inadequate. At most it raises no more than a feeble doubt as to whether the water in question was excess water or water covered by the plaintiffs' contract. It does not even appear how much water was actually delivered to the Boca-Chica estate at the Maturi Dam. It was a question of fact whether the water diverted to Boca-Chica was excess water. The officials familiar with the somewhat complicated conditions determined that it was. I think they were right. At any rate it does not plainly appear that they were wrong.

(3) The majority opinion ignores the fact that the water now held contracted to the plaintiffs must come in substantial part from the Toro Negro river, a source in which not even the plaintiffs' counsel venture to assert that they have rights. Their old concessions were of course limited to water available in the Jacaguas Valley on the south side of the water shed. All the witnesses agree that the water now in controversy accrued in substantial part from pressure of the additional water behind the Guayabal Dam. That pressure was necessarily increased by the water brought from Toro

Negro through the new tunnel.

The third paragraph of the decree ordered is:

"That by virtue of said contract the plaintiffs are entitled to have the surplus waters in the Jacaguas river as above defined flow down the bed of said river from below the Guayabal Dam to the said Aruz pumping station without diversion or interference by the defendants or the intervener."

This, applied to the facts, amounts to requiring that Porto Rico shall allow some—we know not how much—Toro Negro water to flow down the bed of the Jacaguas river, in order to become available to the plaintiffs at the Aruz pump. We cannot know that thus they may not overrun the full amount of the aggregate of their old concessions. It certainly gives the plaintiffs some water to which they have not a vestige of legal right.

(4) Moreover, the statutory power to contract was limited to "equivalence in value." The result reached plainly gives the plain-

eiffs, not equivalence, but large profits, out of this public irrigation system. Under the decree ordered they are practically certain to get at least the full amount of their old concessions, and delivered with substantial regularity. Now the record shows, and it is obvious, that regularity of delivery is a factor of prime value in any irrigation system. The plaintiffs offered no evidence that, during the diversion complained of, they were not receiving water the full "equivalent in value" of their old concessions. But they did contend that—

"All that the contract of August 26, 1914, was intended to do or did was to change the method and time of the delivery of a small part of the concession waters."

This contention, in effect adopted by the majority, puts a construction upon paragraph 3 of the contract resulting in large profits to the plaintiffs at the expense of Porto Rico or the other water users who must be taxed for all expenses not defrayed by the sale of excess water. Such result I think unconscionable and inconsistent with the fair interpretation of the contract.

(5) The record, though bulky, is singularly meager in relevant and The fact that both the plaintiffs and Porto Rico lucid evidence. agree that, at the time of the contract, it was known that, because of the increased weight of water behind the Guayabal Dam, more water than formerly was appearing at the Aruz pump in the Maturi Pool, does not, I think, support—it controverts—the plaintiffs' contention that the parties intended the contract to cover the entire additional supply, whether it came down in the surface of the river through or over the Maturi Dam, or whether it appeared by seepage in the intervening 774 feet of slope between that dam and the Aruz pump. If the parties had intended the contract to cover all the increased supply, from whatever source, and whether flowing above or below the surface, words apt and unmistakable to effect such intention would have been used, as Judge Dodge pointed out. 240 Fed. 264, 153 C. C. A. 182. That the irrigation officials did not so understand the contract is conclusively shown by their conduct. That the words used, construed as a grant, do not warrant such interpretation, was the view of this court when the case was here before, and is, in my confident judgment, the only fair and sound interpretation of those words.

I think the decree below should be reversed, and the bill dismissed.

DOLBEAR et al. v. GULF PRODUCTION CO. et al. PENN et al. v. PHŒNIX DEVELOPMENT CO. et al.

(Circuit Court of Appeals, Fifth Circuit. August 10, 1920.)

No. 3441.

1. Trespass to try title \$\infty\$41(1)\top Evidence insufficient to establish title through lost deeds.

Where plaintiffs claimed through alleged lost deeds 50 years and more old, the existence of which was not shown by the testimony of any one who had ever seen and read them, all persons having direct knowledge respecting the alleged conveyances being dead, and the county records had been burned, and where neither plaintiffs nor those under whom they claimed had ever been in possession of or exercised acts of ownership or control over the land, which was vacant and unused, nor paid taxes, except for three years, documents and correspondence showing that they claimed the land, and a general supposition of their ownership in the neighborhood, held insufficient to establish title in plaintiffs as against purchasers without notice from the heirs of the record owner.

2. Adverse possession = 104—Grant not presumed from evidence consistent with its nonexistence.

The presumption of grant to one not having record title can never fairly arise where all the circumstances are perfectly consistent with the nonexistence of the grant.

3. Evidence \$\iff 317(5)\$—Declarations of ownership by persons not in possession incompetent as hearsay.

Declarations of ownership by persons not in possession or exercising acts of ownership or control of land are hearsay and incompetent to prove title.

4. Appeal and error ⋘721(1)—Joint assignment of error must be good as to all joining.

A joint assignment of error is not available, unless it is good as to all joining.

Hutcheson, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Texas; Duval West, Judge.

Actions at law by Angeline Louise Bailey Dolbear and others against the Gulf Production Company and others and by Caro Minor Penn and others against the Phœnix Development Company and others. Judgments for defendants, and plaintiffs bring error. Affirmed.

Charles T. Butler and Oliver J. Todd, both of Beaumont, Tex., N. B. Morris, of Palestine, Tex., and Jacob C. Baldwin and W. W. Moore, both of Houston, Tex. (Orgain, Butler, Bolinger & Carroll, of Beaumont, Tex., and Kennerly, Williams, Lee & Hill of Houston, Tex., on the brief), for plaintiffs in error.

A. D. Lipscomb, Sol E. Gordon, and W. D. Gordon, all of Beaumont, Tex., C. L. Carter, T. J. Lawhon, and Ed. P. Phelps, all of Houston, Tex., and J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La., for defendants in error.

Before WALKER and BRYAN, Circuit Judges, and HUTCHE-SON, District Judge.

BRYAN, Circuit Judge. Plaintiffs in error sued defendants in error in trespass to try title to a portion of the east half of a league of land in Liberty county, Tex. The two cases were tried together, though not consolidated, and resulted in judgments for defendants in error, based

upon directed verdicts.

Jesse Devore, who obtained a grant of the entire league in 1835, is the common source of title. The individual plaintiffs in error claim as heirs of devisees of Rufus Dolbear. Republic Production Company has deeds from its coplaintiffs in error, and in addition acquired, pendente lite, the title to a small undivided interest, estimated by the trial court at 1½ acres, which passed by descent to three great-grand-children of Jesse Devore. Defendants in error trace their title from all the heirs of Jesse Devore, other than those just referred to, and from

one J. J. Moor, who procured a tax deed in 1879.

[1] In order to show title out of Jesse Devore into Rufus Dolbear, plaintiffs in error rely upon three alleged lost deeds to the east half of the league, as follows: (1) From Jesse Devore to Edwin or Edward Hall, dated between 1835 and 1851. (2) From Hall to A. B. Lawrence, dated 1851. (3) From C. L. Cleveland, as administrator of the estate of A. B. Lawrence, to Rufus Dolbear, dated 1868 or 1869. The public records of Liberty county were destroyed by fire December 12, 1874. Search for the disputed deeds and inability to find them being shown, an effort was made to prove their existence and contents by

secondary evidence.

Ada C. Bailey testified that her father had in his possession the deeds claimed to have been lost; but the witness did not examine the deeds. and based her testimony upon statements made to her by her father and sister. Assessments were made at the state capital in Travis county, for 1850 to the estate of Hall, for 1851 to Edward Hall, and from 1852 to 1858, inclusive, to A. B. Lawrence, by Charles Buckholtz. No assessments were shown from 1859 to 1862, inclusive. Assessments were made in Liberty county for 1863 and 1864 to C. Higginbotham, for 1867 to "Unknown," for 1868 to A. B. Lawrence, by C. L. Cleveland, Adm., for 1869 to 1871, inclusive, to Rufus Dolbear, by C. L. Cleveland, agent. No more assessments were shown until 1878, when the property was assessed as unknown. The only payments of taxes for the years above given were made by E. Hall for the year 1850, and by Edward Hall for the year 1851. Evidence was offered that C. L. Cleveland paid the taxes for the year 1870 as agent of Rufus Dolbear, but it was not shown that Dolbear ever reimbursed Cleveland, and it appears from a letter from Cleveland in August, 1873, that he had not been reimbursed up to that time. Edward Hall dealt in Texas lands from 1840 to 1860. In 1837 Rufus Dolbear married Clothilde Pixley or Lawrence, who was an orphan and had been a member of the family of A. B. Lawrence for several vears.

There was produced from proper custody an unprobated will of Rufus Dolbear, dated June 11, 1867. In listing his possessions, he stated in this revoked will that he had advanced \$145 to Judge Fooley, \$125 of which was to be paid to Judge Cleveland, of Liberty, Tex., "to at-

tend to the Jesse Devore grant of half a league of land near Liberty—2,222 acres—to secure the land to me." In disposing of his property, he gives half of the land in Texas to his son. Rufus Dolbear's will, made in 1872, and probated in New Orleans, but not in Texas, contains this statement:

"A half league of land in Liberty county standing in my name belonged half to myself and half to my son, Rufus L."

An instrument, purporting to be a copy of a declaration of trust executed by Rufus Dolbear October 10, 1868, in the handwriting of N. E. Bailey, acknowledged that—

"The half of a certain league of land bought in my name at the succession sale of A. B. Lawrence in the county of Liberty, Texas, belongs to my son Rufus L. Dolbear, and that I am to make him a title to the same as soon as I can learn what would be a just division of the same."

August 23, 1873, C. L. Cleveland wrote a letter to Rufus L. Dolbear, son of Rufus Dolbear, stating that a Mr. Palmer wanted to buy 200 acres of "the Devore" owned by Rufus Dolbear. October 28, 1873, Mr. Cleveland wrote to Levi Dolbear, a brother of Rufus Dolbear, that he had inclosed to Mr. Bailey the declaration of trust, which he had procured to be recorded in Liberty county. A letter from Levi Dolbear, dated November 29, 1874, to Jules V. Penn, a grandson of Rufus Dolbear, mentioned the Texas land and stated that Rufus Dolbear had conveyed one-half of it to Rufus L. Dolbear. There was a letter from Wharton Branch, dated April 11, 1879, to the heirs of Rufus Dolbear, in which he states that he had learned from his uncle, C. L. Cleveland, that a tract of land in Liberty county belonged to Rufus Dolbear. There was other correspondence between John McDougall, a real estate agent living in New Orleans, and members of the Dolbear family, and powers of attorney from the Dolbear heirs to him authorizing him to make claim for them to lands in Texas, but not specifying any particular lands.

Rufus Dolbear visited the lands for three days, shortly after the Civil War, and stated to a witness living near by that he owned them. Claimants under the Dolbear title filed suit in Liberty county, Tex., in 1891, against J. B. Simpson and Wharton Branch, for title and possession of the east half of the Devore league, which they dismissed in 1893. Their claim was then allowed to lie dormant until these suits were brought, April 6, 1918.

Several witnesses testified that the land was spoken of as the Dolbear land by some of the settlers living near it. Defendants in error claim to be bona fide purchasers for value and without notice of the title asserted by plaintiffs in error. Their agent procured abstract of title, employed attorneys to examine it, and paid valuable consideration. The only portions of the east half of the Devore league in actual possession of any of the parties was under the tax title of J. J. Moor. There was no evidence indicating that defendants in error had any notice or knowledge of the claim of plaintiffs in error. The deeds under which the defendants claim were not quitclaim deeds, but purported to convey the title,

Jesse Devore died in 1849, Edward Hall in 1879, A. B. Lawrence in 1862, Rufus Dolbear in 1872, Levi Dolbear in 1888, Rufus L. Dolbear in 1868, C. L. Cleveland in 1892, and John McDougall in 1906.

There was no proof of the disputed deeds. 3 Wigmore on Evidence, § 1957. Shifflet v. Morelle, 68 Tex. 387, 4 S. W. 843; Potts v. Coleman, 86 Ala. 94, 5 South. 780; Edwards v. Noyes, 65 N. Y. 126.

Whether the evidence was sufficient to justify a presumption of the missing deeds in the chain of title of plaintiffs in error is the important question which immediately arises. It is the settled law that a deed may be presumed where possession of real property has been continued during the period prescribed by the statute of limitations (Fletcher v. Fuller, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759), and it appears to be the rule in Texas that long-continued acts of ownership or control, acquiesced in by the owners of the apparent title, will supply the requirement of possession, and may create a like presumption. Baldwin v. Goldfrank, 88 Tex. 258, 31 S. W. 1064; Walker v. Caradine, 78 Tex. 493, 15 S. W. 31.

The application of either of the above rules of presumption is fatal to plaintiffs in error. They have never been in possession. All the sundry persons who, from time to time, occupied or used parts of the land, did so in recognition either of the record title or the tax title.

The acts of ownership or control relied upon by plaintiffs in error are: Assessments of taxes; payments of taxes, for one year each, by E. Hall, Edward Hall, and Cleveland; Dolbear's inspection of the land shortly after the Civil War; and the circumstance that Dolbear's devisees or their heirs brought suit in trespass to try title in 1891, which they dismissed in 1893.

The assessments fom 1850 to 1858 were not made in Liberty county, where the Devore heirs lived, but at the state capital. The other assessments were to unknown and different parties, were not continued long enough to the same party, and were never followed up or accompanied by any act of dominion which would likely come to the knowledge of the apparent owners. The Texas decisions clearly show that acquiescence is as essential as dominion, and, of course, there can be no acquiescence without knowledge.

It cannot plausibly be contended that the payment, for 3 years in 20, of taxes on vacant and unused land, not otherwise visibly dealt with, is inconsistent with the fact that the holders of the record title continuously claimed to be, and in reality continued to be, the owners of the land. There was no evidence that the Devore heirs were ever informed of the visit by Dolbear upon their land, or ever heard of the Dolbear claim. The Dolbear claimants never did anything with reference to the land which the Devore heirs could reasonably be expected to know of or to resist.

[2] The presumption of grant to one not having record title can never fairly arise, where all the circumstances are perfectly consistent with the nonexistence of the grant. Ricard v. Williams, 7 Wheat. 59, 5 L. Ed. 398. The failure of the Dolbear heirs to test out their title while Hall, Levi Dolbear, Cleveland, and McDougall were living, by whom the deeds could have been established and re-established if they

ever existed, is more consistent with the nonexistence than with the existence of the title asserted.

The remainder of the evidence offered by plaintiffs in error, whether admitted conditionally or rejected, consisting of Miss Bailey's testimony, of the wills of Rufus Dolbear, of what purported to be a copy of the declaration of trust, of miscellaneous letters from Cleveland to Rufus L. Dolbear and Levi Dolbear, from Levi Dolbear to Jules Penn, from Wharton Branch to the heirs of Rufus Dolbear, and from McDougall to members of the Dolbear family, of powers of attorney from Dolbear's devisees and heirs, etc., constituted at best only claims of title.

[3] Uniformly, declarations by a party in possession of real property, and in Texas, perhaps, by one not in possession, but exercising acts of ownership or control, are admissible to qualify, explain, or color the possession, acts of ownership, or control. 3 Wigmore on Evidence, §§ 1772 to 1776, 1778, 1779, 1780; Fletcher v. Fuller, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759. But in the absence of possession, or acts of ownership or control, such declarations violate the hearsay rule, and are not competent. 3 Wigmore on Evidence, supra; Davidson v. Wallingford, 88 Tex. 622, 32 S. W. 1030; Mooring v. Mc-Bride, 62 Tex. 309, text 311, Greenleaf on Evidence (16th Ed.) § 108; 1 Elliott on Evidence, §§ 539, 540, 541.

There is nothing in the evidence to show either actual or constructive notice of the claim of plaintiffs in error. Wethered v. Boon, 17 Tex. 143, text 151; Bounds v. Little, 75 Tex. 320, 12 S. W. 1109; Wilson v. Wall, 6 Wall. 83, 18 L. Ed. 727. If it be true that some of the neighbors living near this property heard it spoken of as the Dolbear property, that circumstance would not prevent the defendants in error from being purchasers without notice. Bounds v. Little, supra.

[4] It is contended that the instruction to find for defendants in error was erroneous as to Republic Production Company, because that plaintiff in error acquired title to the small undivided interest which passed by descent to some of the Devore heirs. The only assignments of error are joint ones, of all the plaintiffs in error. The other plaintiffs in error are not entitled to a reversal because of error affecting only Republic Production Company. Republic Production Company cannot complain, because it has not separately assigned the instruction as error. A joint assignment of error is not available, unless it is good as to all joining. 3 Amer. Dig. (Century Ed.) title Appeal and Error, § 2985; 1 Amer. Dig. (Decennial Ed.) same title, § 721(1); 1 Amer. Dig. (Second. Dec. Ed.) same title, § 721(1).

No one of the assignments of error is sustainable, and the judgments are therefore affirmed.

HUTCHESON, District Judge (dissenting). I agree with the majority of the court in their conclusion that—

"The presumption of a grant to one having record title can never fairly arise, where all the circumstances are perfectly consistent with the non-existence of the grant."

I also agree with their conclusion that—

"The facts in this case are more consistent with the nonexistence than with the existence of the grant."

I am of the opinion, however, that this latter conclusion is one of fact, at which it was the province of the jury, and not of the court, to arrive, and I cannot concur in that portion of the opinion which declares that plaintiffs failed on this issue as matter of law.

Notwithstanding this view, however, I think it clear that the judgment, except as to the small interest claimed by the Republic Production Company, under the Devore heirs, should be affirmed upon the issue of innocent purchase, which I agree with the majority in thinking the evidence established as matter of law for defendants.

As to the Republic Production Company, I agree with the majority that there is authority for their position that "a joint assignment of error is not available, unless it is good as to all joining," but I am of the opinion that this technicality of construction, if it ever prevailed in the federal courts, has been abolished by the recent act of Congress, the purpose of which was, and the effect of which ought to be, to prevent the loss on appeal of a substantial right through some modal or formal failure. I therefore, while concurring in the affirmance of the main portion of the judgment on the ground above stated, dissent from the judgment of affirmance in the particular last mentioned.

NEW CORNELIA COPPER CO. v. ESPINOZA.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920. On Rehearing, October 18, 1920.)

No. 3437.

Constitutional law \$\istheta 20\$—Legislative interpretation, followed by acquiescence, will be accepted.

An act passed almost contemporaneously with the going into effect of the Constitution and interpreting its provisions will be accepted as a correct interpretation, after acquiescence for 8 years.

not within state Employers' Liability Act.

Employers' Liability Law Ariz. § 4, cl. 2, protecting employés in all work necessitating dangerous proximity to explosives, is not applicable to a miner, injured by an explosion which occurred on the surface of tne soil in the morning, before beginning work, resulting from a fire built by the servant to warm himself.

3. Master and servant € 109½, New, vol. 7A Key-No. Series—Evidence to establish claim under state Employers' Liability Act for injury from explosion held insufficient to go to jury.

In an action for a miner's death, under Employers' Liability Law Ariz. § 4, cl. 2, protecting employés required to be in dangerous proximity to explosives, evidence held insufficient to go to the jury.

In Error to the District Court of the United States for the District of Arizona; William H. Sawtell, Judge.

Action by Ignacio S. Espinoza, as administrator of the estate of Jose Maria Ochoa, deceased, against the New Cornelia Copper Company. Judgment for plaintiff, and defendant brings error. Reversed.

Cleon T. Knapp, of Bisbee, Ariz., and Boyle & Pickett, of Douglas, Ariz., for plaintiff in error.

Kibbey, Bennett & Jenckes, of Phœnix, Ariz., for defendant in error. Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The plaintiff, as administrator of the estate of Jose Maria Ochoa, deceased, brought this action in the lower court to recover damages from the defendant for the death of the deceased, under two causes of action specified in the complaint, to wit: Under the "Employers' Liability Law of Arizona," and also under the common-law liability, alleging certain negligent acts and omissions upon the part of the defendant. Upon motion, plaintiff was required to elect as between the two causes of action alleged by him in the complaint, whereupon the plaintiff elected to proceed under the Employers' Liability Law (Laws Ariz. 1912, c. 89), which is the first cause of action.

It is alleged in the complaint: That on or about the 27th day of November, 1918, the defendant, was, had been for a long time theretofore, ever since has been, and now is engaged in the business and occupation of mining and operating its mines at and near Ajo, in the county of Pima, in the state of Arizona, and in the extraction of ores therefrom by means, among other methods, of tunnels, open pits, shafts, and other excavations into the earth. That in the prosecution of said work the defendant used in and about said mines large quantities of gunpowder, blasting powder, dynamite, compressed air, and other explosives. That on said November 27, 1918, said Jose Maria Ochoa was employed by the defendant to work in and about the working and operation of said mines then being operated by the defendant as aforesaid, and was actually engaged in work and labor under said employment, in and about said mines, and in dangerous proximity to said gunpowder, blasting powder, dynamite, and other explosives which were then upon and about said mines, and had been placed there by the defendant for use in the carrying on of its said work of mining. That said Ochoa had no notice or knowledge of the dangerous proximity to him, of said gunpowder, blasting powder, dynamite, and other explosives. said Ochoa was so upon said mines, and while there actually engaged in the work and labor for which he had as aforesaid been employed by the defendant, and while in said dangerous proximity to said gunpowder, blasting powder, dynamite, and other explosives, said gunpowder, blasting powder, dynamite, and other explosives were, without any fault of the said Ochoa exploded. That by the effect of said explosion said Ochoa was killed. That the said death of said Ochoa was not caused by the negligence of said deceased. That by reason of the premises and by virtue of the laws of the state of Arizona in such case made and provided, namely, by virtue of the provisions of chapter 6, title 14, Revised Statutes of the state of Arizona of 1913, relating to the "liability of employers for injuries to workmen in dangerous occupations," the defendant was liable in damages to the plaintiff, as administrator of said estate of said Jose Maria Ochoa, deceased, and for the benefit of his surviving widow and children; and plaintiff, as such administrator, alleged that by reason of the premises the said estate of said Jose Maria Ochoa, deceased, has sustained damages in the sum of \$20,000, for which sum plaintiff prays for a judgment against defendant and for his costs of suit.

The defendant demurred to the complaint upon the ground that said Employers' Liability Law and section 7 of article 18 of the Constitution of the state of Arizona are both unconstitutional and void, in that said provisions are contrary to and contravene the Fourteenth Amendment to the Constitution of the United States, in that said provisions deprive the defendant of its property without due process of law and deny to it the equal protection of the law, by subjecting it to unlimited liability for damages for personal injuries by its employés, without any fault or negligence on the part of the defendant causing such injury. or contributing thereto, and therefore that plaintiff's complaint fails to state facts sufficient to constitute a cause of action. Defendant also denied each and every allegation contained in the complaint, and alleged that if the deceased was killed, either as alleged in the complaint or otherwise, his death wholly resulted from and was wholly caused by decedent's willful neglect and carelessness, and his failure to use any care or caution in his own behalf at the time and place of said alleged accident.

At the close of the testimony for plaintiff the defendant moved the court for an instructed verdict in favor of the defendant which motion was denied. At the close of the testimony for the defendant, the defendant again moved the court for an instructed verdict in its favor which motion was denied. The case was submitted to the jury, who returned a verdict in favor of the plaintiff and against the defendant in the sum of \$10,000, whereupon a judgment was entered for said amount, with costs of suit. A motion for a new trial was denied. From the said judgment the defendant sued out a writ of error from this court. The parties will be designated as in the court below.

It has been determined by the Supreme Court of the United States, in Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537, that the constitutional provision of the state of Arizona and the Employers' Liability Act here involved are not repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States and that question is no longer in issue in this case.

The Constitution of the state of Arizona provides, in article 18, section 7, as follows:

"To protect the safety of employés in all hazardous occupations, in mining * * * the Legislature shall enact an Employers' Liability Law, by the terms of which any employer * * * shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employé in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employé shall not have been caused by the negligence of the employé killed or injured." Revised Statutes of Arizona 1913, p. 168.

This Constitution of the state came into effect upon the admission of the state into the Union February 14, 1912, Id. p. 195. The act of May 24, 1912, passed at the first regular session of the Legislature of the state of Arizona (chapter 89 of the Session Laws of Arizona of 1912, p. 491; Revised Statutes of Arizona 1913, §§ 3153–3162), is declared in section 1 to be an Employers' Liability Law, as prescribed in the foregoing section of the Constitution. Section 2 of the act refers to the constitutional provision and follows strictly its language. Section 3 of the act provides by way of declaration and determination a legislative construction for the words "hazardous occupation" as used in the Constitution and in the act. It provides that—

"The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in" section 4 of this act, "are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of" section 2 of this act.

To this legislative construction of the words "hazardous occupation" there is added the specific declaration that such occupations are dangerous and hazardous to the workmen therein because of the risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein. The declaration is as follows:

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein."

Section 4 declares and determines certain occupations to be hazardous within the meaning of the act, among others in clause 2 of the section:

"All work when making, using, or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive."

In Endlich on the Interpretation of Statutes, § 527, the author, commenting on the weight to be given the legislative interpretation of constitutional provisions, says:

"The greatest deference is shown by the courts to the interpretation put upon the Constitution by the Legislature, in the enactment of laws and other practical application of constitutional provisions has had the silent acquiescence of the people, including the legal profession and the judiciary and especially when injurious results would follow the disturbing of it. The deference due to such legislative exposition is said to be all the more signal when the latter is made almost contemporaneously with the establishment of the Constitution and may be supposed to result from the same views of policy and modes of reason that prevailed among the framers of the instrument thus expounded."

In 8 Cyc. p. 37, it is said that the practical construction of constitutional provisions by the legislative department in the enactment of laws necessarily has great weight with the judiciary and is sometimes followed by the latter when clearly erroneous. To the same effect is the rule stated in 12 Corpus Juris, p. 714.

[1] The act of May 24, 1912, was passed almost contemporaneously with the going into effect of the Constitution, and for eight years it has

been acquiesced in by the people of the state and by the judiciary as a correct interpretation of the Constitution. We see no reason why it should not be accepted in all its terms as a correct exposition of the

Employers' Liability Law.

For a month and a few days prior to November 27, 1918, Jose Maria Ochoa was employed by the defendant in its mine near Ajo, in Pima county, Ariz. On that date Ochoa left his residence about 6:30 in the morning for the mine, where he was due to go to work at 7 o'clock. He arrived at a point on the surface about 30 or 40 feet from the entrance to the mine at about 6:45 o'clock, or about 15 minutes before the time he was required to descend to his work in the mine. He stopped at this point and built a fire with wood about 10 or 15 feet to the side of the road. An explosion in the wood killed him.

Juan Delgado, a witness for the plaintiff, testified as to what occur-

red. This testimony is without contradiction:

"I knew Jose Maria Ochoa, the deceased. I was going to my work when he was killed. The deceased was near a fire which he (the deceased) had built. The fire was within the lines of the copper company. At that time 8 or 10 more men were with me and the deceased. They were all by the fire. The deceased alone built the fire. I arrived at the place as soon as the deceased built the fire. The others began to come afterwards. The fire was within the land of the company, about 35 or 40 feet to one side of the quarry hole in which the men were supposed to work. We were all going to work in the quarry hole that day. We were waiting for our time to go to work. I and the others went to work in the quarry hole after we picked up the deceased. Before the accident the deceased had been working in the quarry hole about a month, more or less. There was some powder under some wood, and the deceased didn't know that there was any powder there, and he lit some papers there. The powder was under the fire. It was concealed under the wood on the surface. It was not customary for the employes coming to work in the morning to build fires to warm themselves before actually going in to the work. In the mines they use gunpowder, dynamite, and other explosives. I used powder in working in the mine. I got the powder that I used in the mine from the powder house. All the workmen there who used powder get it in the same way. A man in charge, who works for the copper company, furnished the powder from the powder house. The powder used by the men belonged to the New Cornelia Copper Company. The workmen used only that part of the powder furnished each day that was necessary. I do not know where the powder came from that exploded. The day of the accident was a cold day there."

On cross-examination the witness testified that-

"The accident occurred at 7 minutes to 7. The deceased, myself, and the other men were supposed to begin work at 7 o'clock. The deceased, before the explosion, called me and the other men. I was standing, at the time of the explosion, on the ground 6 or 7 feet from the fire, with my back to it. Immediately after the explosion the deceased was lying down about 8 feet from me. I spoke to him, and notified the foreman, who came and asked the men to help. I took care of the deceased until an automobile came and took him to the hospital, where the doctors took charge of him. I went to the hospital with the deceased, where the deceased died at 10 o'clock in the morning. I left the hospital and went to my work. There was a path leading to the entrance of the mine, and the fire built by the deceased was about 10 or 15 feet to the side of the road."

This was all the evidence for the plaintiff relating to the accident and its cause, when the plaintiff rested his case. The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant. The court was in doubt as to whether the mere fact that the dynamite was placed there by some unknown person was one of the conditions of the employment. Thereupon the plaintiff was permitted to recall the witness Juan Delgado as to the practice of the employés in the handling of the powder belonging to the company. The witness testified that:

"I have observed the handling of powder by the other employés of the mine. They get the powder by means of a report. In my experience I never had powder left at the close of the day; they just give what powder is necessary. If it happened that a little more was given than necessary, it would be returned to the powder house. I never knew of an instance where powder not used was not returned to the powder house. I came here as a witness for the company. * * * I worked for the company a year and a month. During that time there was never any other explosion of powder buried around the property. This was the only instance I ever heard of where a man was injured on top of the ground by powder, and the only instance I ever knew of where powder was placed around on tep of the ground."

The court thereupon denied the motion of the defendant for an instructed verdict in its favor. The defendant then called Charles W. McHenry, the mine foreman, who testified that:

"The deceased was employed as a miner at the time of his death. The deceased's duties were running a jack-hammer and blasting. On the day the deceased was killed, he was supposed to work in the glory hole, which is an outcropping of ore that had been mined from 30 to 75 feet below the level of the surrounding country. The deceased's duty was to drill inside of the edge of said glory hole and let the rock cave to the bottom. It was not deceased's duty to light any fires either to warm himself or for any other purpose. The defendant company has no particular rule about lighting fires, but dries and stoves are furnished, and the men are asked not to build fires to warm themselves. I do not know whether there were any such dries or houses on the morning deceased was killed, but it is the practice to provide a place for the men. I was new on the ground at the time the deceased was killed. The place of the explosion where the deceased was killed was 20 or 30 feet from the rim of the glory hole, which is from 30 to 75 or 80 feet deep and approximately 200 feet long. The place where the deceased would be working was 200 feet, more or less from the place where the explosion occurred. Eight or 10 minutes before 7 o'clock in the morning, there was an explosion, which should not have occurred at that particular time, and was out of the ordinary. * * * The deceased was not working at the time of the accident. The defendant company kept a powder house with a man in charge on each level, where its men were working. If a few men are working, the shift boss is also in charge of the powder magazine. The houses are supplied with order books, which state the number of sticks of powder, the number of feet of fuse, and the number of caps to be used. At the bottom of the order is the number of the miner who gets the order. The order has to be signed by the shift boss for a man to get powder. The man asks the shift boss for the exact amount of powder that is needed, and the order is based upon the man's report. All powder not used shall be returned immediately to the powder house. There are instances, rather rare, where a man orders enough powder for filling all holes, and something has happened, a hole has caved, and he can't get the powder in, and there is a stick that is to be returned. The rule is that the powder is to be returned to the powder house. There are times when men have powder left over. Unless the men return the powder left over to the powder house, I do not know what they might do. It is possible that some powder left over might not be returned to the powder house. It is done. I do not know whether deceased was killed by dynamite or powder, or whether the powder or dynamite was owned or controlled in any way by the defendant company. In my experience with the company, there was never an explosion such as oc-

curred when the deceased was killed. I do not recall a case where an explosion occurred of powder or dynamite left upon the surface or placed around for safe-keeping. There had been other unexpected powder explosions in the mine, but none that I recall from powder that had been left around or placed anywhere for safe-keeping. On my recommendation, made immediately after I started to work on September 1, 1918, the defendant company provided dries for the men, places for the men to warm by, and the company asked the men not to build fires outside; but I could not say positively that such places were working at the time deceased was killed. Before the time of the accident, the weather was too warm for the men to build fires around. When I first landed on the job, I asked for a dry on account of the men being wet below, and not because of weather conditions on top. The men on the surface had no use, particularly, for a fire until along about the first of the year. The entrance where the deceased would go into the glory hole was about 30 feet away from the fire, and after he got into the glory hole he would walk under the rim of it some way to his place of work, a gradual incline from the rim of the glory hole down to the bottom. Neither powder nor dynamite would be placed at the spot where the deceased was killed, to be used in the work in the mine. I presume it had been placed there, since there was an explosion; but whether it was powder or dynamite I could not say. The powder used by the company was Hercules 40 per cent., commonly called giant powder."

Peter R. Brady, the shift boss, testified that—

"The deceased's duties were drilling and blasting ground. At the time of the accident, there were orders that any powder left over after the holes were filled was to be returned to the powder house. The powder was kept in a little powder house built of corrugated iron about 300 feet from where the accident occurred. I had charge of the powder when I was on shift. shift boss is supposed to measure the holes after they are drilled and more or less determine the amount of powder that is to be used. When the men get through drilling the powder is issued to them, and there is a note made of the powder issued, and if there is any powder left through some accident to the hole, being filled or caved in, the men are supposed to return it to the powder house. I do not remember that there were any instructions on the day of the explosion with reference to building fires around the property; but we would not allow the men to build any fires around the works on account of the lumber that was piled up there. My instructions were not to allow the fires anywhere around the works. When the men did not return powder left over, there had to be some kind of an accounting, because I was responsible for the powder that they used. By the rule regarding the return of leftover powder to the powder house, I mean the men were supposed to avoid danger in leaving powder scattered around the works. As far as I can recall, the men on my shift always obeyed these instructions. I cannot say about the other shifts. There possibly may have been instances where powder was not returned to the powder house according to instructions; but I do not recall any such, and I have been on the works two years."

Thereupon the defendant renewed its motion for an instructed verdict in its favor, which the court denied.

[2] The statute (clause 2 of section 4, Act of May 24, 1912) protects the employé at manual and mechanical labor in all work where it is necessary for him to be in dangerous proximity to gunpowder, blasting powder, dynamite, or any other explosive. It was necessary for the deceased to be in dangerous proximity to at least one of these explosives, when he was at work in the mine, where such explosives were being used by the defendant in prosecuting its mining operations; but the deceased was not at work in the mine at the time of the explosion caus-

ing his death, and he was not in dangerous proximity to the explosive being used in the mine. He was on the surface, where no mining operations were being carried on by the defendant, and where it was not using explosives. The deceased was employed by the defendant to work in the mine, and not on the surface. The hazardous occupation in which the deceased was engaged was in the mine, and not on the surface. The building of a fire on the surface was no part of defendant's mining operations. It was the deceased's voluntary act, at a point 10 or 15 feet to the side of the road, and before he had gone to work, and against the general instructions of the mine foreman. The powder or dynamite was not placed under the wood by the defendant, or by its direction or consent. It was concealed under the wood, and the inference is that, if it was obtained from the defendant, it was taken without authority and was a tortious act.

The risk or hazard which the deceased incurred in being near the fire on the surface was not a risk or hazard inherent in the work in the mine, and in the doing of that work the risk or hazard was avoidable by the deceased. It was an outside venture, unattached to the hazard-ous employment in which he was engaged when at work in the mine. He need not have gone there; he need not have started the fire. The work for which deceased was employed did not necessitate his presence near the fire on the surface, or near the explosive that was there, or at that place at all. It did not necessitate his dangerous proximity to gun-

powder or dynamite at or near the place of the accident.

In Arizona Eastern Railway Co. v. Matthews, 20 Ariz. 282, 180 Pac. 159, the plaintiff was employed as a bill clerk at a railroad freight house. He was injured by falling into a scale pit being constructed by the railroad company along the usual route traveled by himself and others having business in and about defendant's freight depot. The plaintiff was employed during the night-time. The accident occurred between 4 and 5 o'clock in the morning, when he was returning from luncheon at a nearby restaurant. The plaintiff was injured, and claimed damages from the railroad company under the Employers' Liability Act. Upon a trial before a jury a verdict was returned in his favor for \$3,000. The defendant appealed to the Supreme Court. In the opinion of that court there is an elaborate discussion of the constitutional and legislative provisions of the Employers' Liability Law, particularly the clause in the Constitution protecting the safety of employés in all hazardous occupations, by placing the liability for the death or injury to such employé "caused by any accident due to a condition or conditions of such occupation." The court says:

"The expression 'caused by an accident due to a condition or conditions of such occupation' is original in our Constitution and laws. We have not been able to find it in any of the Compensation or Liability Laws, or in any decision of a court, or in any text-book, and it therefore necessarily follows that it has not been defined or applied. It is evident that the accident must arise out of and also be inherent in the occupation itself; the condition or conditions that produce the accident must inhere in the occupation. If the occupation is nonhazardous, if the condition or conditions inherent therein are innocuous, the occupation and the employé therein are outside of the purview of the Constitution and likewise of the Liability Law."

Referring to the facts in that case, the court said:

"The danger of falling into the scale pit was not peculiar to appellee in his occupation of bill clerk. It was a danger to which persons not employes of appellant were exposed as much as those engaged in the service of appellant. Appellee shows by his complaint and by the testimony of himself and others that the scale pit into which he fell was 'along the route usually traveled by himself and others having business in and about defendant's freight depot.' This being so, it was not a risk or hazard peculiar to his work, but one 'common to the neighborhood.' In re McNicol, 215 Mass. 497, L. R. A. 1916A, 306, 102 N. E. 697."

Before reaching the question of liability of the defendant for the damage to the plaintiff caused by his fall into the scale pit, the court had determined that the plaintiff as a bill clerk was not engaged "at manual and mechanical labor," as provided in section 3 of the act, and for that reason was not entitled to recover. But in our opinion this fact does not materially lessen the value of this part of the opinion as an authority of that court upon this question.

"Where at the time of the injury the employe is engaged in a voluntary act, not accepted by, or known to, his employer, and outside the duties for which he is employed, the injury cannot be said to be in the course of the employment." Workmen's Compensation Act, Corpus Juris, p. 82.

[3] We conclude that the evidence on the part of the plaintiff was not sufficient to establish a cause of action against the defendant under the statute, and that for that reason the court should have granted defendant's motion for an instructed verdict for the defendant. We are also of the opinion that the defendant was entitled to the same instruction at the close of the case.

The judgment is accordingly reversed, with direction to enter judgment in favor of the defendant.

On Rehearing.

In a petition for rehearing the copy of a recent decision of the Supreme Court of Arizona in Consolidated Arizona Smelting Co. v. John Egich, 199 Pac. 132, not yet [officially] reported, is submitted, with the statement that the doctrine enunciated by that court in Arizona Eastern Railroad Co. v. Matthews, 20 Ariz. 282, 180 Pac. 159, referred to in our opinion as an authority, has been overruled by the later case. Upon an examination of the opinion in that case, it appears that the holding in the Matthews Case that there can be no recovery "under the Employers' Liability Act for an injury resulting from an accident not due to risk or hazard inherent in the occupation" has been modified; the court holding in the later case that—

"An employé engaged in work in one of the hazardous occupations enumerated in the statute may recover for any accident occurring in the ordinary course of events during his work, the only other essentials being that the accident must be due to a condition or conditions of his employment, and not brought about by his sole negligence or fault."

In our former opinion, we referred to the opinion in the Matthews Case mainly with reference to that feature of the case wherein it appeared that plaintiff, a bill clerk employed in defendant's freight office had fallen into a scale pit that was being constructed by the defendant along the route usually traveled by himself and others having business in and about defendant's freight depot. The court held that, before an employé may recover for injury under the act, it must have occurred while he was at work in his occupation, and it must have been occasioned by a risk or danger "inherent in the occupation." In the later decision the court holds that the clause "inherent in the occupation" is misleading in the relation in which it was used in the prior case. The court says:

"The condition or conditions that caused the accident resulting in injury or death may be inherent in the occupation, or they may arise from the manner in which the business is carried on. The conditions of the occupation in which the employé does his work involve not only the place he works, but the tools with which he works, the one as much as the other."

The plaintiff in this last case had been injured while breaking rock with a hammer. While at work the head of the hammer flew off the handle and struck his right foot, breaking the toe. The approximate cause of the accident was the negligence of the defendant in furnishing plaintiff with a defective hammer to do his work. It will be observed that the plaintiff was at work in the mine at the time of the accident, and was using a tool furnished by the defendant. The distinction between that case and the present case is that the deceased in the present case was not at work, either in or about the mine, at the time of the accident, and was not using any tool or implement furnished by the defendant. The modification of the opinion of the Supreme Court of Arizona in the Matthews Case does not, therefore, affect the question involved in this case.

Rehearing denied.

CITY OF RENO v. SOUTHERN PAC. CO. et al.

(No. 3410.)

(Circuit Court of Appeals, Ninth Circuit. October 18, 1920.)

Act July 1, 1862, held to have granted to the Central Pacific Railroad Company of California in præsenti right of way for its road through the territory of Nevada over all land which was then public land of the United States the title of the company to which attached on the definite location of its route as of the date of the act, and any rights acquired by others to the lands under the land laws subsequent to that date held subject to such grant.

2. Public lands 5-92—Grant of right of way to Central Pacific Railroad Com-

pany unconditional,

In Act July 1, 1862, granting to the Union Pacific Railroad Company and the Central Pacific Railroad Company of California right of way through the public lands and also subsidy lands, the conditions attached to the subsidy grant that the lands shall be free from homestead or other claims at the date of definite location are not contained in the grant of right of way, and do not apply thereto, but such grant applies to all lands the title to which was then in the United States and which were then subject to disposition by Congress.

It is within the jurisdiction of Congress to grant to a railroad company right of way through public lands of the United States in a state or territory, and the exercise of such power is not dependent on legislative action by state in which the company is incorporated or by the state or territory in which the land lies.

4. Public lands €=31—Settler on unsurveyed land acquires no vested right against the government.

A settler upon unsurveyed public land acquires no vested right until survey and entry which will prevent the government from otherwise disposing of the land.

 Public lands [∞]92—Unsurveyed land is "public land," although occupied by settler.

A tract of land within the unsurveyed lands of the United States in the territory of Nevada held "public land," within the meaning of Act July 1, 1862, § 2, granting right of way through the public lands to the Central Pacific Railroad Company of California, although a part of such tract was then occupied by a settler, who afterward filed a preemption claim thereon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Land.]

- 6. Public lands 34—Statutory conditions to pre-emption right of settler.

 Under Act June 2, 1862, a settler on unsurveyed public land acquired no pre-emption right, unless he complied with the requirement of the act by filing notice of the specific tract claimed within six months after the survey in the field.
- 7. Public lands 92—Patent to pre-emption subject to railroad right of way.

A patent for a pre-emption, following proceedings in the Land Office, in which the claim was filed subsequent to the grant of a right of way to a railroad company, held to convey title subject to such right of way.

Appeal from the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Suit in equity by the Southern Pacific Company and Central Pacific Railway Company against City of Reno. Decree for complainants, and defendant appeals. Affirmed.

For opinion below, see 257 Fed. 450.

Le Roy F. Pike, H. V. Morehouse, and L. D. Summerfield, all of Reno, Nev., for appellant.

Brown & Belford, of Reno, Nev., and Guy V. Shoup, Chas. R. Lewers, and Wm. F. Herrin, all of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This suit was brought by the Southern Pacific Company and Central Pacific Railway Company against the city of Reno, Nev., to quiet title to a strip of ground 300 feet in length and 92 feet in width, situate between Plaza street and the Central Pacific Railway Company track in Reno. The strip is included in the S. W. ¼ of the N. E. ¼ of section 11, township 19 north, range 19 east, M. D. B. & M. The District Court made a decree in favor of the railroad companies, plaintiffs below, and the city appeals.

The Central Pacific Railway Company is the successor in interest of

the Central Pacific Railroad Company of California. The Southern Pacific is the lessee of the railroad and right of way of the Central Pacific Railway Company. The city claims that there was a dedication by Charles Crocker, successor to one Myron Lake; that on August 1, 1868, Crocker filed a map of the city of Reno with the county clerk of Washoe county, Nev., on which map the land in question was subdivided into blocks and lots, which were intersected by streets and alleys; that one tract, which includes the piece in controversy, was left open and marked "Plaza"; that such tract has always remained open and uninclosed; that in the sales of lots by Crocker, in accordance with this map or plat, all conveyances referred to corresponding numbers of lots or names on the map, and all lots were sold in reference to the map and to the plaza. It is contended that Lake settled upon the land involved as a pre-emption claimant April 22, 1861, filed a declaratory statement as a pre-emption claimant on March 3, 1864, and that the settlement by Lake as a pre-emption claimant was valid against any grant made by Congress to the Central Pacific Railway Company of California, and that afterwards, on August 10, 1865, Lake received patent for the land, and conveyed it, together with other land, to Charles Crocker by deed dated March 22, 1868.

The railroad companies claim title on the ground that the land in question lies wholly within 200 feet of the Central Pacific Railway Company's right of way, and that such right of way was acquired by the Central Pacific Railway Company as the successor of the Central Pacific Railroad Company of California; that the last company obtained title to the tract by the act of July 1, 1862, granting a right of way to Central Pacific Railroad Company of California and the Union Pacific Railroad Company, and also under the acts of Congress of July 2, 1864 (13 Stat. 356), and July 2, 1866 (14 Stat. 79); and that the right of way was paramount to any claim of title of Myron Lake, predecessor of the city of Reno. Appellees also claim that upon the date when Lake claimed settlement (April 22, 1861) the township embracing the tract was unsurveyed public lands of the United States; that the government survey of the township was made in the field and completed on July 18, 1864; that no notice that the tract embraced in Lake's pre-emption claim was claimed as a preemption was ever filed with the Surveyor General, as required by the provisions of section 1 of the act of Congress of June 2, 1862 (12 Stat. 413). Appellees also claim that Lake made no improvements of any kind on the tract in question, or on any land north of the Truckee river, prior to 1864, and that his settlement and improvements were south thereof; that on July 1, 1862, the land involved was a part of the public lands of the United States, unless Lake had acquired a right therein whereby said land ceased to be public land within the meaning of section 2 of the act of July 1, 1862 (12 Stat. 491).

From 1879 to 1899 the city of Reno rented from the Central Pacific Railroad a part of the tract in controversy for the use of a fire house, and upon demand by the Southern Pacific Company removed the fire house in 1899 or 1900. The railroad companies also point out that

the city in 1907 assessed to the Central Pacific Railway Company certain improvements on a street abutting the tract in controversy, and that that company in 1908 paid such assessed taxes.

The principal assignments are that it was error in the court to hold that the plaintiff corporations had a grant for a right of way over and across the lands involved at any time prior to Lake's pre-emption right, and that Lake's pre-emption claim was not initiated prior to any grant of right of way of the plaintiffs; that the court erred in holding that the issuance of the patent by the United States to Lake was not conclusive and binding upon the railroad company as to every matter of fact necessary to be passed upon by the United States before the issuance of the patent; and that it was error to permit the railroad companies to dispute the facts set forth in Lake's declaratory statement in his application for pre-emption filing, particularly the statement that he had settled upon the lands in 1861.

It was stipulated between the parties that on July 1, 1862, the Central Pacific Railroad Company of California, a California corporation, received from the United States—

"a grant of a railroad right of way through the public lands of the United States to the extent of 200 feet in width on each side of said railroad, where it may pass over the public lands, including all necessary grants for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations, said railroad and right of way to extend from the Pacific Coast, at or near San Francisco or the navigable waters of the Sacramento river across the states of California, Nevada, and Utah, to connect with the Union Pacific Railroad at or near Ogden." 12 Stat. 489.

It was further stipulated that the Central Pacific Railroad of California constructed a standard gauge railroad as contemplated by the act of Congress just referred to; that a map of said road as located and constructed was filed in the United States Land Office on November 14, 1867; that the tract in litigation is within 200 feet of the center line of the railroad so constructed; that the section so constructed through said tract was duly approved and accepted by the government; and that it has been used for the purposes contemplated by the act.

Regarding the stipulation as not strictly binding the appellant to any precise legal construction as to a grant, we have considered the position taken, namely, that the Central Pacific Railroad Company of California was not given a grant of a right of way in Nevada by express words either in the act of 1862 or in the act of 1864, and only impliedly by the act of July 3, 1866 (14 Stat. 79). The argument of appellant is that the act of Congress of July 1, 1862, limited the grant in the first instance to the eastern boundary of California and in the second instance to the completion of its railroad across the state of California, and that there never was a grant or right given to the Central Pacific Railroad Company of California in the state of Nevada until its road was completed across the state of California; that the title of the Central Pacific Railroad to any portion of its claimed right of way in the state of Nevada was subject to defeat by settlement thereon and pre-emption made by a bona fide claimant at any time prior to the completion of the Central Pacific in the state of California.

[1] Section 2 of the act of July 1, 1862, granted to the Union Pacific the right of way through the public lands to the extent of 200 feet on each side of the railroad where it may pass over public lands. Section 3 granted to the Union Pacific every alternate section not sold, reserved, or otherwise disposed of by the United States, "and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." Sections 9 and 10 are as follows:

"Sec. 9. * * * The Central Pacific Railroad Company of California, a corporation existing under the laws of the state of California, are hereby authorized to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California."

"Sec. 10. * * * And the Central Pacific Railroad Company of California, after completing its road across said state, is authorized to continue the construction of said railroad and telegraph * * * to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed."

Obviously, the grant of rights of way in both states formed a continuous line, the one being as necessary as the other; both were essential to the completion of the great transcontinental road which Congress contemplated and authorized by the act referred to. By section 9 the Central Pacific Railroad Company of California was authorized to construct from the Pacific Coast to the eastern boundary of California, "upon the same terms and conditions, in all respects, as are contained" in the act for the construction of the railroad and telegraph line first mentioned—that is, the Union Pacific Railroad Company; and section 10 provides that, in the construction of the road across Nevada, such construction shall be on the terms and conditions provided in the act in relation to the Union Pacific Railroad Company until the Union Pacific and the Central Pacific of California "shall meet and connect and the whole line of said railroad and branches and telegraph is completed."

[2] The Supreme Court, in discussing the act of 1862, in Central Pacific v. Gallatin, 99 U. S. 728, 25 L. Ed. 504, held that for the purpose of building the road from San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of the state of California, and from there through territories until the Central Pacific met the road of the Union Pacific, all rights, privileges, and franchises were given to the Central Pacific that were granted to the Union Pacific, except the franchise of being a corporation and incidental matters not relevant at all to the present case. The court said:

"The land grants and subsidy bonds to this company were the same in character and quantity as those to the Union Pacific, and the same right of amendment was reserved."

And it was held that by filing acceptances the Central Pacific Company voluntarily submitted itself to such legislative control of Congress as was reserved under the power of amendment.

In Central Pacific Railroad Co. v. Dyer et al., 5 Fed. Cas. 364, Justice Field and Judge Hillyer had before them a bill to quiet title of the Central Pacific Railroad Company as against a number of persons in Nevada. The question involved called for a determination of the estate and interest claimed by them in land over which the line of the railroad constructed by the company ran between the boundary of Nevada and the big bend of the Truckee river in that state. The court discussed the question when did the right of way to the extent of 200 feet on each side of the road vest in the plaintiff under the act of Congress. It was contended by the defendants that the grant of the right of way was subject to the same limitations prescribed by the act concerning grants of the alternate sections, namely, that the land designated was not reserved or otherwise disposed of by the United States, or that a pre-emption or homestead claim had not attached to it at the time the line of the road was definitely fixed. This construction was held to be "clearly incorrect," and Justice Field said:

"The grant of the right of way is a present grant, operating immediately upon the passage of the act, without reservation or exception, and is subject to no conditions except those which are subsequent, or necessarily implied, such as that the road shall be constructed within the period specified, and be afterward maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were necessarily subject to the exercise of this right. The reservations and exceptions found in the third section apply only to the grants of land therein mentioned, and do not apply to the grant of the right of way made in the second section."

In Railroad Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578, the court, in an action brought by Baldwin to recover from the railroad company damages for entering upon his land in Nebraska and appropriating a strip in the construction of its road, discussed the claim of the railroad company to a right of way over the land under the act of Congress of July 23, 1866, entitled:

"An act for a grant of lands to the state of Kansas to aid in the construction of the Northern Kansas Railroad and telegraph." 14 Stat. 210.

By the sixth section of that act there was granted to the railroad company a right of way through the public lands for the construction of the railroad as proposed, the grant limited to the extent of 100 feet in width on each side of the road where it passed through the public domain. When Congress made the grant, the land claimed by Baldwin was vacant and unoccupied land of the United States before the line of the road over it was definitely located, until October, 1871, while Baldwin acquired whatsoever right he possessed in October, 1869. The railroad company contended that Baldwin took the land subject to its right of way, while Baldwin set up that the grant of the right of way took effect only from the date at which the company filed its maps designating the route with the Secretary of the Interior. The court, again speaking through Justice Field, regarded the act of Congress as making two definite grants—one of lands to

the state of Kansas for the benefit of the railroad company; and the other of a right of way directly to the company itself. The language of the act was regarded as in terms of a grant in præsenti, with the purpose that, when the route of the road was definitely fixed, the title attached from the date of the act to the sections, except such as were taken from its operation by certain clauses mentioned in the act. The court said:

"The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route."

It was also held that all persons who acquired any portion of the public lands after the passage of the act of grant took the same sub-

ject to the right of way conferred by it for the proposed road.

In Nielsen v. Northern Pacific Railway Co., 184 Fed. 601, 106 C. C. A. 581, we recognized the distinction made in the decisions of the Supreme Court between the grant of land to aid in the construction of the Northern Pacific Railroad and the grant of a right of way, saying that, while both grants are in præsenti, that of the right of way is not subject to the conditions attached to the land grant, that the lands be free from homestead or other claims at the date of definite location. In support of this doctrine the court cited Railroad Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578, and Bybee v. Oregon & California R. Co., 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305. We also held that, before the definite location, all persons acquiring any portion of the public lands after the passage of the granting act took the same subject to the right of way for the proposed road.

The amendatory act of Congress of July 2, 1864 (13 Stat. 356), which amended the act of 1862, supra, required the Central Pacific to complete 25 miles of its road in each year after a prescribed time, and the whole line to the California state line within four years, and provided (section 16) that, if the Central Pacific Company should complete its line to the California boundary line before the Union Pacific reached that line, the Central Pacific Company could extend its road eastward 150 miles on "the established route" to meet and connect with the Union Pacific, and that upon doing so the Central Pacific "shall enjoy all the rights, privileges, and benefits conferred by this act on

said Union Pacific Railroad Company."

Appellant argues that this is the first grant specifically made to the Central Pacific Company in Nevada, and that it was dependent upon the completion of its road across the state of California upon the established route, before any right of way could attach to any public lands in Nevada, and in no event did the Central Pacific comply with the terms of the act of July 2, 1864, and therefore acquired its first right of way under the act of Congress of July 3, 1866 (14 Stat. 79, § 2). The act of July 3, 1866, was to amend the act of 1862 and the act of July 2, 1864. By section 2 the Union Pacific, with the consent and approval of the Secretary of the Interior, was authorized to

locate, construct, and continue its road from Omaha westward in a continuous completed line until it should meet and connect with the Central Pacific Railroad Company of California, and the Central Pacific, with the consent and approval of the Secretary of the Interior, was authorized to locate, construct, and continue its road eastward in a continuous completed line until it should meet and connect with the Union Pacific: Provided that each company, when the nature of the work required it, could work for an extent of 300 miles in advance of their continuous completed line.

Now, going back to the act of July 2, 1864, which amended the

before-mentioned act of 1862, it was provided:

"And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim nor include any government reservation or mineral lands, or the improvements of any bona fide settler, * * * to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws." Section 4.

This act of 1864, so far as the present case is concerned, is immaterial, in that it did not restrict the grant of the right of way made in the act of 1862, except to limit the right of way granted to the Central Pacific to an extension of 150 miles easterly from the east boundary line of the state of California in the event that the Central Pacific should reach the boundary line of California before the Union Pacific did. This restriction, however, was taken away by the act of 1866, already cited. By the terms of the act of 1864, construction of 150 miles extension through Nevada was authorized on the established route. Section 16. The Supreme Court has held that the act of 1864 did not confer a new grant, but enlarged that made previously by the act of 1862, and that even as to the alternate odd-numbered sections, which were granted in the act of 1864 to aid in the construction of the road, the grant became effective as of the date of the act of 1862. except as to certain reserved lands specifically enumerated. Missouri, Kan. & Texas R. Co. v. Kansas Pacific R. Co., 97 U. S. 491, 24 L. Ed. 1095; United States v. Burlington & Mo. Riv. R. Co., 98 U. S. 334. 25 L. Ed. 198; Kansas Pacific R. Co. v. A., T. & S. F., 112 U. S. 414. 5 Sup. Ct. 208, 28 L. Ed. 794.

Section 3 of the act of 1862 is the provision granting the alternate odd-numbered sections on each side of the railroad to aid in the construction of the railroad, and specifically provides that it shall not be applicable to land sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim has attached at the time the line of the road is definitely fixed. We do not find such an exception made in section 2 of the act of 1862, wherein there is granted the right of way, and the act of 1864 does not amend or change section 2 of the act of 1862.

The true construction is, we think, that the act of 1862 granted a right of way to the two railroads in severalty. The Union Pacific was to build westward, and the Central Pacific eastward, until they should meet. Under the grant, the right of way vested in each railroad company separately as it was earned through construction. Con-

gress scarcely could have intended, by first mentioning the Union Pacific, to make a grant of a right of way through Nevada to that corporation alone. We find nothing in the amendatory act of 1864 which took away the right given by the act of 1862 to the Central Pacific, except as to the 150-mile limitation, which is not relevant to the present controversy. If there were an established route, it must have been created under the act of 1862, which was the act under which the company was authorized to continue construction through the territories of the United States until the roads met.

We must accept it on the record that the Central Pacific complied with the act of 1864, for there is nothing to show that it failed in compliance, and the stipulation, already referred to, shows construction and filing of a map. The act of 1864, in referring to the established route did not include a route then definitely established as existing at the time of the passage of the act. Section 5 extended the time of designating the general route and filing the map, although under the decision in Stuart v. Union Pacific, 227 U. S. 352, 33 Sup. Ct. 338, 57 L. Ed. 535, even if the line of the route was not definitely located until actual construction, title to the right of way attached upon construction, and became effective as of the date of the act of grant.

One of the main objects of the act of 1866 was to release the Central Pacific from the 150-mile limitation in Nevada, which had been imposed by the act of 1864. No language in the act of 1866 recalls or declares forfeited the right of way granted by the act of July 1, 1862.

- [3] It is said that the Central Pacific, having been a California corporation, had limited powers, and could not, at the time of the passage of the act of 1862, transact business or take lands in Nevada. But we are convinced that it was within the jurisdiction of Congress to grant the right of way through the territory of Nevada at the time of the passage of the act of 1862, and that the exercise of such power was not dependent upon legislative action by the state of California or the state of Nevada. Van Wyck v. Knevals, 106 U. S. 360, 369, 1 Sup. Ct. 336, 27 L. Ed. 201.
- [4] Passing to an examination of the status of the land in controversy: It is to be remembered that on July 1, 1862, it was unsurveyed, and not until March 3, 1864, was any filing made upon it. Lake settled upon part of the land, and resided thereon from February, 1862. Between March, 1864, and August 10, 1865, survey was made, plat was filed in 1864, and patent was granted for the land in August, 1865. Ordinarily, one who settles upon unsurveyed public lands of the United States acquires no vested right to the tract settled upon until there has been an entry in the local land office.

In Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, it was held that a settler could not claim that a pre-emption filing attached to the land in a way to prevent the government from disposing of the land prior to payment of the price and prior to the conditions being complied with by the pre-emption claimant. The court recognized that, while certain privileges are given to one who settles upon the public land in advance of the public surveys, whereby such settler is allowed, when the surveys are made and returned, to apply for pur-

chase, if he does so within a specified time after the survey and the return of the township plats, and takes certain other steps, nevertheless the title to the land is subject to the control and disposition by the government, just as it was before the occupancy by such settler. The doctrine of that case is referred to in Northern Pacific Ry. v. Colburn, 164 U. S. 383, 17 Sup. Ct. 98, 41 L. Ed. 479, Northern Pacific Ry. v. Smith, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157, and Emblen v. Lincoln Land Co., 184 U. S. 660, 22 Sup. Ct. 523, 46 L. Ed. 736, and had the approval of this court in United States v. Hanson, 167 Fed. 881, 93 C. C. A. 371.

[5] Was the tract occupied by Lake included within the words "public lands," as used in section 2 of the act of 1862, or did the occupancy of Lake from April, 1861, to July 1, 1862, give him an equity which took the lands out of the category of public lands, and thus make his title good against the present appellee? In Union Pacific v. Harris, 215 U. S. 386, 30 Sup. Ct. 138, 54 L. Ed. 246, the court had under discussion the act of July 3, 1866 (14 Stat. 159), in a case where a settlement was made in April, 1861, and declaratory statement was filed in the United States Land Office on May 13, 1861. The court, following the usual definition, said that by the words "public lands" the statute meant to describe such as are "subject to sale or other disposal under general law." The case is not authority for departing from the rule of Buxton v. Traver, supra, and other earlier cases, for it appears that Harris had actually made a preemption filing upon the land prior to July 2, 1864, and that the right of way granted to the railroad came through the act of 1864, which act contained a provision for acquiring title through condemnation.

Washington & Idaho R. Co. v. Osborn, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346, cited in the Harris Case, was brought under the right of way act of March 3, 1875, in which is an express provision saving the rights of settlers in possession and a provision for means of condemnation. Holding, as we do, that in the case before us the title of the Central Pacific of California to the right of way vested on July 1, 1862, the meaning of the words "public lands," as used in the act of 1862, is to be determined by that act, rather than by later supplemental or amendatory statutes. The act of 1862 was silent as to any method under which possessory claims of settlers could be condemned or acquired by the railroad company. In the Harris Case. supra, Justice Brewer, writing of conditions in Nebraska, referred to the fact that a large part of Western Nebraska was, at the time of the passage of the act of 1862, unoccupied and unsurveyed, and

said:

"The speedy construction of the railroad to the Pacific was desired, and nothing was said about condemnation of the right of way."

Furthermore, at the time of the passage of the act of 1862, the ultimate fee of lands in Nevada was in the government, and there were no rights which the government was under obligation to recognize, if, in the opinion of Congress, public welfare required disposition without relation to possible claims of settlers. St. Joseph & Denver Co. v. Baldwin, supra. We therefore believe that "public lands," as included within sections 2 and 3 of the act of July 1, 1862, are such lands as remained with the government for ultimate disposition, lands to which the government had not already parted with the fee. There are exceptions from the lands granted by the provisions of the act, and they are mentioned in section 3; but there are no exceptions mentioned in section 2, the public lands through which the right of way is granted. Kindred v. Union Pacific, 168 Fed. 648, 94 C. C. A. 112; Union Pacific v. Karges (C. C.) 169 Fed. 459; Union Pacific v. Greelev. 189 Fed. 1, 110 C. C. A. 571. In expressing this view we are but following the guidance of the Supreme Court as expressed in United States v. Union Pacific, 91 U. S. 72, 23 L. Ed. 224, where the court, through Justice Davis, said that many of the provisions of the act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and could not be construed properly without reference to the circumstances which existed when it was passed. Among other things the court said:

"This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. * * * There was a vast unpeopled territory lying between the Missouri and Sacramento rivers, which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. * * * And there was also the pressing want, in time of peace, even, of an improved and cheaper method for the transportation of the mails and of supplies for the army and the Indians. It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. * * * No argument can be drawn from the wisdom which comes after the fact. Congress acted with reference to a state of things believed at the time to exist, and, in interpreting its legislation, no aid can be derived from subsequent events."

We conclude that the land on which Lake had settled had not been sold; nor had it been reserved; nor had it been otherwise disposed of. The title was in the United States, and there had been no home-stead or pre-emption claim which attached prior to the passage of the act of 1862. Kansas Pacific R. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; Hastings, etc., v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; Northern Pacific v. Colburn, supra. We use the word "attached" in the sense in which it was defined by Justice Miller, speaking for the court in Kansas Pacific R. v. Dunmeyer, supra. He said, referring to the rule:

"It did not mean mere settlement, residence, or cultivation of the land; but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

If the case presented a question as between Lake and parties other than the United States and its grantee, different rules might have to be applied; but as between the railroad company and this appellant we conclude that the tract vested in the railroad company on the date of the act of 1862. In the Yosemite Valley Case, 15 Wall. 77, 21 L. Ed. 82, it was held that the pre-emption act was not intended to deprive Congress of the power to make any other disposition of the

lands before they are offered for sale, or to appropriate them to any public use.

We do not find it necessary to go further into a discussion of the relationship of a settler upon unsurveyed lands toward the United States. We recognize that settlements upon unsurveyed lands were authorized in certain states and territories under conditions named in certain acts of Congress, as, for instance, the privileges extended to California under an act of May 30, 1862 (12 Stat. 410, § 7). It may be that the act of June 2, 1862 (12 Stat. 413), which was an act to establish a land office in Colorado, and for other purposes, gave privileges to settlers on unsurveyed lands in Nevada, and it is certain that the act of Congress to establish a land district in Nevada and for other purposes, approved July 2, 1862 (12 Stat. 503), which was a day after the right of way grant act, did extend the pre-emption laws to Nevada.

[6] Under no circumstances, however, did Lake acquire right of preemption prior to the date of filing his declaratory statement, because he failed to comply with the conditions of the act of June 2, 1862, in that he gave no notice of the specific tracts claimed within six months after the survey was made in the field. The statute referred to expressly requires that such notice be filed, and on failure to file it, or to pay for the tracts claimed, within 12 months from the filing of such notice,

the party claiming—

- "shall forfeit all right thereto: Provided said notices may be filed with the Surveyor General and to be noted by him on the township plats, until other arrangements have been made by law for that purpose."

The only notice that Lake filed was a declaratory statement in the land office at Carson City, Nev., more than 6 months after the survey had been completed in the field, or after July 18, 1863. In Lansdale v. Daniel, 100 U. S. 113, 25 L. Ed. 587, where a declaratory statement was filed before the time when the surveys had been turned into the local land office, the court held that the notice of claim or declaratory statement required by the act then under consideration, the act of March 1, 1854 (10 Stat. 268), was indispensable to give the claimant any standing as a pre-emptor; his settlement alone not being suffi-

cient for that purpose.

[7] The next point calling for special mention is whether the record title of Lake, including his pre-emption filings in the land office and the patent issued to him by the United States for his pre-emption claim, are conclusive of his title to the 400 feet claimed by the railroad company as in the grant of the right of way. The records offered by Lake were competent to show that on March 3, 1864, he declared his intention to settle on the land described in his statement under claim of a right of pre-emption. They were also competent to prove that he made proof, paid the purchase money, and received a patent for the land described, and that when his pre-emption filing was made such land was public land subject to the pre-emption law, and that there was no other occupant or claimant, and that Lake had complied with the requirements of the law. On the other hand, the issuance of the patent did not establish that he had settled on his pre-emption

claim prior to March 3, 1864, or that he had made improvements upon

any particular subdivision of his claim.

In Tarpey v. Madsen, 178 U. S. 215, 20 Sup. Ct. 849, 44 L. Ed. 1042, it was held that the land office record was conclusive as to the time when the pre-emption claim attached. The question here involved is whether the land in controversy was a part of the public lands on July 1, 1862, when Congress granted right of way through the public lands. Patent to Lake and the pre-emption records do not establish that he ever acquired title free from the right of way grant to the railroad company, for the filing of a map of definite location and the construction of the road through the pre-emption claim and subsequent to a patent issued, lead to the conclusion that the patent was issued subject to the right of way granted prior to the date of the issuance of the patent. St. Joseph & Denver, etc., Co. v. Baldwin, supra; Bybee v. Oregon & California R. Co., supra; Stuart v. Union Pacific, 227 U. S. 342, 33 Sup. Ct. 338, 57 L. Ed. 535; Lewis v. Rio Grande W. R. Co., 17 Utah, 504, 54 Pac. 981. Under the facts, Crocker having bought from Lake in 1868, when the railroad was at Reno, no attempted dedication by Crocker can defeat the right of the railroad company; but Crocker's deed to the company in 1886 is evidence tending to prove that there never was a dedication.

Appellant having failed to show any ground upon which the title of the railroad company can be disturbed, the decree must be affirmed.

Affirmed

WESTERN UNION LIFE INS. CO. v. BARBER, State Insurance Com'r of Oregon.

(Circuit Court of Appeals, Ninth Circuit. October 18, 1920.)

No. 3450.

Insurance \$\infty\$87—Effect of statute on right of agents to take and sell premium notes stated.

Gen. Laws Or. 1917, pp. 333, 386, §§ 14, 24k, the former providing that any note taken by any company or its agent or agents in whole or part payment of a premium for insurance shall be regarded as the property of the insurance company issuing the policy, and any suit thereon shall be brought by and in the name of such company, and the latter, relating expressly to life insurance companies providing that it shall be unlawful for any such company or its agent or representative to hypothecate or sell any note taken for all or part of a premium prior to the delivery of the policy, held not to prohibit agents of a life insurance company from taking notes for the amount of a premium in their own name, remitting the premium to the company in cash, or from selling such notes after delivery of the policy.

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit in equity by the Western Union Life Insurance Company against A. C. Barber, State Insurance Commissioner of Oregon. Decree for defendant, and complainant appeals. Reversed,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

F. H. Graves, W. G. Graves, and B. H. Kizer, all of Spokane, Wash., for appellant.

George M. Brown, Atty. Gen., of Oregon, I. H. Van Winkle. and. Millar E. McGilchrist, Asst. Attys. Gen., of Oregon, and L. A. Liljeqvist, of Portland, Or., for the appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The decree appealed from dismissed the bill of complaint at the complainant's cost. The case made by the bill is clearly and tersely stated by the learned judge of the court below as follows:

"The plaintiff is a life insurance company organized under the laws of the state of Washington, authorized to do business in this state [Oregon]. It has numerous agents engaged berein, and it is alleged such agents cannot solicit business and write policies successfully unless they will extend credit for the first year's premium to and accept notes from applicants for insurance: that under the laws of Washington plaintiff cannot accept such notes as admitted assets, and it is therefore compelled to require its agents to remit to it in cash the amount due it on all first year premiums, for business written by them; that the agents are not financially able to take and hold until due promissory notes, and remit to the home office the amount thereof in cash, and therefore, when the applicant has not the money to pay the premium and desires to give his note, it is necessary for the agent to take such note as his own property and sell the same to some banking house, remitting plaintiff from his own funds the amount due it; that in February, 1919, the defendant in his official capacity as insurance commissioner advised plaintiff's agents that the taking of notes in their own names and the sale thereof by them as their own property, either before or after the delivery of the policy, was illegal, and he so notified the banking houses with which plaintiff's agents had been doing business, and to which were sold the notes taken by them.

"Upon learning of the action of the commissioner, plaintiff took the matter up with him, urged that premium notes were not necessarily the property of plaintiff, but, subject to the limitations as to negotiation imposed by the state law, the agent was at liberty to take such notes in his own name and as his own property, and to negotiate and dispose of the same as such; but the commissioner adhered to his ruling that they were the property of the company, and the agents could not lawfully take them as their own, or dispose of them as such, and to do so was cause for revocation of the agent's license to do business in the state. It is alleged that the defendant threatens to and will unless restrained revoke the license of agents who dispose of premium notes as their own property, and will revoke the license of insurance companies which knowingly permit their agents to do so."

February 16, 1917, the state passed an act "to provide for the regulation and supervision of insurance in the state of Oregon, other than state industrial accident insurance" (General Laws, 1917, c. 203), the fourteenth section of which reads:

"Any note taken in payment or part payment of or for any premium to be paid as the consideration for any policy or indemnity contract issued or delivered in this state by any company or its agent, or agents, shall be regarded as the property of the insurance company issuing such policy or contract, and any suit to collect any such note shall be brought by and in the name of the company issuing such policy or contract."

Section 21 is headed "Domestic Insurance Companies," and is followed by a number of subdivisions thereof containing a large number of provisions regarding such domestic companies. Section 23 is headed "General Provisions Relating to Mutual Fire Insurance Companies," and that section contains a large number of provisions regarding mutual fire insurance companies. Section 24 is headed "General Provisions Relating to All Life Insurance Companies," and in that section and in the succeeding section 24a such life insurance companies are "defined." Section 24k of the subdivision relating to life insurance companies is as follows:

"(1) It shall be unlawful for any company or agent, or other representative thereof, to hypothecate, sell or otherwise dispose of a promissory note, order or other similar obligation received in payment for all or any part of a premium on a policy of insurance applied for under the provisions of the laws of this state, prior to the delivery of the policy.

"(2) Any company or any agent or other person who violates any of the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, be punished by a fine of not exceeding one hundred dollars (\$100.00) for each offense, and the insurance commissioner shall have authority in his discretion to revoke the license to transact business in this state theretofore issued to such company or agent."

Immediately following the provisions relating to life insurance companies, ending with section 240, is section 25, headed "Provisions Relating to Surety Companies," containing a large number of provisions relating to such surety companies, which is followed by other specifically stated provisions, headed "Provisions Relating to Interinsurance

Exchanges."

We have no doubt that section 14, above quoted, means exactly what it plainly says, which is in effect that any and every note taken in payment of or for any premium to be paid as the consideration for any policy or indemnity contract issued or delivered in the state of Oregon (which manifestly includes all contracts of insurance designated in the act of February 16, 1917), by any company or its agent or agents, shall be regarded as the property of the insurance company issuing such policy or contract, and that any suit to collect any such note shall be brought by and in the name of the company issuing such policy or contract. But the declaration that any and every such note shall be regarded as the property of the company issuing the policy or contract for which the note is given, and that in the event suit upon such note is resorted to such suit shall be brought in the name of such company, is very far from declaring what the agent of the company holding such note may or may not do with it in any other respect. By subdivision (k), however, of section 24—which section deals expressly and specifically with "All Life Insurance Companies"—it is expressly declared that it shall be unlawful for any company or agent or other representative thereof, to hypothecate, sell, or otherwise dispose of such note, order, or other similar obligation received in payment for all or any part of a premium of a policy of insurance applied for under the provisions of the laws of the state, prior to the delivery of the policy, and, further, that any company or any agent or other person who violates any of the provisions of section 24 shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished in a prescribed way, and that the insurance commissioner of the state shall have authority in his discretion to revoke the license to transact business in the state theretofore issued to such company or agent. Subdivision (k) not only does not prohibit the agent or other legal representative of life insurance companies doing business in Oregon from hypothecating, selling, or otherwise disposing of such notes, orders, or other similar obligations given on account of premiums for insurance, after the delivery of the policy, but, in our opinion, impliedly permits that to be done by expressly making it unlawful to do so prior to such delivery. And we find strong corroboration of the correctness of the construction thus placed on sections 14 and 24k of the Act of February 16, 1917, in the later statute of the state, enacted in 1919 (Laws of Oregon 1919, p. 160), which reads as follows:

"Whenever any bill, note or other written evidence of indebtedness is given to any person, firm or corporation for the premium of any policy of life insurance, said note shall have printed thereupon in legible characters 'Nonnegotiable for thirty days after the date hereof' and said bill, note or other evidence of indebtedness shall be nonnegotiable during said time, as understood by the Negotiable Instrument Law of the state of Oregon." (Italics ours.)

The judgment dismissing the bill is reversed, with costs to the appellant.

GILBERT, Circuit Judge (dissenting). It is the contention of the appellant that the Oregon statutes permit the appellant's agents who solicit insurance in the state of Oregon to receive premium notes in their own names and as their own property, and to negotiate and dispose of the same as such. I think that the court below properly held otherwise. Section 14 of the Laws of 1917 provides in clear terms that all notes taken in payment of premiums shall be regarded as the property of the insurance company, and that any suit to collect any such note shall be brought by and in the name of the company. Section 24k of the same act makes it unlawful for any insurance company or its agents to pledge, sell, or dispose of any such notes so belonging to it prior to the delivery of the policy. The amendment of 1919 contains no repeal of the former statutes. It provides that—

"Whenever any bill, note or other written evidence of indebtedness is given to any person, firm or corporation for the premium of any policy of life insurance, said note shall have printed thereupon in legible characters 'Nonnegotiable for thirty days after the date hereof.'"

These three statutory provisions, under well-settled rules, must be construed together, so as to give, if possible, effect to all. The provision of the amendment that when a premium note is given "to any person, firm or corporation" is taken by the majority of this Court to repeal section 14, and provide that premium notes may be given to and become the property of persons and firms, as well as insurance companies. This, I think, is error.

An insurance company can act only through its officers or agents. Its premium notes, in the usual course of business, may be delivered to persons or firms who act for it, as well as to the officers of the corporation itself. The amendment does not mean that such notes may be payable to such persons or firms as their individual property.

Its meaning, in view of the existing law, is that, while such notes may be given to persons or firms on behalf of a corporation, the corporation itself shall be the owner thereof. This is the contemporary construction adopted by the state officials whose duty it is to enforce the law. That fact is to be taken into consideration here, notwithstanding that so brief a period has elapsed since the enactment of the statutes.

In Lewis' Sutherland Statutory Construction, § 474, it is said:

"The practical construction given to a doubtful statute by the department or officers whose duty it is to carry it into execution is entitled to great weight and will not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous."

Said the court in Edwards v. Darby, 12 Wheat. 206, 210:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

This rule is reaffirmed in United States v. Moore, 95 U. S. 760, 763, and in subsequent cases, and it has been applied in Fitzwilliam v. Campbell, 99 Fed. 30, 37, Southern Pine Co. v. Hali, 105 Fed. 84, 91, and by this court in Grossett v. Townsend, 86 Fed. 908, 912.

Repeals by implication are not favored. The intention to repeal "will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance." Lewis' Sutherland Statutory Construction, § 247. In Winters v. George, 21 Or. 251, 257, the court said:

"It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable."

And in Swensen v. Southern Pac. Co., 89 Or. 275, it was said:

"A repeal by implication is effected, if there be such positive repugnancy between the new and the old enactments that they cannot stand together or be harmonized; but the courts will, however, if possible, construct the two statutes together, and adopt any reasonable construction which will sustain both of them."

DIRECTOR GENERAL OF RAILROADS v. BENNETT.*

(Circuit Court of Appeals, Third Circuit. November 12, 1920.) No. 2584.

1. Commerce \$\insigma 27(7)\$—Engineer, injured when leaving work, engaged in "interstate commerce," within Employers' Liability Act.

Where a locomotive engineer, after completing yard shifting movements in furtherance of interstate commerce, was injured while taking his engine to the roundhouse, either to put it up for the night or to receive further orders, *held*, that he was engaged in interstate commerce, within the Employers' Liability Act (Comp. St. §§ 8657-8665).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Commerce 27(7)—Movement of engine toward roundhouse after completing work held within Employers' Liability Act; "interstate commerce."

Where an engine, engaged in yard shifting movements of interstate commerce, was being taken to the roundhouse, either to be put up for the night or to receive other orders, held, that it was engaged in "interstate commerce" during such movement, so as to enable its engineer to recover under Employers' Liability Act (Comp. St. §§ 8657-8665) for injuries received during the movement.

3. Master and servant \$\infty\$=286(15)—Negligence in placing of defective car on track with small clearance jury question.

In an action under the Employers' Liability Act (Comp. St. §§ 8657-8665) for the death of an engineer, scalded when the safety valve of the locomotive was knocked off by a defective car on the adjoining track, held that defendant railroad's negligence in placing the defective car at a point of narrow clearance was a jury question.

Where a bulging defective car was left at a point of narrow clearance, so that it knocked off the safety valve on a locomotive passing on an adjoining track, resulting in the engineer's death, held, in an action under the federal Employers' Liability Act (Comp. St. §§ 8657-8665), that deceased's assumption of risk was a jury question.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by Mabel Bennett, administratrix of Frank Bennett, deceased, against the Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Clarke Mason, of Philadelphia, Pa., for plaintiff in error.

Frank F. Davis and John C. Oldmixon, both of New York City, for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. Bennett, engineer of a yard engine, employed in shifting service of a railroad engaged in both interstate and intrastate commerce, hauled a train of interstate cars to its destination in the railroad yard. This terminated all service in connection with the train. The eight hour day of the shifting crew having ended, or being about to end, the next movement of Bennett and his engine was toward the roundhouse, there to receive orders, if any, to be carried out on overtime; or, lacking orders, to discharge the crew and house the engine. In making this movement, the edge of a car on an adjoining track struck and tore away the safety valve of the engine. Bennett died from injuries sustained from escaping steam. In this suit, brought by his administratrix under the Federal Employers' Liability Act (Comp. St. §§ 8657–8665), judgment was entered on verdict in her favor. The defendant sued out this writ of error.

By the first question brought here for review, the validity of the judgment is challenged on the ground that the plaintiff failed to prove the engagement of both employé and carrier in interstate commerce at the time of the injury as required by the Act. Second Employers' Liability Cases, 223 U. S. 1, 55, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; St. Louis & San Francisco Ry. Co. v. Seale, 229 U. S.

156, 158, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; Illinois Central R. R. Co. v. Behrens, 233 U. S. 473, 478, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Murray v. P., C., C. & St. L. R. R. Co., 263 Pa. 398, 107 Atl. 21. Assuming that the double aspect of the Federal question is raised by the assignments of error, its answer depends on the character of commerce in which the employé was employed and in which the engine as an instrumentality of commerce was engaged at the time of the injury. Neither one nor the other was at the time actually engaged in moving commerce of any kind, for the engine was moving light; but the movement in which both were involved may have been a necessary incident to commerce of one kind or the other, and if so, the movement partakes of the character of the commerce to which it relates.

[1] Considering the question as it bears on the employment of the engineer, it was shown that he was either on his way home after a movement of interstate traffic or on his way to a place at which he might receive orders for further movements, either interstate or intrastate. The interstate movement just completed was not shown to have been merely a yard shifting movement as in Murray v. P., C., C. & St. L. R. R. Co., supra, but was, so far as the evidence discloses, a movement in actual furtherance of interstate commerce. Putting out of view the remote possibility of future employment as not determinative of the character of his work at the time of his injury (Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 357, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54), the day's work of the engineer. so far as the evidence shows, had ended and his movement was homeward. An employe's "trip through the yard to his engine in the morning," has been held to be a necessary incident to his day's work and necessarily to partake of the character of that work. Erie R. R. Co. v. Winfield, 244 U. S. 170, 173, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662; Nor. Car. R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. If the first train movement the decedent engineer was ordered to make in his day's work had been of an interstate train, the trip of the engine from roundhouse to train would for like reason have been an incident to interstate commerce, and if injured in making the trip, he would have been entitled to the protection of the Federal Employers' Liability Act. Similarly, on leaving his day's work, his last train movement having been of an interstate train, his movement homeward bound would be regarded as a necessary incident to the commerce he had just completed. Erie R. R. Co. v. Winfield, supra. On both reason and authority we are of opinion that when Bennett was injured while leaving his job at the end of the day, notwithstanding the movement might have been, but actually was not, interrupted by an order to proceed elsewhere on overtime. he was but discharging a duty of his employment in a manner necessarily incident to the interstate movement he had just completed.

[2] The defendant maintains in the other aspect of the question, that it, the carrier, was not engaged in interstate commerce at the time of the injury because its engine, moving light, was not an instrumentality specifically assigned to interstate commerce, nor was it performing

a service exclusively or directly connected with commerce of that kind. The character of the instrumentality with reference to commerce, like that of the employé, depends on whether it was a necessary incident to the commerce just concluded. If the engine, instead of going to the roundhouse to end its day's work, had started from the roundhouse to begin its day's work, and was directly on its way under orders to a movement in interstate commerce, the trip from roundhouse to traffic would without doubt have been a movement necessarily incident to interstate commerce and so closely related to it as to have been practically a part of it. Erie R. R. Co. v. Winfield, supra; Nor. Car. R. R. Co. v. Zachary, supra; Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146, 157, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. If, to use another illustration, the engine had left an interstate movement just completed and was on its way to another interstate movement ordered, it would be regarded with equal certainty to have been engaged in the carrier's business of interstate commerce. If, on the other hand, the engine were passing from an interstate movement completed to an intrastate movement ordered, there might be a question as to which commerce the movement from one to the other was incidental, and, accordingly, a question as to the character of which commerce this spanning movement partook. But in the case at bar the engine's departure was from interstate commerce and its movement was toward no commerce of any kind. Its movement, if incidental to commerce at all, must therefore have been incidental to interstate commerce. That is the only commerce with which it had any relation at the time of the injury. As the reverse movement of the engine—from roundhouse to interstate traffic—is a necessary incident to interstate commerce, we fail to see why a movement from interstate commerce to roundhouse is not, pari ratione, a necessary incident to such commerce. The movement home after service in interstate commerce is regarded as a necessary incident to that commerce with respect to an employé (Erie R. R. Co. v. Winfield, supra). It would seem that the same movement home after the same service by the instrumentality on which the employé had been employed was similarly a necessary incident to the commerce in which the carrier had just been engaged.

If the engine had been employed as an instrumentality exclusively in interstate commerce, no one would doubt that the engine movement from roundhouse to traffic or from traffic to roundhouse would be an incident to the one kind of commerce in which it was at all times engaged. This is so because of the certainty of the commerce in which the instrumentality was engaged and because of the direct relation which each bore to the other. When the relation of commerce and its instrumentality is equally direct and the character of the commerce last moved is equally certain—as in this case, where, after the interstate movement, no movement of another kind was begun or presently contemplated—the movement of the instrumentality is as directly and certainly an incident to the commerce last moved as where the instrumentality is engaged exclusively in commerce of a defined kind.

We are of opinion that the trial court committed no error in its charge or in its refusal to direct a verdict because of failure of proof of the two essentials of the Federal Employers' Liability Act.

The defendant charges further error to the court in permitting the jury to find that Bennett's death was due to negligence on the part of his railroad employer and to find that Bennett did not assume the risk of the accident which happened. On these issues the facts are briefly these:

The movement of the engine was on a track next to and parallel with a track on which there was a line of cars. One of these cars had been inspected three days before, and, though showing a bulge in the door, it had been passed as fit for service. In addition the car had a list.

The car in this condition, the jury has found, was at rest with its bulging door and list toward the track on which the decedent's engine was moving at a point where, because of congested conditions, the clearance between trains was markedly narrow, being in this instance according to tests made after the accident not less than four nor more than six inches.

The engine was struck by this car at the place where it bulged, as evidenced by the iron having been scraped, a condition not shown on

the prior inspection.

[3] The principal fact on which the court submitted the issue of negligence was the act of the defendant in keeping in service a defective car and placing it on a track at a point of narrow clearance known to be highly dangerous at all times. While from the narrow clearance—an incident to railroad operation made particularly dangerous here by the position of city streets—no inference of negligence can be drawn, Reese v. P. & R. Ry. Co., 239 U. S. 463, 36 Sup. Ct. 134, 60 L. Ed. 384, the duty nevertheless devolved on the railroad employer to exercise the care which the exigency reasonably demanded for the safety of his employe. We therefore see in the evidence enough to sustain the verdict by which the jury found that in placing an admittedly defective car at a place of admittedly great danger the defendant was guilty of negligence, unless, as urged by the defendant, lastly, the decedent had assumed the risk of such danger as an incident to his employment.

[4] Whether the decedent assumed this risk depends primarily on the character and origin of the danger. The jury might readily have found the danger not one ordinarily to be expected and one not easily to be seen and quickly comprehended. The jury did find that it had its rise in the defendant's negligence. Whether the decedent assumed the risk of the defendant's negligence depends finally upon whether the defect or disrepair involved in his negligence, and the risk arising from it, were so obvious and open that he should, as an ordinarily prudent person under the circumstances, have seen and appreciated them. Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 102, 34 Sup. Ct. 229, 58 L. Ed. 521; Seaboard Air Line v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. The circumstances which govern this question include the decedent's knowledge of the great though ordinary danger of the narrow clearance; his ability to see straight ahead down the track on which his engine was moving; his inability, because of the limited clearance, to look from the side of his cab and bring the line of cars into view; the presence

of a car on the adjoining track which was in disrepair, in that it bulged at the door, and was defective, in that it leaned out of plumb—faults, though small, that together were sufficient to contract the clearance and

create the danger which resulted in the accident.

We are of opinion that it was for the jury to gather from these circumstances and decide whether, under the law as charged, the decedent had assumed the risk of the danger arising from the defendant's found negligence. Gila Valley Ry. Co. v. Hall, supra; Seaboard Air Line v. Horton, supra; McGovern v. P. & R. Ry. Co., 235 U. S. 389, 401, 35 Sup. Ct. 127, 59 L. Ed. 283.

The judgment below is affirmed.

HINES, Agent, v. KEYSER.*

(Circuit Court of Appeals, Third Circuit. November 12, 1920.)
No. 2596.

1. Master and servant \$\infty 286(15)\$—Negligence in placing cars in switchyard

question for jury.

Where plaintiff, an engineer, when moving his engine backward, pushing cars in a railroad yard, was injured by collision between his cab and a car standing on a switch track, whether the company was chargeable with negligence in leaving the car so close to the passing track that it could not be passed safely by any engine, unless it was moved slowly and with extreme care, nor at all by one with a cab slightly wider than usual, and where it could not be seen by plaintiff because of the cars ahead, held properly submitted to the jury.

Commerce \$\insigm 27(5)\$—Employers' Liability Act applicable to employ engaged in interstate commerce though employ causing the injury was not

so engaged.

Where an employe was injured while a carrier was engaged in interstate commerce, and while the employe was employed in such commerce, it is immaterial to his right of recovery under Employers' Liability Act April 22, 1908, § 1 (Comp. St. § 8657), whether or not another employe, when he committed the act of negligence which was the cause of the injury, was also employed in interstate commerce.

In Error to the District Court of the United States for the Eastern District of Pennsylvania: I. Whitaker Thompson, Judge

District of Pennsylvania; J. Whitaker Thompson, Judge. Action at law by Harvey K. Keyser against Walker D. Hines, Agent. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Clarke Mason, of Philadelphia, Pa., for plaintiff in error. Frank F. Davis and John C. Oldmixon, both of New York City, for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. The judgment here under review was recovered in an action for personal injuries brought under the Federal Employers' Liability Act. Keyser, the plaintiff below, was a locomotive engineer engaged at the time of the accident in shifting cars in the South Bethlehem Yard of the Philadelphia & Reading Railway

Company then in possession and operation of the Director General of Railroads. The movement was of a draft of six cars pushed from the rear by the engine in reverse. Because the engineer could not see the track from his position in the cab, this backward movement was controlled solely by signals made by a brakeman standing on the third car from the engine and received by the plaintiff sitting with his hand on the throttle at his usual place, but (because of the backward movement) with his body turned and his eyes toward the brakeman. As the draft moved along Track No. 2 the cab of the engine was struck by a car on a switch leading into Track No. 4, left in such position that one corner projected towards and by a glancing blow collided with the engine, crushing in the cab and inflicting the injury of which the plaintiff complains in this action. Upon the plaintiff's testimony alone the defendant moved for a directed verdict on the several grounds, which, because of the court's refusal, followed by verdict and judgment, are brought before us by this writ of error.

[1] The first of these concerns the question of proof of defendant's negligence and is raised on the defendant's contention that there was not sufficient evidence to warrant the finding by the jury that placing the car on the switch in such position that its corner projected and collided with the engine was a violation of any duty which the defendant

owed the plaintiff.

The bases of this contention are that the normal clearance between the tracks, though so narrow as always to be fraught with great danger, did not involve negligence, Reese v. Philadelphia & Reading Railway Company, 239 U. S. 463, 36 Sup. Ct. 134, 60 L. Ed. 384; and that the clearance was ample if the passing engine had been carefully handled, as evidenced by the fact that another engine running slowly and without cars had on the same day approached the same projecting car and by slowing down had passed it with a clearance of one inch. That the plaintiff's engine did not pass it in safety, the defendant contends, was due to one of two things: Because the cab of his engine was slightly wider than the cab of the engine that had passed in safety, or because the plaintiff's engine, moving at a speed of from six to seven miles an hour acquired a sway which brought about the contact; contact being avoided by the first engine because of its lower speed. As there was no evidence that the speed at which the plaintiff was moving his engine was excessive, and as there was evidence that the plaintiff's view of the track ahead and its perils was obstructed by the draft he was moving, the defendant evidently owed the plaintiff the duty of supplying him with a smaller engine as a reasonably safe instrument with which to work on that track, or of assuring him a clear way as a reasonably safe place in which to follow his employment of shifting cars. As the defendant had placed a car on the siding in such position that the plaintiff could not pass it with the engine supplied him without collision, and as the defendant called upon the plaintiff to make a movement the danger of which was masked to him, even if it were obvious to others, it was a fair question for the jury whether the defendant had not thereby violated the duty which the law imposed upon him for the protection of his employé.

As a second ground for a directed verdict, the defendant insisted that the injury to the plaintiff arose out of a risk incident to his employment which he had assumed and for which therefore he cannot recover, relying upon repeated rulings of the Supreme Court that, except with reference to certain defenses expressly eliminated, assumption of risk under the Federal Employers' Liability Act has the same effect as a complete bar to an action as it had before the passage of the Act. This effect is elaborately considered and tersely stated by the Supreme Court in Seaboard Air Line v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 640 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475). There it was said:

"On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employé. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. * * * But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employé is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

See also Boldt v. Pennsylvania R. R. Co., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385; Reed v. Director General, 267 Pa. 86, 110 Atl. 254.

We find nothing in the court's charge inconsistent with this rule of assumption of risk. The jury by its verdict has found negligence on the part of the defendant in leaving the car on a switch in a position whereby its corner projected and came into collision with an engine on another track, and that the risk of this negligence was not one ordinarily incident to the plaintiff's employment. It has also found that the risk of this negligence was not so open and obvious that the plaintiff employé should have seen it and appreciated it. Therefore, in these findings of the jury under the court's submission, we cannot say as a matter of law there was error.

[2] The remaining ground urged by the defendant for a directed verdict was the failure of the plaintiff's evidence to show that the defendant, the Director General of Railroads, "was engaged in interstate commerce at the time of the accident because there is no proof that the car with which the engine collided was so employed." Stated differently, the defendant maintains that in order for the plaintiff to sustain the verdict under the Federal Employers' Liability Act, he must have proved that the defendant was engaged in interstate commerce at the time he, or some one of his servants, placed the car upon the siding in the negligent manner which later brought about the accident. This is a novel proposition. The defendant finds support for it in Mayers v. Union Railroad Co., 256 Pa. 474, 100 Atl. 967; Id., 243 U. S. 656, 37 Sup. Ct. 482, 61 L. Ed. 949. From a careful reading of this case and of the Federal authority on which it was expressly rested (Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54), we fail to find

such a rule. The test of an employer's engagement in interstate commerce within the meaning of the statute is not the character of its engagement at the time of the commission of a negligent act, when not contemporaneous with the injury, but it is the character of its engagement at the time of the consequent injury to its employé. It is clear by the terms of the statute as well as by many decisions of the Supreme Court that the "right of recovery [under the statute] arises only where the *injury* is suffered while the carrier is engaged in interstate commerce and while the employé is employed by the carrier in such commerce; but," the Supreme Court continued, "it is not essential, where the causal negligence is that of a coemployé, that he also be employed in such commerce, for, if the other conditions be present, the statute gives a right of recovery for the injury or death resulting from the negligence of any of the * * * employes of such carrier.' " Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146, 150, 151, 33 Sup. Ct. 648, 649 (57 L. Ed. 1125, Ann. Cas. 1914C, 153). The offending car in this case was carelessly placed on the switch by the defendant, or by one of his servants, who doubtless was a coemployé of the plaintiff; but as the negligence here charged to the defendant was not alone that of placing the car in such position on the switch, but was also that of operating a train of cars in interstate traffic toward and against the car so placed, it is not material whether in committing the first act of negligence the defendant employer, or his servant, the coemployé, was engaged in interstate or intrastate commerce. Second Employers' Liability Cases, 223 U. S. 51, 52, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

The sole question therefore is, whether there was evidence on which the jury could find the two essentials of recovery under the statute. The parties agreed by stipulation that two cars in the draft were in interstate commerce and that, in consequence, the plaintiff was employed in interstate commerce at the time he suffered his injury. As the plaintiff was the servant of the defendant employed at the time in moving his master's traffic, it manifestly was permissible for the jury to find the character of the employer's engagement in commerce from evidence which established the character of the employé's employment in commerce, for at the time of the injury both were concerned in the identical traffic.

Finding no error in the proceedings below, the judgment is affirmed.

SNYDER v. HAUSHEER.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1920.)

No. 5487.

1. False imprisonment = 3—Complaint held one for false imprisonment.

A complaint alleging that defendant town marshal without probable cause and without a warrant imprisoned plaintiff, and praying for exemplary damages, with allegations of malice and bad faith, *held* one for false imprisonment, and not for malicious prosecution.

False imprisonment \$\infty\$-4—Officer's malice immaterial, if warrant justified arrest.

If defendant town marshal was justified by his warrant in arresting plaintiff, evidence as to defendant's acts and declarations, tending to show malice or bad faith in making the arrest, became immaterial.

3. False imprisonment 5-7(3)—Warrant fair on its face protects officer.

Under Comp. St. Wyo. 1910, § 5902, defining breach of the peace, section 6131, providing that prosecuting attorneys may verify informations on information and belief, section 1645, as to duties of marshals, and section 1226, as to executing process, and Const. Wyo. art. 5, § 22, as to jurisdiction of justices of the peace, a town marshal was not liable for false imprisonment, where he arrested plaintiff on a warrant charging breach of the peace, issued by a justice of the peace, on the sworn complaint of the county and prosecuting attorney, and confined plaintiff in jail pending inquiry, after having telephoned the justice of the peace and received no answer; defendant being a ministerial officer only, protected by a warrant fair on its face.

In Error to the District Court of the United States for the District

of Wyoming; John A. Riner, Judge.

Action by Albert W. Hausheer against John Snyder and another. Judgment against the named defendant, and he brings error. Reversed, and new trial granted.

James H. Devine, of Ogden, Utah (David L. Stine, Roscoe C. Gwilliam, and J. D. Murphy, all of Ogden, Utah, on the brief), for plaintiff in error.

Paul W. I.ee, of Ft. Collins, Colo. (George H. Shaw, of Ft. Collins, Colo., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

CARLAND, Circuit Judge. The defendant in error, hereafter called plaintiff, brought this action against plaintiff in error, hereafter called defendant, and the Wyoming Sugar Company, to recover damages for false imprisonment. The case was tried to a jury, and at the close of all the evidence counsel for defendants moved for a directed verdict. The motion was granted as to the Sugar Company and denied as to the defendant. The court thereupon, on its own motion, directed a verdict for the plaintiff, except as to the amount of damages. The jury rendered a verdict in favor of the plaintiff in the sum of \$2,000, upon which judgment was entered. Counsel for defendant excepted to the refusal of the court to direct a verdict in favor of the defend-

ant, and also to the action of the court in directing a verdict for the plaintiff, except as to the question of damage. The case is now before us for review; the above rulings of the court being assigned as error.

With the Sugar Company out of the case, the charge of conspiracy between the company and the defendant, as alleged in the second cause of action, necessarily failed, leaving the defendant as the only party

against whom a recovery could be had.

[1] It is claimed by counsel for plaintiff that the action is more than one for false imprisonment. We do not understand what the cause of action would be, if it was for more than false imprisonment. The action is certainly not one for malicious prosecution, as only the officer who imprisoned the plaintiff is sued. In both the first and second causes of action it is alleged that the defendant without probable cause and without a warrant, or any other order of arrest, imprisoned the plaintiff for 10 hours in a filthy cell in the jail located at Worland, Wyo. The complaint prayed for \$10,000 exemplary damages, and necessarily it contains allegations in regard to malice and bad faith; but these allegations do not change the cause of action from false imprisonment to something more, whatever that may mean. The trial court told the jury that the action was one for false imprison-

ment in the charge to the jury on the question of damage.

The defendant by his answer admitted that he arrested and imprisoned the plaintiff, but denied that said imprisonment was without probable cause or without a warrant. He also pleaded that at the time of the arrest he was town marshal of the town of Worland, Wyo., and that on September 12, 1917, a criminal complaint charging the plaintiff with having committed a breach of the peace was duly executed and filed in the office of J. W. Pulliam, a justice of the peace in and for the county of Washakie, Wyo., and a warrant was duly issued thereon by said justice of the peace, charging plaintiff with having committed a breach of the peace, and that said warrant was placed in the hands of defendant as town marshal of the town of Worland, which warrant required the defendant to apprehend and take into his custody the plaintiff; that the defendant did apprehend and arrest the plaintiff under and by virtue of said warrant, which he had in his possession, and confined him in the jail in said town of Worland, for the reason that the arrest was made at a late hour of the day and said justice of the peace was not at his office and could not be found at the time of said arrest.

[2] The only evidence introduced at the trial was that on the part of the plaintiff. There was much evidence introduced for the purpose of showing that the Sugar Company had something to do with the arrest and imprisonment of the plaintiff; also evidence in regard to the acts and declarations of the defendant tending to show malice or bad faith in making the arrest. But, if the defendant was justified by his warrant, these matters become immaterial, especially as a verdict was directed in favor of the Sugar Company. The evidence showed that on the evening of September 12, 1917, Pulliam, who was a justice of the peace in the town of Worland, Wyo., delivered a warrant to the defendant of which the following is a copy:

"The State of Wyoming, County of Washakie-ss.:

"To the Sheriff or Any Constable of Said County-Greeting:

"Whereas C. H. Harkins, county and prosecuting attorney of said county, has this day complained to me, on oath, that A. W. Hausheer did on or about the 12th day of September, A. D. 1917, at Worland, in the county and state aforesaid, commit a breach of the peace by then and there talking in a loud and unnecessary manner, by violent actions, and by other rude behavior, interrupt and disturb the peace of the inhabitants of the town of Worland, Washakie county, Wyo., and prayed that the said A. W. Hausheer might be arrested and dealt with according to law. Now, therefore, in the name of the state of Wyoming, you are hereby commanded forthwith to apprehend the said A. W. Hausheer and bring him before me to be dealt with according to law.

"Given under my hand this 12th day of September, A. D. 1917.

"J. W. Pulliam, Justice of the Peace."

There was a blank return on the warrant, which was not filled out or signed by the defendant. This fact, however, is of little importance, as the proceedings were discontinued the morning after the arrest and no trial had. Defendant thereupon went to the Dorman Hotel in Worland and looked over the register, for the purpose of ascertaining if the plaintiff was stopping there. He found that he was, and thereupon went to the plaintiff's room; the proprietor of the hotel going with him. He knocked at the door of the room, which being opened by the plaintiff, defendant said to him that he had a warrant for his arrest for a breach of the peace. The plaintiff had been in bed asleep, and after he had dressed defendant arrested him and took the plaintiff downstairs and over to the jail, and locked him up. Defendant telephoned the justice of the peace, but received no answer. Plaintiff remained in jail until morning, when he was liberated by the officer on duty during the day and left town. The defendant testified that he had the warrant above mentioned either in his hand or in his pocket when he arrested the plaintiff. The plaintiff testified that he asked the defendant if he had a warrant at the time of the arrest, and the defendant replied, "You will get your warrant in the morning," and that the defendant did not show any papers or warrant when he made the

Mr. Harkins, who was prosecuting attorney of Washakie county, Wyo., at the time of the arrest, testified that on the evening of September 12, 1917, he drew up the following complaint:

"Before J. W. Pulliam, Justice of the Peace.

"The State of Wyoming v. A. W. Hausheer.

"The State of Wyoming, County of Washakie-ss.:

"I, C. H. Harkins, county and prosecuting attorney of said county, do solemnly swear that on or about the 12th day of September A. D. 1917, in the county of Washakie, town of Worland, and state of Wyoming, the said A. W. Hausheer did willfully, maliciously, and unlawfully then and there by loud and unnecessary talking, and by threatening language, and by violent actions, and by other rude behavior, interrupt and disturb the peace of the inhabitants of the town of Worland, Washakie county, Wyo., contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Wyoming.

[Signed] C. H. Harkins.

"Subscribed and sworn to before me this 12th day of September, 1917.

"J. W. Pulliam, Justice of the Peace.

"Filed this 12th day of September, 1917.

"J. W. Pulliam, Justice of the Peace."

—and swore to the same before the justice of the peace. The justice of the peace testified that he swore Harkins to the complaint and signed and issued the warrant, which he delivered to the defendant to serve. Pulliam could not testify whether the complaint was ever actually filed in his office or not. Harkins testified that he inclosed the complaint and warrant in an envelope and delivered it at Pulliam's office, but sub-

sequently it was returned and taken back.

We do not attach much importance to whether the complaint was actually filed in the office of the justice of the peace. He could swear Harkins to the complaint at Harkins' office, where the evidence tends to show the complaint was sworn to and the warrant issued. Much evidence, as we have said before, appears in the record tending to show that the plaintiff was in Worland for the purpose of inducing laborers to go to Ft. Collins, Colo., and work for the Sugar Company at that place, and that the Wyoming Sugar Company, for the purpose of keeping the laborers in Wyoming in its own service, devised a scheme whereby the plaintiff should be made to leave town. The direction of a verdict in favor of the Sugar Company, however, not being complained of, must be accepted as refuting such a claim so far as the Wyoming Sugar Company is concerned.

But, whatever truth there may be in the claim made, there is no evidence that the defendant was connected therewith, and if there is, he is not now being sued for malicious prosecution. Section 5902, C. S. Wyoming 1910, defines the offense for which the warrant was issued. Section 6131 provides that prosecuting attorneys may verify informations on information and belief. Section 1645 gave the defendant authority to make the arrest and confine plaintiff in jail until a trial or examination could be had. Section 1226 makes it obligatory upon the sheriff to serve process issued by the courts, and the above section placed upon the defendant the same duty and holds him to the same accountability as to all process placed in his hands. Pulliam was a judicial officer having jurisdiction of the offense charged in the complaint; his office being created by article 5, section 22, of the Constitution of the

state of Wyoming.

[3] On this record the defendant contends that he was a mere ministerial officer, bound to execute the process of the court placed in his hands for service by the justice of the peace, and was in law fully protected thereby; that as an officer he had no right to question the authority of the court issuing regular process, and was not bound to inquire and had no right to inquire upon what information or evidence the magistrate acted, and that after having arrested the defendant he was within his rights and acted in accordance with the law of his state, under section 1645, supra, in placing plaintiff in jail until such time as judicial inquiry could be made respecting the offense of which he stood charged. We are of the opinion that this contention is sound. In the case of Erskine v. Hohnbach, 14 Wall. 613, 616 (20 L. Ed. 745), Justice Field, in delivering the opinion of the court, used the following language:

"Whatever may have been the conflict at one time in the adjudged cases as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law

with authority to pass upon and determine particular facts and render judgment thereon, it is well settled now that, if the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcment against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued."

To the same effect are the following cases: Hofschulte v. Doe et al. (C. C.) 78 Fed. 436; Whitten v. Bennett et al. (C. C.) 77 Fed. 272; Carman v. Emerson, 71 Fed. 264, 18 C. C. A. 38; Bohri et al. v. Barnett, 144 Fed. 389, 75 C. C. A. 327; Jennings v. Thompson, 54 N. J. Law, 55, 22 Atl. 1008; Gordon v. West et al., 129 Ga. 532, 59 S. E. 233, 13 L. R. A. (N. S.) 549; State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; Holz v. Rediske et al., 116 Wis. 353, 92 N. W. 1105; Clarke v. May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; Mangold v. Thorpe et al., 33 N. J. Law, 134; Pankewicz v. Jess et al., 27 Cal. App. 340, 149 Pac. 997; Henline v. Reese, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. Rep. 736; 35 Cyc. 1737.

We have examined the cases cited by counsel for plaintiff, but do not find any of them contradicting the principle established by the above cases. We are clearly of the opinion that the justice of the peace in this case possessed jurisdiction over the subject-matter of the complaint upon which the warrant was issued, and that he had authority to issue the warrant for the plaintiff; that the defendant was a ministerial officer, with a warrant regular on its face showing no departure from the law or defect of jurisdiction over the person of plaintiff, and that said warrant gave the defendant full and entire protection in the enforcement of the warrant against any prosecution which the plaintiff might institute against him, although serious errors may have been committed by the justice of the peace in reaching his conclusion or judgment upon which the process was issued.

We are therefore of the opinion that the court erred in refusing to direct a verdict for the defendant, and that the judgment must be re-

versed, and a new trial granted; and it is so ordered.

SMITH v. FIRST NAT. BANK OF CASSELTON, N. D.*

(Circuit Court of Appeals, Eighth Circuit. September 27, 1920.) No. 5561.

 Banks and banking \$\infty\$261(4)—In action for deceit against national bank, ultra vires no defense,

A national bank held liable for deceit, where its president, who transacted its business, purporting to act for the bank, sold to paintiff a note and real estate mortgage, and received payment by drafts payable to him as president, when in fact the bank did not own the note and mortgage, and did not deliver them, although it did not receive the purchase money,

and although plaintiff knew it had no authority to make such loans, either for itself or as broker, where he had previously during several years purchased such loans from it, through its president, in the same manner.

2. Banks and banking \$\iff 261(4)\$—In action for deceit against national bank, ultra vires no defense.

In such case, the action is not one to enforce an ultra vires contract, but in tort, and plaintiff's right arises out of the fact that the bank held itself out as having such loans for sale, and as negotiating them through its president, and is therefore liable for his acts and statements in such negotiations.

3. Estoppel € 90(2)—Acts not prejudicial do not raise equitable estoppel.

Where a national bank sold a note and mortgage, which it did not own and could not deliver, subsequent negotiations between the purchaser, the president of the bank, and the actual owner of the note and mortgage, by which the purchaser obtained the same, thereby reducing his loss, and consequently the liability of the bank, held not to estop him from maintaining an action against the bank for the deceit.

In Error to the District Court of the United States for the District of North Dakota: Charles F. Amidon, Judge.

Action by Frank M. Smith against the First National Bank of Casselton, N. D. Judgment for defendant, and plaintiff brings error. Reversed

A. W. Cupler, of Fargo, N. D. (Ed. Pierce and B. G. Tenneson, both of Fargo, N. D., on the brief), for plaintiff in error.

Matthew W. Murphy, of Fargo, N. D. (Aubrey Lawrence, of Fargo,

N. D., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and JOHNSON, District Judge.

STONE, Circuit Judge. Error by plaintiff below from adverse judgment in suit for deceit. Smith was a money lender living in the state of New York. The bank was a national bank located in the town of Casselton, N. D. The amended petition alleges that the bank, through its president, R. C. Kittel, represented to Smith that it had a note for \$30,000 secured by a mortgage on North Dakota land, and that it offered this loan to him for sale at a discount of \$1,500; that he relied upon the above representations and purchased the loan, paying therefor \$28,695.15; that the bank, through Kittel, converted this sum: that it never had the note or mortgage; that the note and mortgage were in fact owned by a business company (the Northern Trading Company), and then were pledged as collateral by it for a loan to a Minneapolis bank; that to protect himself from loss he was compelled to and did pay the pledgee \$15,198.65, and thereby secured the note and mortgage and other security; that thereafter he was paid about \$8,000 of this \$15,198.65, leaving a balance of \$7,198.65, for which this suit was brought. The theory of the petition is fraud and deceit by the bank, in representing falsely that it had the note and mortgage. The bank pleaded the general issue, novation and compromise, waiver and estoppel, election of remedies, offset and counterclaim, and ultra vires. The issues concentrated on the liability of the bank for the acts of Kittel, and the effect of a contract made between Smith, Kittel, and the Northern Trading Company, by which Smith secured the note and mortgage from the Minneapolis bank, and also bonds which netted

him the \$8,000 payment referred to in the amended petition.

The pertinent facts follow: The bank was capitalized for \$50,000, and had a surplus of \$10,000. R. C. Kittel was its president, and personally conducted the business of the bank. For years it had conducted two classes of business respecting loans on real estate: First, it made such loans, later selling them to buyers; and, second, it brought together persons desiring loans upon real estate security and persons who made such loans. The first was a loan business; the second, a brokerage business. It charged a commission in such cases. R. C. Kittel was the president of the bank: he was also vice president of the Northern Trading Company, and was engaged in the loan brokerage business on his own account. Smith, and his father before him, had for some years bought loans offered by the bank, acting through Kittel. He knew the capitalization and surplus of the bank: that it had no authority to make a single loan of \$30,000; that it did a brokerage business in real estate loans; that it had no authority to do such business; that Kittel did an individual loan brokerage business, and that he was vice president of the Northern Trading Company. This loan was submitted in January, 1914, by Kittel, who signed the letter "R. C. Kittel, President," although his reference to possession and control of the loan is, in this and subsequent letters, in the singular, such as, "I have a first mortgage note. * * * " Smith's letters were addressed to "R. C. Kittel, Pres. First National Bank, Casselton, N. D." Smith accepted the loan February 4, 1914, saying he would have the loan assigned to his sister. Kittel, in acknowledging this letter, said he would have that assignment made at once and shown on the abstract of title sent to Smith. Smith made payment through drafts to the order of "R. C. Kittel, President." These drafts were deposited by Kittel to the credit of the Northern Trading Company, and the proceeds used by it. The bank used none of the money and received no commission or compensation of any character in connection with the loan. The note and mortgage were never in possession of the bank, but were, at the time Smith accepted the loan and thereafter, pledged by the Northern Trading Company with a Minneapolis bank as collateral for a loan made to the Trading Company.

On March 5, 1914, 18 days after the final payment by Smith, he examined the abstract for the property, which had been received after the above final payment. It showed the loan made by the Northern Trading Company, with no assignment to or title ever in the bank. From this date, early in 1914, Kittel postponed sending the loan papers. In November, 1915, Smith became suspicious of the loan, but never at any time before this suit was brought communicated with any other official or director of the bank concerning it. December 6, 1915, the bank went into receivership. Ascertaining that the loan papers had been deposited by the Northern Trading Company with the Minneapolis bank as collateral security for a loan, Smith executed a contract, dated February 1, 1916, with the Northern Trading Company and Kit-

tel. This contract recited that Smith had bought the \$30,000 note and mortgage from the Northern Trading Company and Kittel, and had later ascertained that they were pledged to the Minneapolis bank, which then held it for a balance of \$15,098 due on its loan; it then provided that upon payment by him to the Minneapolis bank of this balance of \$15,098 he was to have the \$30,000 note and mortgage; that, for the purpose of repaying Smith the above outlay of \$15,098, the Trading Company and Kittel agreed to deliver to him \$8,000 of the Trading Company bonds, and, if possible, the conveyance of an incumbered half section of land; that, if said conveyance of land be procured, it would be received by Smith as full payment of the balance paid by him to the Minneapolis bank; that, if such conveyance be not made, then the amount due because of the payment to the Minneapolis bank to be reduced \$8,000, represented by the bonds. No conveyance of the land was made. Smith realized the face value of \$8,000 from the bonds, and, on foreclosure, secured full payment of the mortgage note.

[1, 2] This is an action for deceit. The trial court, jury having been waived, ruled for defendant on these grounds: that, as such transactions were ultra vires and, both impliedly and actually, known by Smith to be such, no action for deceit in connection therewith could be maintained; that the only basis of recovery in such ultra vires transactions would be for money had and received, but that such action was not here maintainable, because the bank had received no money nor profit; that the conduct of Smith in relation to the contract, under which he obtained the loan papers from the Minneapolis bank, amounted to a waiver and an estoppel in favor of the bank. The loan would have been ultra vires if made by the bank, because of the amount involved, or, if it was a brokerage transaction, because national banks have no power to engage in the brokerage business. This was both impliedly and actually known by Smith, and he also knew that this loan was of such character. But he is not here trying to enforce the contract. This action is in tort for deceit. It is based upon the claim that Smith sent money to the bank in reliance upon the representation by an officer of the bank that it had a certain loan for sale, when such statement was known by said officer to be false. Whatever Smith did was with the knowledge that the bank had for years engaged in making and brokering real estate loans. He had, for years, bought such loans from the bank, two of which were in excess of the bank's lending power, and one of which was larger than \$30,000. In all of these loan sales to him, Kittel had conducted the negotiations for the bank. The bank had thus held itself out to him as having such loans for sale and as negotiating them through Kittel. It is, therefore, responsible, in tort, for the acts and statements of Kittel in such negotiations. If Kittel knowingly stated falsely that the bank had such a loan for \$30,000, and if Smith parted with his money relying upon that statement, and sent that money to Kittel as an officer of the bank, then there was a fraud upon Smith, for which both Kittel and the bank were liable.

[3] This liability is not affected by the subsequent arrangement between Smith, Kittel, and the Northern Trading Company, through

which Smith gained possession of the note and mortgage. That arrangement was but a laudable effort by Smith to reduce his loss. There is no element of estoppel based upon this arrangement, for the bank never knew of it and did not act upon it; nor is it shown how it could have affected the action of the bank, then in receivership, had it known. It resulted beneficially to the bank by reducing its liability for nondelivery of a note and mortgage proven to be worth \$30,000, the face value, to \$7,198.65.

With directions to grant a new trial, the judgment is reversed.

HOOK, Circuit Judge, concurs in the result.

DODGE et al. v. CLARK et al.

(Circuit Court of Appeals, Fifth Circuit. November 19, 1920.)

No. 3592.

1. Lis pendens 24(1)—Purchaser bound by suit against vendor. Where a lis pendens has been filed, a person subsequently purchasing from the defendant becomes bound by the decree when rendered.

2. Lis pendens = 25(5)—Purchaser under executory contract unaffected by subsequent filing.

One purchasing by an executory contract before filing of suit against the vendor is a prior purchaser and not affected by a subsequent lis pendens, although he has not then completed payments on the contract.

3. Adverse possession 72—Bond for title is color of title.

Under Civ. Code Ga. 1910, § 4169, declaring that adverse possession for seven years under written evidence of title gives prescriptive title, a bond for title is color of title, and possession thereunder, with part payment of purchase money, is adverse against all except the maker of the bond.

4. Adverse possession \$\infty\$=114(1)—Evidence showing holding hostile and

Evidence that adverse claimants took possession, paid part of purchase money, and occupied and cultivated the land, either directly or through tenants, etc., held to sustain a finding of hostile possession, ripening into prescriptive title.

Appeal from the District Court of the United States for the Southern

District of Georgia; Beverly D. Evans, Judge.

Suit by Laura E. Clark and Anna E. Holliday against D. Stewart Dodge and others, as executors of Norman W. Dodge, deceased, and others. Decree for complainants, and defendants appeal. Affirmed.

John R. L. Smith, of Macon, Ga. (Grady C. Harris and Harris, Harris & Whitman, all of Macon, Ga., on the brief), for appellants.

Charles Akerman, of Macon, Ga. (R. Earl Camp, of Dublin, Ga., on the brief), for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges

KING, Circuit Judge. On June 1, 1918, the appellees, Laura E. Clark and Anna E. Holliday, filed a bill in equity in the United States District Court for the Southern District of Georgia, Western Division,

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

against D. Stewart Dodge, Cleveland H. Dodge, and M. Hartley Dodge, as executors of Norman W. Dodge, deceased, Walter M. Clements, J. H. Roberts, Paul Roberts, William McRae, and Joseph S. Davis, United States marshal for the Southern district of Georgia, to enjoin the enforcement of a writ of assistance issued against Jasper McCray, W. C. Clark, and H. M. Clark, directing said United States marshal to put said Clements, said J. H. & Paul Roberts, and William McRae in possession of land lot No. 262 in the Twelfth district of Laurens county, and to enjoin interference with the possession of complainants under said writ.

Complainant Laura E. Clark claimed to be the owner of the south half, and complainant Anna E. Holliday of the north half, of said lot No. 262 under deeds executed by W. C. Clark to them, respectively, on the 18th and 19th days of July, 1911, recorded, respectively, on August 4 and September 30, 1911, and averred that each had been in actual adverse possession, had erected valuable improvements, and cultivated said land; that said W. C. Clark had purchased said land in the year 1892 from Jasper McCray as a part of a tract consisting of four contiguous land lots, and had gone into actual possession of said tract, and on January 2, 1893, Jasper McCray had executed and delivered to said W. C. Clark a bond for title, conditioned to convey said four land lots in consideration of \$300 cash, and three promissory notes, each for \$433.33½, due, respectively, February 1, 1894, 1895, and 1896. On December 13, 1897, said Jasper McCray executed a warranty deed to said Clark conveying to him said four land lots.

On June 25, 1894, Norman W. Dodge filed a bill in equity in the United States Circuit Court for the Southern District of Georgia, Western Division, asserting title to a large number of land lots, including said land lot 262, against L. L. Williams and numerous other defendants, among whom was Jasper McCray, who was served with subpœna on July 13, 1894. Said bill was stated to be a bill of peace and to quiet title and for injunction and relief. W. C. Clark was not made a party to said cause, nor served with any process therein, and testified that he had no notice of its pendency until after the decree rendered therein. A decree finding that Norman W. Dodge had title to numerous land lots, including said land lot 262, was rendered on December 2, 1902.

In February, 1905, on petition of Norman W. Dodge, filed against Jasper McCray, W. C. Clark, and H. M. Clark, in said case of Dodge v. Williams et al., stating that McCray or said Clarks were in possession of said land lot No. 262, and that they refused to surrender the same to him, a writ of assistance was issued, and W. C. Clark was notified by the United States marshal for the Southern district of Georgia that in April, 1905, he would be ejected thereunder.

On April 19, 1905, W. C. Clark filed his bill in said United States Circuit Court against said Dodge and said United States marshal, reciting the issuance of said writ of assistance, and that he would be ejected thereunder, unless the court should restrain its execution. He asserted title to said lot under his possession, under said bond for title, executed to him by said McCray, since the winter of 1892; that he had been in

quiet, peaceable possession for more than seven years, had built a home and made valuable improvements thereon; that he was not a party to, and never appeared in, said case of Dodge v. Williams et al., and was in no wise bound by the decree therein. He prayed a perpetual injunction against the execution of said writ of assistance, and that the decree of December 2d, in so far as it affected his rights in and to said land lot No. 262, be set aside.

Service was acknowledged by said defendants, and general and special demurrers filed thereto. No further steps appear to have been taken to execute said writ of assistance. On November 11, 1910, said case of Clark v. Dodge and the marshal was dismissed, because no parties had been made therein.

On May 18, 1918, a petition was filed by D. Stewart Dodge, Cleveland H. Dodge, and M. Hartley Dodge, as executors of Norman W. Dodge, alleging his death, and asking to revive said suit of Dodge v. Williams et al., by substituting petitioners as complainants in place of Norman W. Dodge, deceased, and an order to this effect was entered on the same day.

On said May 18, 1918, said executors filed a petition reciting the issuance of said writ of assistance against Jasper McCray, W. C. Clark, and H. M. Clark on February 16, 1905; that said writ had been lost, mislaid, or destroyed; that the marshal's records, while showing its delivery to him, did not show that it had been executed, or any return thereon or disposition thereof; that the executor had sold and conveyed said land, and it was now the property of J. H. Roberts, Paul Roberts, William McRae, and W. M. Clements. They prayed the issuance of an alias writ requiring the United States marshal of said district to put said purchasers in possession as the successors to the right of possession of said Norman W. Dodge and of petitioners as substituted complainants. An order directing such alias writ of assistance to issue was made instanter on said May 18, 1918, and on said day such writ was issued, to enjoin the enforcement of which this bill has been filed.

A final decree on the pleadings and evidence was rendered in this cause by said United States District Court on April 21, 1920, in which the court found that the equity of the cause is with the complainants as against the defendants, and that the complainants have prescriptive title to the premises described in the bill as against the defendants.

The ground urged for a reversal is the claim of the appellants (defendants) that W. C. Clark and those claiming under him were bound by the decree of December 2, 1902, rendered in the suit filed on June 25, 1894, to which Jasper McCray was a party, and that it operated against him as a privy in estate with said McCray as fully as if he were a party thereto, under the doctrine of lis pendens.

This insistence is based on the claim that Clark had not paid the entire purchase money to and received his deed from McCray before the filing of said suit, and therefore was not, at the time said suit was filed, an innocent purchaser of said land for value without notice. The doctrine of lis pendens presents quite a different question from that of who is such an innocent purchaser for value without notice that

equities which are good against his vendor cannot be asserted against him at any time, short of the period creating a prescriptive title, or

raising the bar of the statute of limitations.

[1] Where one purchases from another, who is a party to a pending suit affecting the title to realty, the question is not one of bona fides as against equities, but is one of becoming through his predecessor in title, by a purchase pendente lite, represented in such suit. He is notified by the law that in any pending suit against the vendor affecting the land by his purchase he becomes bound by the decree to be rendered. Mellen v. Moline Iron Works, 131 U. S. 352, 371, 9 Sup. Ct. 781, 33 L. Ed. 178. But here, at the time of W. C. Clark's purchase of the land under bond for title on January 2, 1893, an investigation would have disclosed that no suit had been brought by Dodge for this land lot.

[2] One who purchases by executory contract of purchase before the filing of the suit is a prior purchaser, and not affected by a subsequent lis pendens. 17 Ruling C. L. § 25; Parks v. Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656. It follows that this decree does not. therefore, bind W. C. Clark and those who claim under him, as he did not purchase pending this suit. The District Court found that the equity of this suit was with the complainants and that they had a good prescriptive title.

31 Without discussing the effect of the long delay in attempting to enforce the decree of December 2, 1902 (Tinsley v. Rice, 105 Ga. 285, 287, 31 S. E. 174), we think the evidence fully sustains the finding of the court that the complainants had a good title by prescription.

"Actual adverse possession of lands, by itself, for twenty years, shall give a good title by prescription against every one, except the state, or persons laboring under the disabilities hereinafter specified." Code of Georgia 1910, § 4168.

"Adverse possession of lands, under written evidence of title, for seven years, shall give a like title by prescription." Code of Georgia 1910, § 4169.

Under the settled line of decisions in Georgia, a bond for title is color of title, and possession thereunder with only a part of the purchase money paid is adverse against all persons except the maker of the bond, and will ripen into a title by prescription through 7 years' possession under color of title. Fain v. Garthright, 5 Ga. 6, 15; Garrett v. Adrian, 44 Ga. 274, 276. Hence the adverse holding of W. C. Clark against Dodge began from the date of his purchase under his bond for title in January 2, 1893, nearly 18 months before the suit of Dodge v. Williams et al. was filed.

[4] Clark had bargained for four lots as one purchase, and on January 2, 1893, had taken possession thereof, and paid a part of the purchase money. He had asserted actual rights as the purchaser of this land lot by timbering it and turpentining it by his tenant. He lived on one of the land lots embraced in the purchase. In 1904 his son H. M. Clark started to erect the house on this land lot, which W. C. Clark subsequently deeded to Mrs. Laura E. Clark, the wife of H. M. Clark. The house was finished in the spring of 1905, and has been occupied by

Mrs. Laura E. Clark and her family ever since.

Mrs. Holliday went into possession in 1907, and has been in possession ever since. The land has been cultivated by a tenant and improvements have been made on it. There was sufficient evidence of such possession of this land lot 262 from the date of its purchase in 1893 under the bond for title as warranted the District Court, who heard the testimony, in finding that complainants had a good title by prescription.

The decree of the District Court is therefore affirmed.

HAMILTON INV. CO. et al. v. BOLLMAN.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920. Rehearing Denied December 9, 1920.)

No. 2746.

1. Judgment \$\infty\$263(1)—Declaration advising defendants of nature and ex-

tent of claim good against motion in arrest.

Where the declaration clearly advised defendants of the nature and extent of the claim that would be presented, it is good as against a motion in arrest, if the facts which the jury were warranted in finding constitute a cause of action.

2. Trial \$\infty\$320—Supplying blank forms of verdict is matter of accommodation, and not legal requirement.

Responsibility for returning a true verdict is on the jury, and it is a matter of accommodation, and not a legal requirement, for the judge to supply blank forms.

3. Appeal and error €=866(3) —Sufficiency of evidence only reviewable question under assignment for failure to direct verdict.

On writ of error in an action at law, the only reviewable question under an assignment of error complaining of the refusal to direct a verdict is whether there was sufficient evidence to warrant a finding against ap-

4. Conspiracy = 9-That plaintiff should not have been deceived by fraudu-

lent scheme is not a defense.

It is not a defense to an action for damages for a conspiracy to obtain plaintiff's property by fraud that he, as a successful and supposedly prudent business man, ought not to have been deceived by the fraudulent scheme.

5. Conspiracy \$\infty\$ 13—Defendant a party to conspiracy to defraud, though

making no representations.

Where parties purchasing the stock and business of the B. Company, and paying a part of the price in notes on which the B. Company was to be liable, obtained most of the cash payment from the defendant corporation, and without further consideration transferred accounts receivable of the B. Company, constituting practically all of its liquid assets, to the corporate defendant, making plaintiff's claim uncollectable, the individual defendant, president of the corporate defendant, held a party to the conspiracy to defraud, though he made none of the false representations inducing the sale.

6. Corporations 426(10)—Liable to party defrauded by its president, when

receiving and retaining fruits of conspiracy.

Where defendant's president participated in a conspiracy to defraud plaintiff of his property, and defendant received and retained, without paying therefor, fruits of the conspiracy of greater value than the amount recovered by plaintiff, it was liable to plaintiff.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by Otto Bollman against the Hamilton Investment Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

John W. Creekmur and Donald J. De Wolfe, both of Chicago, for plaintiffs in error.

John G. Campbell and Herman A. Fischer, both of Chicago, for defendant in error.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. This is a writ of error by two of the defendants to reverse a judgment at law based on a jury's verdict.

Bollman sued for damages sustained through the defendants' alleged conspiracy to obtain property from him by fraudulent means.

[1] No challenge was offered to the sufficiency of the declaration until after verdict. We think it clearly advised the defendants of the nature and extent of the claim that would be presented. So, if the facts which the jury were warranted in finding from the evidence constituted a cause of action, the declaration was good as against a motion in arrest.

We find no material, if any, variance between allegations and proofs. In the charge to the jury the trial judge fully and accurately stated the law of conspiracy in civil cases and adequately covered all other

legal matters arising from the issues.

[2] Complaint is made that the judge did not give to the jury forms of verdict providing for a several finding of guilty or not guilty on the part of these plaintiffs in error. But the judge's charge called the jury's attention to that contingency. Counsel furnished no forms to be submitted, and they called attention to the matter only after the verdict had been received. Responsibility for returning a true verdict was on the jury. It was a matter of accommodation, not of legal re-

quirement, that led the judge to supply blank forms.

[3] Practically the whole contention in briefs and oral argument is that the court erred in refusing to direct a verdict of not guilty. Prolonged discussion of evidence introduced by defendants, and of affidavits filed in support of a motion for a new trial, and of what inferences should be drawn from conflicting evidence, together with the conclusion that the judgment should be reversed because it is contrary to "the weight of the evidence," indicate that counsel are not apprised of the limitations of review on a writ of error. Under the instant assignment of error the only reviewable question is: Was there sufficient evidence to warrant a finding of legal liability substantially as charged?

From the testimony of Bollman and his witnesses, including a deposition of Ruler, one of the alleged conspirators, which the verdict shows that the jury accepted as true, the case may shortly be outlined as follows: Bollman owned all of the 1,000 shares of Bollman Piano Company of St. Louis. Four shares were in the names of nominal directors; the remainder stood in Bollman's name. Bollman was ill, and desired to sell his business and go away to recuperate. This was

known to Piper and Ruler, of St. Louis, and they wanted to get control of the company. Hamilton Investment Company, of Chicago, was a corporation engaged in making usurious loans to mercantile concerns under the guise of buying their accounts receivable at heavy discounts. Rees was president of the Hamilton Company, with general authority. Mudge (also a defendant, but "not found") was a subordinate agent of the Hamilton Company. Piper and Ruler got in touch with Mudge. The plan was for Piper and Ruler to buy through Mudge as a "straw man." To this end Mudge was to and did pose as a man of large means, with a prosperous and growing business, a residence on the shore of the lake at Chicago, a yacht lying out in front, etc. His first proposal was to pay all cash for Bollman's business, if the price was satisfactory. When Bollman fixed a price that would require Mudge (for Piper, Ruler, and himself) to produce \$234,200 in cash, Mudge professed that the volume and demands of his business were now such that he could not immediately spare more than \$140,000 in cash. Bollman finally agreed to take for the balance notes on which the Bollman Company should be liable, to be secured by a pledge of the stock when it should be assigned to Mudge. Piper, Ruler, and Mudge were counting on getting the major portion of the \$140,000 from Rees, who had control of the Hamilton Company's funds. Rees, for the Hamilton Company, was desirous of getting his fingers into the Bollman Company's accounts receivable. He knew he could not do this while Bollman owned the business. He was willing to help Piper, Ruler, and Mudge get control, so that he could handle the accounts receivable of the Bollman Company. On June 14th Mudge telephoned Rees to come to St. Louis. On the 15th Piper, Ruler, Mudge, and Rees had an extended conference at a hotel room. The situation was gone over. Rees was informed that they wanted \$105,000 from him. On the 16th those four men met Bollman at his attorney's office. A contract between Bollman and Mudge was drawn. Bollman and his directors signed resignations. But title and control were not to pass until the 17th, when the certified check for \$140,000 and the several notes were to be exchanged for the contract and resignations. On the 16th Rees furnished Mudge \$105,000. Piper opened an account with a St. Louis bank that never had had any relation with the genuine Bollman Company. Piper deposited the \$105,000 to the credit of "Bollman Company by E. J. Piper, President," and checks so signed were to be honored by the bank. Piper increased his bank credit by giving the bank his note signed in the name of "Bollman Company by E. J. Piper, President," and by depositing a check on the genuine Bollman Company bank account signed in the same way, and thus the sum of \$140,000 was available. All of the above-recited plan was unknown to Bollman. He relied upon the manufactured appearances being true. Piper, Ruler, and Mudge were irresponsible. On the 16th the "Bollman Company, by E. J. Piper, President," and the "Hamilton Company, by Evan Rees, President," signed a contract whereby the Hamilton Company was to have the handling of the genuine Bollman Company's accounts receivable (then the property of Bollman) at a profit of 3 to 4 per cent. a month. On the 17th Piper procured from his bank a "cashier's check" for \$140,000 and gave it to Mudge. Then Piper, Ruler, Mudge, and Rees met Bollman and his attorney at the attorney's office, and the respective deliveries of documents were made by Bollman and by Mudge as the contracting parties. At this meeting false representations of Piper, Ruler, and Mudge were continued. Rees was silent. On leaving the meeting Piper, Ruler, and Mudge took control of the genuine Bollman Company, and in pursuance of their arrangement with Rees delivered to Rees, for the Hamilton Company, and without any consideration except the \$105,000 furnished the day before by Rees to Mudge, \$150,000 of Bollman Company's accounts receivable. The proximate cause of Bollman Company's bankruptcy and Bollman's loss on the deferred payments for the purchase of his property was the above-stated abstraction of the major portion of Bollman Company's net assets—practically all of its liquid assets.

Stripped to its nakedness the scheme was to take \$140,000 worth of Bollman's property, without his knowledge or consent, and with it to procure the cash with which to make the down payment on the purchase of Bollman's property, which he had been induced to part with

for less than all cash on the fiction of Mudge's responsibility.

True, there is evidence in the record on which a finding of not guilty on the part of these plaintiffs in error might be based; and the foregoing statement is not to be taken as a finding of facts by this court. It is simply a recital of the evidence that is favorable to Bollman.

[4] There is nothing in the suggestion that Bollman, a successful and supposedly prudent business man, ought not to have been deceived. Conspirators who successfully carry through a scheme to defraud will not be heard to complain of the stupidity of their dupe.

[5, 6] Contention is advanced that the facts as stated fail to constitute a cause of action against these plaintiffs in error, because Rees (for the Hamilton Company and himself) made no false representations, and because, even conceding a moral obligation, there was no legal duty on his part to speak when the others in his presence were beguiling Bollman. Thus Rees is draped as an innocent bystander, who had no interest in the transaction. But that is contrary to the jury's finding that Rees was a coconspirator, and that the one sum of \$105,000 was used twice—first, as an advance to Mudge with which to enable Piper, Ruler, and Mudge to get control of the Bollman Company; and, second, as the pretended consideration for taking \$150,000 of the Bollman Company's accounts receivable, thus depleting the assets on which Bollman was partially relying as security for the deferred And the Hamilton Company was holdable on the same evidence, because it received and retained without paying therefor fruits of the conspiracy of greater value than the amount of the verdict. Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Johnston-Fife Hat Co. v. National Bank of Guthrie, 4 Okl. 17, 44 Pac. 192; American National Bank v. Hammond, 25 Colo. 367, 55 Pac. 1090.

The judgment is affirmed.

BENJAMIN v. BUELL. In re SCHISSEL.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920. Rehearing Denied December 9, 1920.)

No. 2793.

1. Appeal and error \$\infty\$753(2)—Filing of assignment of errors not essential

to jurisdiction.

Under rule 11 of the Circuit Court of Appeals, Seventh Circuit (150 Fed. c, 79 C. C. A. c), requiring the filing of an assignment of errors within six months, but authorizing the court to notice errors not assigned, the filing of assignments of error is not essential to the jurisdiction of the Circuit Court of Appeals, and failure to file such assignments does not authorize a dismissal of the appeal.

2. Bankruptcy = 303(3)—Evidence held to support finding creditor knew of insolvency.

Evidence that the bankrupt had for some considerable time been insolvent, and that a creditor to whom a payment was made within four months of bankruptcy had had a long course of dealings with the bankrupt, was frequently in his place of business, and had opportunity for intimate knowledge of his affairs, held sufficient to sustain a finding of the chancellor, who heard and saw the witnesses, that the creditor knew of the bankrupt's insolvency when the payment was made to him.

3. Bankruptcy = 165(2)—Evidence held to show an agreement goods were to be sold for creditor's account.

Evidence that a creditor to whom the bankrupt had been largely indebted advanced practically the entire purchase price of a large stock of goods, and supervised its sale by the bankrupt, rejecting certain sales made, held to sustain his claim that he did not loan the money to the bankrupt for the purchase of the goods, but that he purchased the goods himself under an arrangement whereby the bankrupt was to sell them and divide the profits, so that the value of the goods taken by the creditor after bankruptcy was not a preference.

 Bankruptcy = 140(3)—Appearance of credit to bankrupt immaterial, in absence of proof credit was given.

In proceedings to require a creditor to repay the value of goods which he claimed to have purchased and allowed the bankrupt to sell for his account, the trustee cannot rely on the appearance of credit given to the bankrupt by possession of the goods to defeat the creditor's title thereto, where there was no evidence that any one had extended credit to the bankrupt on the faith of such appearance.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill in equity by Edwin B. Buell, trustee in bankruptcy of the estate of Sam Schissel, bankrupt, against Louis Benjamin, to require repayment of alleged preferences. Decree for complainant, and defendant appeals. Motion to dismiss appeal denied, decree modified, and cause remanded.

Bernard J. Brown, of Chicago, Ill., for appellant. Fred E. Newton, of Chicago, Ill., for appellee.

Before ALSCHULER and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge. [1] The appeal herein was prayed and allowed and bond filed within due time, but assignment of er-

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rors was not filed for more than six months after entry of decree. Appellee moved to dismiss the appeal on the ground that under rule 11 of this court (150 Fed. c, 79 C. C. A. c) the filing of the assignment of errors is jurisdictional, and unless filed within the statutory six months there was properly no appeal. We think the rule itself negatives such conclusion, in that it provides that under certain circumstances the court may notice errors not assigned at all, and hence in its discretion may consider an appeal even without assignment of errors, thus clearly indicating that the provisions of the rule respecting assignment of errors are not jurisdictional. In Hultberg v. Anderson, 203 Fed. 853, 122 C. C. A. 171, this court held that, notwithstanding the rule requiring assignment of errors to be first filed, prior filing was not jurisdictional, and failing to so file did not vitiate an appeal otherwise properly taken. The motion to dismiss the appeal is denied.

The appeal is from a decree in equity requiring appellant to pay to the trustee of the bankrupt estate of Sam Schissel \$6,641 as an unlawful preference to appellant. The bill of complaint charged that appellant, knowing the bankrupt to be insolvent, within four months of the bankruptcy was paid by bankrupt \$1,400 on a prior indebtedness of the bankrupt to appellant, and that very shortly before the bankruptcy, in order to secure to himself the payment of a considerable balance then due from the bankrupt to appellant, and to hinder and defraud the other creditors of the bankrupt, there was turned over to appellant about \$5,000 worth of the bankrupt's goods, which were stored away and fraudulently concealed from the trustee in bankruptcy.

It appears from undisputed evidence that for a considerable time prior to the bankruptcy appellant had been advancing funds to appellee, and that about the middle of September bankrupt owed appellant in the neighborhood of \$3,000; that about that time the bankrupt undertook to purchase about \$5,500 of woolens from the firm of Cohen & Sons, and paid \$100 thereon. Unable to obtain from Cohen & Sons credit for the goods, he made an arrangement with appellant, whereby appellant would settle with Cohen for the purchase price of the goods, and the bankrupt would sell them, and the profits on the sale would be divided equally between appellant and the bankrupt. Appellant settled for the goods, about half in cash and half with his note. Shortly afterwards appellant, claiming he had pressing need for money, urged the bankrupt to let him have some, and was given about \$1,400, which the bankrupt testified was not intended to be payment on the indebtedness, but was agreed by appellant to be returned to the bankrupt in very short time, which agreement, however, is denied by appellant. It seems that a few weeks later, and a very short time before the bankruptcy, bankrupt demanded that appellant return the amount so paid as per alleged agreement. Appellant not only refused to return the \$1,400, but insisted upon closing out the Cohen goods transaction, and he actually sold the remaining goods of that purchase to one Lew for about \$5,000, and Lew took possession of them and stored them in a warehouse, paying appellant therefor something less than the invoice price of the goods, and appellant keeping the money. As to whether the \$1,400 was or was not to be repaid to appellant, the evidence is very contradictory. But whether or not it was so agreed, the payment actually went in reduction of the indebtedness theretofore due from the bankrupt to appellant.

[2] That the bankrupt was at that time, and for a very considerable time before, insolvent, is, we believe, sufficiently shown by the evidence. Whether appellant knew, or had cause to believe, that the bankrupt was then insolvent, and that the payment would constitute a preference, is dependent upon conflicting evidence, and facts and circumstances which the evidence disclosed. From appellant's long course of dealings with the bankrupt, and his financial interest in him through being so long his creditor, coupled with his frequent presence at bankrupt's place of business, and conversations concerning his affairs, and opportunity for intimate knowledge of them, we cannot say that the chancellor, who heard and saw the witnesses, was not justified in the conclusion he must of necessity have reached, to support the decree, that at and before time of the payment appellant was aware of the bankrupt's insolvency, and of his very desperate financial straits, and of the large excess of liabilities over assets which the undisputed evidence seems to establish. This being so, so much of the decree as is predicated upon this \$1,400 payment to appellant by the bankrupt is justified and should remain undisturbed.

[3] A different situation is presented with reference to so much of the decree as rests upon the transaction with reference to the Cohen goods. It may be assumed that when, a day or two before the bankruptcy in November, appellant took and sold these goods, and took to himself the proceeds thereof, he knew or had reason to believe the bankrupt was insolvent. But there is no less reason to believe that he had the same knowledge when, some weeks before, the deal for the Cohen goods was made. Under the circumstances it would be a strong tax upon credulity to believe that at that time, with knowledge of the insolvency, and the bankrupt then already in his debt about \$3,000, he would deliberately enter into an arrangement whereby he became a

general creditor for upwards of \$5,500 more.

It is not contended that there is any want of good faith in the contention that appellant advanced practically the entire consideration for the Cohen purchase, and, this fact being conceded, it adds verity to appellant's claim that the Cohen goods were not in fact to become the property of the bankrupt, but he was merely to handle them, turning them into cash, repaying appellant his advance, and dividing with appellant whatever profit was realized. The conduct of the parties seems to indicate that this was their understanding. Two instances appear, where, while the goods were in bankrupt's possession, appellant vetoed sales of some of them made by bankrupt. All this, as well as the logic of the situation, would indicate that, respecting the consideration paid by appellant for the Cohen goods, the relation between bankrupt and appellant was not that of debtor and creditor, but that there was a trust relation, whereunder these goods were, as between the bankrupt and appellant, to be subject to a prior charge in appellant's favor for the amount of his advances, and that appellant's sale of them and application of the proceeds upon his advance of the purchase of such goods, was not a preferential payment to appellant. Under the practically undisputed evidence, the action of appellant as to these goods is not properly subject to complaint by the trustee or the creditors of the bankrupt.

[4] There is no merit in the suggestion by appellee's counsel that appellant had no right to permit the bankrupt to possess these goods, and thus possibly to lend appearance of his solvency, and thereby improve his credit, in view of the fact that there is no evidence that credit was extended the bankrupt on the faith of such appearance.

The decree should be modified, by reducing the amount of the preferential payment as found and ordered paid by appellant, by so much thereof as is represented by the transaction in regard to what is above termed the Cohen goods, and limiting the recovery against appellant to the said \$1,400 preferential payment to him.

The cause is remanded, with direction to modify the decree in accordance with the foregoing views.

HAYWOOD et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920. Rehearing Denied December 9, 1920.)

No. 2721.

1. Constitutional law \$\infty\$271\to\$Criminal law \$\infty\$1005\to\$Right of review not essential to due process.

The right to a review of a judgment of conviction by an appellate court is not essential to due process of law, since all the rights of accused necessary to due process are fully protected in the trial court.

2. Criminal law \$\infty\$=1186(2)—Congress can prohibit reversals on errors not substantially prejudicial.

Since Congress could have withheld entirely the privilege of review of a conviction for crime, Comp. St. Ann. Supp. 1919, § 1246, providing that no error shall rèquire the reversal of the judgment, unless it can be affirmatively shown from the record as a whole that the party complaining thereof has been denied some substantial right, whereby he has been prevented from having a fair trial, is a valid reduction of the privilege of review.

3. Army and navy \$\infty 40\$—Espionage and Selective Service Acts repealed general statute.

Penal Code, § 6 (Comp. St. § 10170), denouncing conspiracies to use force to prevent, hinder, or delay the execution of any law of the United States, does not apply to forcible obstruction of the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k) and the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a-10212h), the penal provisions of which constitute the specific directions for the punishment of all obstructions, forcible or otherwise, of the recruiting and enlistment service, and repeal pro tanto Penal Code, § 6, since Congress did not intend to inflict punishment twice for the same offense.

4. Conspiracy 34—Forcible prevention of production for sale to government not prohibited.;

A conspiracy to prevent by force private individuals from producing goods to fulfill their contracts with the government is not punishable under Penal Code, § 6 (Comp. St. § 10170), applying to conspiracy to

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prevent the execution of the laws of the United States, since that section is limited to obstruction of the enforcement of the laws by the officers of the government charged with that duty.

5. Conspiracy \$\iiins 30\$—Forcible prevention of production not interference with right under United States Constitution or laws.

The right of an individual or corporation to produce goods to sell to the government is not a right or privilege conferred by the Constitution or laws of the United States, so that a conspiracy to prevent such production by force is not punishable, under Penal Code, § 19 (Comp. St. § 10183), denouncing conspiracies to injure citizens of the United States in the exercise of any right or privilege secured to them by the Constitution and laws of the United States.

Criminal law \$\iiii 395\$—Fifth Amendment does not prohibit use of evidence illegally seized.

Const. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself, though not limited to the compelling of testimony by the witness in court, is limited to testimonial compulsion, and does not prohibit the use against a defendant of his papers and documents illegally seized by officers of the government.

7. Searches and seizures 5—Fourth Amendment does not entitle members of voluntary association to return of association property.

Const. Amend. 4, protecting persons against unlawful search and seizure, does not entitle the members of a voluntary association to ask as individuals a return of property of the association unlawfully seized by government officers, since, except for purposes of contractual liability, the association is distinct from its members, and the several members are not entitled to possession of its property.

8. Indictment and information \$\infty\$=125(5\frac{1}{2})\$—Charging conspiracy to prevent registration and to induce desertions not duplicitous.

An indictment charging a conspiracy to violate the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), by preventing registration thereunder and by inducing desertions of those who had registered, is not duplicitous as charging two conspiracies, one of which could not by its nature originate until the other was terminated, since the intention to procure desertions of those who registered under the Selective Service Act and plans to effect that intention could have been formed before the day of registration.

9. Conspiracy

43(5)—Particular way overt acts furthered conspiracy need not be alleged.

It is not necessary that the pleading should show the particular way in which the overt acts alleged furthered the conspiracy.

10. Indictment and information = 101—Description of class intended to be influenced by conspiracy to prevent registration held sufficient,

In an indictment for conspiracy to violate Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k), the charge that defendants conspired to prevent the registration of the 10,000 members of a voluntary association required to register, whose names were to the grand jury unknown, and to induce the 5,000 members of that association who did register under that act to desert the military service, sufficiently describes the class of individuals to be influenced by the conspiracy.

11. Conspiracy \$\infty\$ 43 (5) — Substance of newspaper articles to cause insubordination need not be alleged.

An indictment for conspiracy to violate the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a-10212h) by the publication of newspaper articles, solicitations, and speeches is not defective for failure to set out the articles verbatim or in substance, since the allegation that such articles were persistent urgings of insubordination and refusal to

enlist are sufficient to identify the articles, as well as to identify speeches and solicitations, especially where the overt acts set forth several articles from the named newspapers, which would help inform defendants of the exact nature of the charge against them.

12. Criminal law = 1134(6) - Erroneous admission of evidence harmless, if admissible on any ground.

If it was error to admit evidence of defendants' other acts, not criminal when committed, to show intent, the ruling was harmless, if such matters were in fact admissible on any ground.

13. Criminal law \$\iiins\$371(1), 374—Prior acts, not offenses when committed,

not admissible to prove intent.

Though prior offenses are admissible in certain classes of cases to prove criminal intent, prior similar acts, which were not offenses when committed, are not admissible to show an intent to commit the same acts after they were made offenses.

14. Conspiracy \$\infty\$ 45—Evidence of organization before Espionage Act admissible to show knowledge of means.

Though evidence of the organization of an association, the defendant's control thereof, and the methods of its operation before the enactment of the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a-10212h), was inadmissible to show an intent to violate that act, such evidence was admissible in a prosecution for conspiring to violate the act to show defendants' possession and knowledge of the use of the means by which the act could be violated.

15. Criminal law \$\infty 374\to Articles printed before enactment of Espionage Act admissible, if used afterward.

Newspaper articles urging insubordination among the military forces, which were printed before their publication was made an offense, are admissible in a prosecution for the offense, if they were used by defendants for the prohibited purpose after the statute was enacted.

16. Conspiracy \$\infty\$45—Articles contemplating enactment of Selective Service Act admissible to show intent.

In a prosecution for conspiracy to induce violation of the Selective

Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k), correspondence, newspaper articles, and pamphlets antedating passage of that act, but which contemplated its passage and declared a purpose to violate and obstruct it when passed, were admissible as bearing directly upon criminal intent.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

William D. Haywood and others were convicted and sentenced on each of four counts of an indictment for conspiracy to violate or obstruct the execution of sundry laws of the United States, and they bring error. Judgment modified, by striking therefrom the imprisonments and fines assessed under counts 1 and 2, and, as modified, affirmed.

George F. Vanderveer and Otto Christensen, both of Chicago, Ill., for plaintiffs in error.

Charles F. Clyne and Joseph B. Fleming, both of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. Plaintiffs in error were sentenced on each of four counts of an indictment for conspiracy to violate, or to obstruct the execution of, sundry laws of the United States. Terms of imprisonment, separately assessed against each defendant on each count, were to run concurrently. As the prison sentence under the fourth count equals or exceeds in each instance the period fixed under the other counts, it would be unnecessary, if the case sought to be made under the fourth count was adequately pleaded and proved, to inquire further, except for the fact that separate fines were levied under each count. For example, many defendants were fined \$5,000 under the first count, \$5,000 under the second, \$10,000 under the third, and \$10,000 under the fourth. And since these fines cannot be satisfied by payment under any one count, the defendants are entitled to a review of the case under each count.

[1, 2] Before proceeding further, we think it right to emphasize the fact that a review by an appellate tribunal is not a requirement in affording a defendant the due process of law that is secured to him by the Constitution. In England writs of error in criminal cases are of comparatively recent origin. In our country, though writs of error within certain limitations have been allowed from the beginning, the grant has been of grace or expediency, not of constitutional demand. In the court of first instance the defendant is given his day in court, his trial by jury, his opportunity to confront opposing witnesses, and all other elements of due process of law. And if Congress might have withheld entirely the privilege of review, it is self-evident that Congress may at any time reduce the previously granted privilege. From recent legislation (40 Stat. pt. 1, p. 1181, Comp. St. Ann. Supp. 1919, § 1246) we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial.

By demurrer, motion for directed verdict, requests for instructions, and motion in arrest, defendants challenged the sufficiency of the

case as pleaded and proved under the first count.

Section 6 of the Penal Code, a re-enactment of section 5336 of the Revised Statutes (Comp. St. § 10170), is the basis of the count. It denounces conspiracies to use force to prevent, hinder, or delay the execution of any law of the United States.

Defendants, so the government contended, conspired to prevent by force the execution of the following laws: (1) The joint resolution of April 6, 1917, declaring war on Germany; (2) the President's proclamation of April 6, 1917, concerning conduct of alien enemies; (3) Act June 3, 1916, making provision for national defense; (4) Act July 6, 1916, making appropriations for fortifications; (5) Act of August 29, 1916, making appropriations for the naval service; (6) act of same date, making appropriations for the support of the army; (7) Act April 17, 1917, making appropriations to cover deficiencies; (8) Act May 18, 1917, known as the Selective Service Act; (9) Act June 15, 1917, making appropriations for urgent deficiencies; (10) Act July

24, 1917, to purchase, manufacture, and operate airships; (11) Act June 15, 1917, known as the Espionage Act; (12) the following sections of the Penal Code of March 4, 1909, namely, 4, 19, 21, 37, 42, 135, 136, 140, and 141.

How was the execution of these various laws to be prevented by force? Defendants were officers and agents of the Industrial Workers of the World. That organization was opposed to capitalism and the wage system, believed that the "workers" should seize the "tools of industry," was hostile to our system of government, denounced our entry into the war as the result of the influence and desire of the "ruling, capitalistic classes," and undertook to block our efforts to win. Defendants, having control of that organization as an instrument, conspired to have their members, who were workmen in factories engaged in producing war munitions and supplies, break machinery, spoil materials, strike, and use force to prevent other workmen from taking their places; also to have their members refrain from registering in obedience to the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k), to have them desert, if brought into registration offices, and to rescue them by force, if caught; and also, in defiance of the Espionage Act, to cause all whom they could influence by speeches, pamphlets, and newspapers to keep out of the military service.

[3] Those parts of the case under the first count that have to do with violations of the Selective Service Act and the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a-10212h) must here be eliminated for the following reasons: Count 3 is for conspiracy to violate the Selective Service Act. Count 4 is for conspiracy to violate the Espionage Act. Granting that section 6 of the Penal Code, on which count 1 is predicated, is broad enough in its terms to cover conspiracies to use force in preventing, hindering, or delaying the execution of the Selective Service Act and the Espionage Act, the penal provisions of these last-named acts constitute the specific directions of Congress for the punishment of all obstructions, forcible or otherwise. of the recruiting and enlistment service. Congress did not intend, in the face of the constitutional prohibition, to inflict punishment twice for the same offense. Under the familiar maxim, "generalia specialibus non derogant," these specific provisions effected pro tanto a repeal of section 6. Snitkin v. United States (C. C. A.) 265 Fed. 489.

[4] There remains, then, the question whether forcible interference with the operations of producers from whom the government was expecting to buy or had contracted to buy war munitions and supplies constituted a forcible prevention of the execution of the acts of Con-

gress in declaring war and making appropriations therefor.

Undoubtedly Congress, under the war power, could have protected by legislation the operations of such producers from all interference, forcible or otherwise, and as the war progressed various strengthening laws were enacted. But the question now before us concerns the true meaning of section 6. That was enacted long before the war. It must be enforced after the war is officially ended. Manifestly in each period, before, during, and after, it must be given the same meaning and effect.

So the question under section 6 covers not only war supplies, but also any peacetime supplies which the government might intend to buy or had contracted to buy. The Government Printing Office is conducted under laws directing, and making appropriations for, its operations. Any direct interference by force with its operations might possibly be held to be a forcible prevention of the execution of laws of the United States. (Running a printing office, however, is a proprietary rather than a governmental function.) But the printing office cannot operate without paper. Suppose the workmen in a paper mill that has a contract to supply paper to the printing office, with knowledge of the contract and with intent to prevent the mill from fulfilling it, go on strike and forcibly prevent the running of the mill. Suppose that workmen in a hemlock forest, whose owner has a contract to supply logs to the paper mill that has a contract to supply paper to the printing office, with knowledge of those contracts and with the intent to prevent their execution, go on strike and forcibly stop the timberman's operations. And so on, along the whole imaginable line of "the house that Jack built." Are these forcible stoppers of industrial production guilty under section 6? How are the laws of the United States executed? By officials upon whom the duty is laid. Performance of that duty cannot be delegated. Producers, who have contracts to furnish the government with supplies, are not thereby made officials of the government. Defendants' force was exerted only against producers in various localities. Defendants thereby may have violated local laws. With that we have nothing to do. Federal crimes exist only by virtue of federal statutes; and the lawmakers owe the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen or subject may lose his life or liberty. Section 6 should not be enlarged by construction. Its prima facie meaning condemns force only when a conspiracy exists to use it against some person who has authority to execute and who is immediately engaged in executing a law of the United States.

Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 32 L. Ed. 766, is the leading case. By a treaty between China and the United States Chinese persons were guaranteed certain civil rights in the United States. That treaty was a part of the supreme law of our land. In purusance of a conspiracy, Baldwin, by force exerted upon the bodies of certain Chinese persons, prevented them from enjoying the rights guaranteed by the treaty. Section 6, the court said.

"means something more than setting the laws themselves at defiance. There must be a forcible resistance of the authority of the United States while endeavoring to carry the laws into execution. * * * His [Baldwin's] force was exerted against the Chinese people, and not against the government in its effort to protect them."

We conclude that no case was made under count 1.

[5] Similar attacks were made upon the case under count 2. This count is based on section 19 of the Penal Code (Comp. St.

§ 10183), which denounces conspiracies to injure citizens of the United States in the exercise of any "right or privilege secured to him by the Constitution and laws of the United States."

Defendants were charged with conspiring to prevent, by strikes and sabotage, such of the producers described in count 1 as were citizens from fulfilling their contracts with the government for war munitions and supplies. To produce, to sell, to contract to sell to any buyer, are not rights or privileges conferred by the Constitution and laws of the United States. If the buyer is an agent of the United States, he needs a federal law to qualify him as a buyer; but the producer and seller is exercising only such rights as antedated federal law, were not included in the grants of power in the Constitution (except to the extent that his product comes under federal taxation, regulation of interstate commerce, and the like), and were expressly reserved by the Tenth Amendment. Foreign governments, foreign and domestic corporations, individuals who were not citizens, all sold war supplies to our government, equally with citizens. No case was made under count 2. United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Lancaster (C. C.) 44 Fed. 885, 10 L. R. A. 333; Lackey v. United States, 107 Fed. 114, 46 C. C. A. 189, 53 L. R. A. 660; United States v. Eberhart (C. C.) 127 Fed. 254. If Congress, under its war power, had limited the production of war supplies to citizens, there would be an analogy to United States v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673, wherein homestead entry of public lands was limited to citizens.

Common to the case under counts 3 and 4 are assignments on rulings made prior to the trial. On September 5, 1917, agents of the Department of Justice raided the offices of the I. W. W. in various cities and seized their files of correspondence, together with copies of newspapers and pamphlets. The greater part was taken in Chicago from the general headquarters in charge of Haywood. The affidavits, on which the search warrants issued, failed to describe the property to to be taken except by reference to its general character, and failed to state any facts from which the magistrates could determine the existence of probable cause. If the proper parties had made prompt application, it may be assumed that they would have obtained orders quashing the writs and restoring the property. Veeder v. United States, 252 Fed. 414, 164 C. C. A. 338. If, following restoration, Haywood and others were adjudged to be in contempt for refusing to obey subpœnas and orders of court to produce the files and documents before the grand jury, it may be assumed that such judgments would be reversed. Silverthorne Lumber Co. v. United States, 251 U. S., 385, 40 Sup. Ct. 182, 64 L. Ed. 319. Nothing of the sort occurred. Government attorneys, without objection or hindrance, used the property as evidence before the grand jury. Indictment was returned on September 28, 1917. In February, 1918, defendants petitioned the court for an order to return the property, and the government moved for an impounding order. In March, 1918, defendants moved to quash the indictment on the ground that evidence illegally obtained had been used before the grand jury. From defendants' verified motions to return the property and to quash the indictment, from the government's verified motion to impound, and from the property then in court, there was a sufficient basis of facts to justify the trial judge in finding that there was probable cause to believe that the property; particularly identified, had been used in the commission of the felonies described in counts 3 and 4. Motions to return the property and to quash the indictment were overruled, and the motion to impound was sustained. The trial lasted from the middle of April to the middle of August, 1918. Repeatedly during the trial the defendants objected and excepted to the admission of such property in evidence.

The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

[6] Part of the Fifth Amendment is as follows:

"Nor shall any person * * *, * be compelled in any criminal case to be a witness against himself."

Defendants claim that by the doings and rulings hereinabove recited both of these safeguards were broken.

From the thirteenth to the middle of the seventeenth century the Ecclesiastical Courts of England and during the later part of the period the Courts of Star Chamber and of High Commission compelled defendants to testify respecting criminal charges against them. During the last century of our colonial period the principle that no person shall be compelled in a criminal case to be a witness against himself had become a fixed part of our inheritance. And it was that fixed and definite meaning that in clearest terms was incorporated in our federal Bill of Rights. "Witness" is the key word. Constitutional safeguards should be applied as broadly as the wording, in the historical light of the evil that was aimed at, will permit; and so a defendant is protected not merely from being placed on the witness stand and compelled to testify to his version of the matters set forth in the indictment; he is protected from authenticating by his oath any documents that are sought to be used against him; he is protected from producing his documents in response to a subpoena duces tecum, for his production of them in court would be his voucher of their genuineness; he is protected from an act of Congress (Boyd v. United States, 116 U. S. 616. 6 Sup. Ct. 524, 29 L. Ed. 746) declaring that the government's statement of the contents of his documents, if he fail to produce them on notice; shall be taken as confessed. But unless the origin and purpose of the command be disregarded and the key word be turned into an unintended, if not impossible, meaning, no compulsion is forbidden by the Fifth Amendment except testimonial compulsion. At the trial of this case no defendant was compelled in any way to become a witness against himself or against any of his alleged co-conspirators. Letters, pamphlets and other documents, identified by other witnesses, were competent evidence; and the trial judge, correctly

finding them competent, was not required to stop, and would not have been justified in stopping, the trial to pursue a collateral inquiry into how they came to the hands of government attorneys. Consequently there was no violation of defendants' rights under the Fifth Amendment. Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; Rice v. United States, 251 Fed. 778, 164 C. C. A. 12; Laughter v. United States, 259 Fed. 94, 170 C. C. A. 162; MacKnight v. United States (C. C. A.) 263 Fed. 832; Wigmore on Evidence, vol. 3, §§ 2250, 2251, 2263, 2264.

[7] If defendants had done nothing but object to the introduction of the documentary evidence at the trial, no further constitutional question would be involved. But prior to the trial they had moved for a return and had resisted the government's motion to impound. And Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, is authority for holding that, if the court erred in impounding the documents and in refusing to return them to defendants, the present judgment must be reversed, because, if the documents had been returned to defendants, they would not have been available to the government at the trial, they could not have been obtained under a subpoena duces tecum, and the government would have been compelled to begin anew its effort to seize them.

Were the defendants' rights under the Fourth Amendment violated by overruling their motions for a return of the property? This safeguard had its origin at a different period and in a different evil from the period and evil out of which grew the Fifth Amendment. In the third quarter of the eighteenth century British officers, armed with general warrants or writs of assistance, were accustomed to invade the privacy of the homes of our colonial forefathers on blind fishing expeditions. Though the same evil at the same time was being resisted in England, the resistance on this side of the water was American resistance, and the harassing raids were a dominant cause of our revolt. This safeguard had its roots in American feeling and action; and it was not a mere bringing forward of an inherited principle that had been settled a hundred years before. Though the Fourth and Fifth Amendments stand side by side, each is as independent of the other as of any of the remaining safeguards in our federal Bill of Rights.

Not all searches and seizures are forbidden. Consider, first, the character of the property that may be seized. It has never been deemed unreasonable to hunt for and take stolen property, smuggled goods, implements of crime, and the like. Inasmuch as the documents in question were the tools by means of which the defendants were committing the felonies, there was no immunity in the nature of the property. Consider, next, the person whose privacy is invaded. If it be granted that the home of Burglar Smith, in which he has concealed the stolen goods and the implements of his crime, cannot lawfully be searched and the property seized, except under a warrant, based on an affidavit, particularly describing the place to be searched and the things to be seized, and stating facts from which the issuing

magistrate may properly find the existence of probable cause for believing that the stolen property and the implements of the crime are there concealed, it does not follow that Burglar Smith will be heard to complain that the Fourth Amendment has been violated by the forcible and unlawful breaking into the home of Burglar Jones and the seizure there of the stolen property and implements of crime of Burglar Smith. Each defendant moved for the return of property that had never been in his possession and was not taken from his person or home or place of business. When asked by the court to specify what property had been taken from each and how their several privacies had been invaded, they declined. In standing on their motions as made (and acceding to the court's suggestion would not have bettered their position) their theory was and now is that the I. W. W. was a partnership; that each partner, in possession of any document, was the custodian thereof for every other partner; that an unlawful invasion of the privacy of one effected a breach of the Fourth Amendment, available to all, severally and collectively. If the soundness of the contention respecting partners be conceded, the inquiry turns to the nature of the I. W. W. It was a voluntary association. It operated under a constitution and by-laws, quite as a corporation operates under a charter and by-laws. Its members at stated times elected officers for limited terms. On the retirement of any officer it was his duty under the by-laws to turn over to his successor the files, records and other property in his possession that pertained to the affairs of the organization. It was an association organized for purposes other than profit, and the payment of dues and fines by its members was merely incidental to carrying on its purposes. During membership or upon withdrawal no member had a proportionable proprietary or possessory right to any of its property or effects. In all of its contacts with the world, except commercial, it had the essential organization and method of a non-profit corporation. If it rented offices and bought furniture and failed to pay, the creditors might hold jointly and severally all the officers and members that could be found, because they could not show a corporate charter to shield them from personal liability. But in other respects the rights of the members should be measured by the essential attributes of the organization they had chosen to adopt. Otherwise they would be granted immunity by reason of their refusal to incorporate. Having explicitly agreed that they should not bear to one another the relation of partners, they cannot now insist that the court shall treat them as such. Niblack on Voluntary Societies, §§ 22, 116, 128; White v. Brownell, 2 Daly (N. Y.) 329; In re St. James Club, 13 Eng. L. & Ev. 529; Ostrom v. Greene. 161 N. Y. 353, 55 N. E. 919; Rohde v. United States, 34 App. D. C. 253. Defendants were indicted as individuals, not as members of the I. W. W. That organization was not on trial. In seizing the outlaw property of the I. W. W. organization, the officers of the government did not impinge upon the rights of any defendant under the Fourth Amendment. Consequently there was no error in impounding the property, overruling the motion for the return thereof, and refusing to quash the indictment.

Count 3 may be outlined thus: From May 18, 1917, to the returning of the indictment the United States was at war with Germany. During that period the defendants were members of the I. W. W., and they conspired to commit 10,000 offenses against the United States, each to consist of counseling, aiding, and abetting one of the 10,000 male persons, other members of said organization, who were eligible conscripts under the Selective Service Act of May 18, 1917, and who by the President's proclamation were required to register on June 5, 1917, but whose names are unknown, to fail and refuse to present himself for registration, and 5,000 other offenses, each to consist of counseling, aiding and abetting one of the 5,000 persons, still other members of said organization, who were eligible conscripts and who should register, but whose names are unknown, to desert the And in pursuance of the conspiracy defendants committed service. overt acts.

- [8] Duplicity is the first objection. Defendants recognize that a single conspiracy may be formed to commit numerous offenses. Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561. In form this count alleges one conspiracy to commit two groups of offenses of the same general character. But the urge of defendants is that a conspiracy formed on May 18, 1917, to counsel and aid members of the I. W. W. to fail to register on June 5, 1917, would come to end on the latter date; that a conspiracy to counsel and aid those members of the I. W. W. who should in fact register on June 5, 1917, to desert the service, could not be formed until on or after that date; and that, therefore, though in form of allegation there is but one conspiracy, in substance and of necessity two separate and distinct conspiracies are included in the same count. The validity of this conclusion depends on the truth of the premise that a conspiracy to counsel and aid desertions could not be formed until after members of the I. W. W. had registered. In Friedman v. United States, 236 Fed. 816. 150 C. C. A. 653, an indictment was upheld that charged a conspiracy to conceal assets from a trustee thereafter to be appointed in an impending bankruptcy proceeding. If, therefore, a conspiracy can be formed and an overt act committed to frustrate an anticroated situation, the counseling and aiding of desertions could be included in the conspiracy formed prior to June 5, 1917, as one of the objects thereof, along with the other object of counseling and aiding refusals to register; and it is manifest that both objects might be forwarded by the same acts and utterances. When the object of counseling and aiding refusals to register came to an end, the conspiracy, unless abandoned, would continue while the object of counseling and aiding desertions remained alive.
- [9] Contention is made that the count is bad because the overt acts set forth do not appear on their face to have had any tendency to effectuate the objects of the conspiracy. We think they had. But it is not necessary that the pleading should show the particular way the overt act furthered the conspiracy. Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561.
 - [10] Defendants finally assert that the count is void for uncertainty

in that the persons whom the defendants were to counsel and aid were not separated from the general mass. They were identified by class as being those eligible conscripts who were members of the I. W. W. The grand jurors did not know their names. Defendants were alleged to be members of the I. W. W. We think the count disclosed to them the offense with sufficient particularity.

Count 4 charged a conspiracy and the commission of overt acts to cause insubordination in the military and naval forces and to obstruct the recruiting and enlistment service in violation of the Espionage Act—

"by means of personal solicitation, of public speeches, of articles printed in certain newspapers circulating throughout the United States (here 12 are designated by name), and of the public distribution of certain pamphlets (here the titles of 3 are given), the same being solicitations, speeches, articles and pamphlets persistently urging insubordination, disloyalty and refusal of duty in said military and naval forces and failure and refusal on the part of available persons to enlist therein."

[11] Every element of the offense is in some way mentioned by the pleader. The point is made that he should have set out the newspaper articles either verbatim or in substance, and that neither was done. In view of Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, Aczel v. United States, 232 Fed. 652, 146 C. C. A. 578, Lew Moy v. United States, 237 Fed. 50, 150 C. C. A. 252, and Jelke v. United States, 255 Fed. 264, 166 C. C. A. 434, defendants do not question that the solicitations and speeches were adequately identified. If the wording, that the solicitations and speeches were persistent urgings of insubordination and refusal to enlist, is not the mere opinion or conclusion of the pleader, but is in fact a statement of their purport, the same wording should be accepted as a statement of fact in regard to the newspaper articles. Among the overt acts set forth in the count several articles from the aforementioned newspapers, with date of issue, page and column specified, were copied verbatim. These would help to inform the defendants of the exact nature of the charge against them. As we do not intend to cumber this page with copies, we can do no better than the pleader did in setting out their substance: The articles persistently urged insubordination, disloyalty and refusal of duty in the military and naval forces and failure and refusal on the part of available persons to enlist therein.

Most of the assignments concerning the admissibility of evidence and the correctness of the court's instructions have disappeared by reason of the holding that no case was pleaded and proved under either count 1 or count 2.

[12, 13] Under counts 3 and 4 numerous objections were made on the ground that the matters offered in evidence antedated the passage of the Selective Service Act and the Espionage Act. If the court erred in admitting them on the ground that they had probative force in establishing the criminal intent charged in these counts, the ruling was harmless if the matters were in fact admissible on any ground. We agree at once (Kammann v. United States, 259 Fed. 192, 170 C. C. A. 260) that criminality cannot be proved by proving innocence. There

is a rule that, in certain classes of cases, the criminal intent charged in the indictment may be made out, or at least supported, by proof of the commission of similar prior offenses. But the terms of the rule require that the prior matters be offenses when committed. To illustrate: Take a time when malicious and premeditated homicide was not unlawful. During that time a person with premeditated malice takes the life of a human being by means of a certain poison. Because he has committed no crime, it is impossible that he should have had any criminal intent. Later a murder law is enacted. Under it the same person is charged with having taken, feloniously and with premeditated malice, the life of a human being by means of the same poison. Presumptively he is innocent. Presumptively he intended, when the murder law was enacted, to respect and obey it. Against the presumption that he did not have the criminal intent to commit murder, the prior innocent homicide has no probative value. But that does not mean that matters in connection with the innocent homicide have no probative value for other purposes in the murder case. Just prior to the innocent homicide this person had in his possession a large quantity of the particular poison. Possession, once established, is presumed to continue. This would bear on his possession, at the time of the alleged murder, of the means by which the murder was accomplished. In committing the innocent homicide this person learned that this particular poison would cause death quickly but in a way that might be mistaken for the result of a natural ailment. Knowledge, once established, is presumed to continue. This would bear on his knowledge of the use and efficacy of the means at the time of the alleged murder. But knowledge of the use and possession of the means by which murder may be committed are matters quite apart, in our judgment, from the intent to commit murder.

[14] Evidence of the organization of the I. W. W., the defendants' control, and the methods of operation through correspondence, pamphlets and official newspapers, was competent, though antedating the laws in question, as bearing on defendants' possession and knowledge of the use of the means by which these felonies could be committed. Furthermore, the presumption of continuing possession and knowledge was fortified by evidence of the same conditions down

to the time of the indictment.

[15] Newspaper articles and pamphlets, printed before the statutes in question were passed, were rendered competent by proof of their use within the indictment period.

[16] Correspondence, newspaper articles and pamphlets, antedating the statutes, but contemplating their passage and declaring the purpose to violate and obstruct them when passed, were of course ad-

missible as bearing directly upon criminal intent.

If these groupings do not cover all of the objections to the evidence under counts 3 and 4, we regard the remainder as of trivial consequence. We find such an abundance of clear and competent evidence within the indictment period that we believe the verdict was inevitable. Some of the defendants claim that there was no evi-

dence connecting them with the conspiracy, except the fact that they were members of the I. W. W. And several, who were not members at the time, insist that there is no evidence against them at all. In each such case our finding is that there was sufficient evidence on which to submit to the jury the question whether the particular defendant was a member of the established conspiracy.

We find no abuse of the trial court's discretion controlling the

scope of the cross-examinations of witnesses.

We find no error in the charge to the jury, and it adequately covered all of defendants' proper requests for instructions. The law of conspiracy under the statutes of the United States has been so frequently and recently expounded in decisions of the Supreme Court and the Courts of Appeals that further repetition is deemed unnecessary.

In the case of each defendant the judgment is modified by striking therefrom the imprisonments and fines assessed under counts 1 and

2; and, as so modified, the judgment is

Affirmed.

ST. JOHN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920. Rehearing Denied December 9, 1920.)

No. 2695.

In Error to the District Court of the United States, for the Eastern Division of the Northern District of Illinois.

Vincent St. John was convicted on an indictment containing four counts charging conspiracy, and he brings error. Judgment modified, by striking therefrom the imprisonments and fines under counts 1 and 2, and, as modified, affirmed.

Clarence Darrow, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Joseph B. Fleming, both of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

PER CURIAM. St. John was one of the defendants in the government's prosecution of Haywood and others. He sued out a separate writ of error. For the reasons given in Haywood v. United States (C. C. A.) 268 Fed. 795, herewith decided, the judgment against St. John is modified, by striking therefrom the imprisonments and fines under counts 1 and 2, and, as so modified, the judgment is affirmed.

ROWE v. BOYLE, U. S. Marshal. *

(Circuit Court of Appeals, Ninth Circuit. October 18, 1920. Rehearing Denied December 6, 1920.)

No. 3489.

1. Criminal law = 242(7)—Evidence in proceeding for removal of defendant to another district for trial.

In a proceeding for return of a prisoner to another district for trial, as a fugitive from justice, introduction of an indictment found against him and his admission that he is the person named therein establishes a prima facie case.

2. Habras corpus =113(12)—Finding of probable cause for return of fugi-

tive presumed correct.

On appeal from a judgment denying a writ of habeas corpus to one ordered by a commissioner returned to another district for trial as a fugitive from justice, in the absence of the evidence on which the commissioner and the court acted, it must be assumed that their finding of probable cause was sustained by competent evidence.

3. Post office 48(4)—Indictment for using mails to defraud sufficient,

An indictment for using the mails to defraud and for conspiracy to commit such offense held suflicient, where it charged that defendants devised a scheme to sell stock of a copper company by means of representations known to be false and fraudulent, and that they used the mails in sending out letters and circulars containing such representations.

4. Post office =48(4)—Essentials of indictment for using mails to defraud. It is not necessary, in an indictment for using the mails to defraud, under Criminal Code, § 215 (Comp. St. § 10385), that the scheme itself should appear to be fraudulent on its face, or to allege that any one has actually lost money or been defrauded.

5. Criminal law = 242 (4)—In proceedings for removal of fugitive to another district for trial, sufficiency of indictment is not an issue.

The validity of an indictment is not a question in issue in proceedings for removal of a person arrested as a fugitive from justice to another district for trial, but is for determination by the court in which it was returned.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Habeas corpus by George F. Rowe against John M. Boyle, United States Marshal. From an order discharging the writ, petitioner ap-

peals. Affirmed.

Rowe appeals from an order discharging a writ of habeas corpus and directing his removal to the jurisdiction of New York for trial. Complaint was made before a commissioner at Scattle that Rowe and Tjosevig and others willfully and feloniously committed certain offenses against the laws of the United States as alleged in the indictment (certified copy of which is part of the complaint), presented to the United States District Court in New York, charging said persons in the first five counts with violations of section 215 (Comp. St. § 10385), and in the sixth count with violation of section 37 (Comp. St. § 10201), of the Criminal Code.

The complaint alleged issuance of a bench warrant and return by the marshal for the Southern district of New York to the effect that he could not find Rowe and Tjosevig within his jurisdiction, and that they were fugitives from justice and were within the Northern division of the Western district of the state of Washington. At the hearing before the commissioner at Seattle the defendant moved to dismiss upon the ground that the complaint did not

state facts sufficient to show probable cause for the removal of the defendant. This motion was denied, and upon evidence introduced the commissioner found that probable cause had been shown to believe that defendant had committed the offense as charged in the complaint, and ordered defendant to be held in bail to appear before the proper District Court in New York. Thereafter appellant surrendered himself to the United States marshal and filed in the District Court for the District of Washington petition for a writ of habeas corpus and writ of certiorari to review the findings of the commissioner. An order to show cause was granted. After due return by the marshal, hearing was had by the District Court, and the writ of habeas corpus was discharged, and order of removal was made. Defendant Rowe appealed.

Appellant questions the sufficiency of the indictment to state a cause of action, and argues that the evidence was insufficient to warrant an order of removal, and that the District Court erred in refusing to allow the defendant

to introduce the testimony of a certain witness.

Walter B. Allen, of Seattle, Wash., for appellant.

Robert C. Saunders, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., both of Seattle, for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVER-TON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). [1] After the government introduced the indictment and Rowe admitted that he was the person named therein, a prima facie case was established. Gayon v. McCarthy, 252 U. S. 171, 40 Sup. Ct. 244, 64 L. Ed. 513.

[2] Whether the evidence considered by the District Court showed probable cause for believing defendant appellant guilty of having devised and intended to devise the scheme and artifice to defraud, as charged in the indictment, and whether defendant for the purposes of executing such scheme, and attempting so to do, unlawfully used the mails as alleged, or whether defendant appellant, together with others, conspired to violate section 215 of the Penal Code (section 10385), as charged, cannot be decided, because the evidence taken before the commissioner and the District Court upon the question of the existence of probable cause is not annexed to the petition, and is not part of the proceeding before the District Court upon application for writ of habeas corpus. In the petition for the writ petitioner sets forth a summary of the evidence of a number of witnesses who testified before the commissioner; but the bill of exceptions does not contain the evidence heard by the commissioner, and there is no certification by the District Judge that the summarized statement in the petition is correct. or that it includes all of the evidence upon which the order of removal was made; nor is there any stipulation to the effect that such summary is a full and correct statement of the evidence presented to the court. In Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177. upon an appeal from an order denying an application for a writ of habeas corpus, the Supreme Court said:

"We must assume, in the absence of the evidence taken before the commissioner and approved by the District Judge, that their finding of probable cause was sustained by competent evidence, bearing in mind, also, that on this proceeding the court would not in any event look into the weight of evidence on that question."

[3] The appellant urges that the indictment is wholly insufficient.

Reduced to narrative, the facts as stated are:

That the Tjosevig-Kennecott Copper Company was a Washington corporation; that Rowe and others, having devised and intended to devise a scheme to defraud certain named persons of money and property by means of false representations, did, for the purpose of executing said scheme and artifice, place and cause to be placed in the United States mails a certain letter thereinafter described; that defendants induced a firm of stockholders. Willis & Co., of New York, to sell and offer to the "victims" 500,000 shares of stock of the Tiosevig-Kennecott Copper Company through advertisements, pamphlets, and letters mailed by Willis & Co., and its agents to the "victims," and that it was the purpose of the defendants to offer the 500,000 shares of stock and other stock by advertising and the use of the mails, and to induce "victims" to buy the stock for cash, holding out that the money received from the sale of stock would be used to develop the property of the Copper Company, defendants well knowing such representations to be false and fraudulent. The defendants were to hold out to the "victims" that Howarth & Co., of Idaho, had bought 50,000 shares of stock and paid therefor \$25,000, which representations were false and known to be false, and were to represent to the "victims" that the entire proceeds from the sale of stock, less commissions to brokers, would go into the treasury and would be used to develop the property.

They were also falsely and fraudulently to represent to the "victims" that the Copper Company owned 22 mining claims in Alaska free of all debt, and that stock offered for sale was treasury stock, and that there were about 800 tons of copper ore on the property ready for shipment, and that trial shipments showed the ore to contain \$19.20 silver to the ton, and that the Copper Company owned a rich copper property, which had been investigated by well-known mining engineers, who had reported that the possibilities of the property were second, if not equal, to the well-known Kennecott Copper mines in Alaska. and that the property had long been known to contain vast quantities of copper ore; that the work already done had uncovered and made ready for shipment about 1,600,000 pounds of high-grade ore, and that the property was only 7 miles from the railroad, and that an aerial tramway would be constructed from the property to the railroad; that the property was opposite the famous Bonanza copper mines, and that the geological formation was identical with that of the Kennecott, "known as the world's richest copper mine," and that one of the claims contained a great body of glance, which would run from 35 per cent. to 70 per cent. copper; that 800 tons of this high-grade ore were ready for shipment, and that a conservative estimate of the ore bodies uncovered showed copper to the value of \$2,000,000; that the plan was to mine and ship the ore on a large scale, and for this purpose 500,000 shares of treasury stock were offered for public subscription at \$1 per share, and that the funds realized from the sale of the stock were to be used to build a tramway and to erect a mill and construct accommodations for men, and that the stock subscriptions as well were to be used to erect a mill and to build a tramway, in order that shipping of

an enormous tonnage would be commenced, and that the stockholders would thus be enabled to participate in the profits made from the metal; that 500,000 shares had been subscribed for, and that it was not probable that further offer of treasury stock would be made, and that, based upon amount of ore already available for mining and shipment, the stock of the company should be worth at least \$2 per share, and that with additional equipment and further development the shares would be worth from 10 to 20 times their price of \$1 per share.

It is charged that the foregoing representations were false and known to be false. Part of the scheme charged was that the "victims" should be fraudulently and falsely told by defendants that the Copper Company owned 440 acres of highly mineralized ground, and that several million dollars worth of high-grade ore was available for mining and shipment, and there would be an active and strong market for the stock of the company in New York, and that \$5 a share might be expected within a few weeks, and that, on the then-present showing of the properties, fully \$4,000,000 worth of copper was in sight, and the intrinsic value of the shares was about \$3, and that assays showed the ore was similar to that of the Bonanza mine, and that certain named engineers had made favorable reports on the property.

It is alleged that defendants mailed circulars to certain named persons, the circulars, which are set forth, containing statements as to the property and stock, and that they mailed letters to certain persons, advising them that the property should prove as valuable as the Kennecott, and that the shares should be worth at least \$15 or \$20, if the

most reasonable expectations should prove true.

The sixth count charges a conspiracy to violate section 215 of the Criminal Code, and alleges that a part of the conspiracy was that the defendants were to procure a certain named firm of stockbrokers to offer to the "victims" 500,000 shares of stock through advertisement, pamphlets, and letters, to be mailed to the "victims," and that they were to represent that the money received from the sale of the stock should be used to develop the property, all of which was known to be false and fraudulent to defendants. Further allegations of conspiracy charge that defendants were to do the things referred to in the allegations of the counts charging the use of the mails in the scheme to defraud. The representations are alleged to have been known by defendants to be false and fraudulent. The overt acts under the conspiracy charge are that, in pursuance of the plan and to effect the object thereof, there were certain conversations had, and that letters which are set forth were written and mailed, and that checks for certain alleged sums were received.

The indictment sufficiently charges these essentials: That a scheme to defraud was intentionally devised by defendants; that, to effect or to attempt to effect the object of the scheme, defendant placed or caused to be placed mail matter in a post office of the United States. United States v. Young, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. 548: Linn v. United States, 234 Fed. 543, 148 C. C. A. 309.

[4] It is not necessary, in an indictment under section 215 supra, that the scheme itself appear to be fraudulent on its face (McConkey v.

United States, 171 Fed. 829, 96 C. C. A. 501; Looker v. United States, 240 Fed. 932, 153 C. C. A. 618), or that it be alleged that any one has actually lost money or been defrauded. See above cases, and Weeber v. United States (C. C.) 62 Fed. 740; United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516. The charge of conspiracy is also sufficient.

[5] Finally, if there were any doubt as to the validity or sufficiency of the indictment, the proper court for the resolution of any such question is that in which the indictment has been returned, and not that where proceedings in removal are instituted. Stallings v. Splain, 253 U. S. 339, 40 Sup. Ct. 537, 64 L. Ed. 940; Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

The order appealed from is affirmed.

Affirmed.

TJOSEVIG v. BOYLE, U. S. Marshal, et al.

(Circuit Court of Appeals, Ninth Circuit. October 18, 1920. Rehearing Denied December 6, 1920.)

No. 3482.

1. Post office \$\iff 48(4)\$—Indictment for using mails to defraud sufficient.

Indictment for using the mails to defraud held sufficient, when it charged that defendants devised a scheme to sell stock of a copper company by means of representations known to be false, and that they used the mails in distributing letters and circulars containing such representations.

Conspiracy \$\iff 43(9)\$—Indictment for conspiring to use mails to defraud sufficient.

An indictment under Penal Code, § 37 (Comp St. § 10201), for conspiring to use the mails to defraud, charging that defendants devised a scheme to sell stock of a copper company, that false representations were made, that they used the mails in distributing letters and circulars containing such representations, that they contracted with a stock brokerage firm for sale of such stock, and that a certain defendant had paid another defendant money for securing his aid, is sufficient.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer,

Judge.

Habeas corpus proceeding by Christian Tjosevig against John M. Boyle, as United States Marshal for the Western District of Washington, and F. J. Colligan, Deputy United States Marshal. From an order discharging the writ, and directing applicant's removal to another jurisdiction, he appeals. Affirmed.

Vivian M. Carkeek, Donald A. McDonald, W. H. Harris, and George Coryell, all of Seattle, Wash., for appellant.

Robert C. Saunders, U. S. Atty., and Robert E. Capers, Asst. U. S. Atty., both of Seattle, Wash., for appellees.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge. Appeal from an order discharging a writ of habeas corpus and directing removal of appellant to another jurisdiction. Defendant Tjosevig, appellant, was indicted with Rowe and others in the District Court of the Southern District of New York. The indictment contains six counts, the first five of which charge violation of section 215 of the Penal Code (Comp. St. § 10385); the sixth charges violation of section 37 of the Penal Code (section 10201). The indictment is similar to that in Rowe v. Boyle, 268 Fed. 809, heretofore decided by us, and the appeal is of the same character.

[1] The contention of appellant is that the false representations alleged in the indictment are "in the form of the negatives pregnant," and that as a consequence defendant had no notice of the nature of the charges made against him and could not prepare for his trial. We think it unnecessary to elaborate upon what we said in Rowe v. Boyle, and under the authority of that case we hold the indictment to be sufficient in its essential averments as a charge for violation of section 215

of the Penal Code.

The special objection to the sixth count is that it is not alleged that the conspirators intended to use the mails to defraud; that no overt act is alleged to have been done to further the object of the conspiracy. The allegations are that defendants willfully and knowingly conspired and agreed among themselves to violate section 215 of the Penal Code! and knowingly conspired together and agreed among themselves to devise a scheme and artifice to defraud a large number of persons described as those who might be induced and persuaded to buy shares of the capital stock of the Copper Company, by obtaining from them: called "victims," their money and property by means of false and fraudulent pretenses, representations, and promises, and that, having devised said scheme and artifice, defendants, for the purpose of executing the same and attempting so to do, would place and cause to be placed in authorized depositories for United States mail matter in the New York district certain letters, writings, circulars, pamphlets, and advertisements containing statements and representations in regard to the property and stock of the Copper Company. This averment is followed by specific charges that the defendants were to do certain things, namely, induce a certain firm of stockbrokers to sell and offer for sale 500,000 shares by advertisement circulars to be mailed, and to induce persons to buy stock by holding out that the money received from the sale of stock would be used to develop the property of the Copper Company; "said representations, as the defendants well knew, being false, fictitious, and fraudulent." numerous other allegations with respect to the sale of stock, and representations made by the defendants, all of which are alleged to have been well known to the defendants to be "false, fictitious, and fraudulent."

Among the overt acts distinctly alleged to have been done "in pursuance of and to effect the object of said conspiraty" are that defendant made a written contract with Willis & Co., stockbrokers of New York, in regard to the sale of stock of the Copper Company, and that Tjosevig came from Alaska to New York with intent to assist in the

sale of stock of the Copper Company, and that in September, 1916, one of the defendants, Hancock, wrote a letter to another defendant, Rowe, requesting Rowe to send him \$400 for his services in connection with a certain report on the property of the Copper Company theretofore signed by Hancock; that to carry out the purposes of the conspiracy one of the defendants, Rowe, obtained from another defendant, Snyder, a check for \$420, payable to the defendant Rowe as a fee for the defendant Hancock.

Our opinion being that the indictment charges violation of the sections of the Penal Code heretofore referred to (United States v. New South Farm & Home Co., 241 U. S. 64, 36 Sup. Ct. 505, 60 L. Ed. 890, Ann. Cas. 1917C, 455), the order appealed from is affirmed.

Affirmed.

SUGAR PRODUCTS CO. v. MOBILE & GULF NAV. CO.

(Circuit Court of Appeals, Fifth Circuit. November 23, 1920.)

No. 3519.

1. Shipping 58(3)—Damages for detention not within demurrage provision of charter.

A clause of a charter party fixing the rate of demurrage for delay beyond the lay days after time for loading or discharging commenced held not to measure the damages for detention of the vessel while awaiting designation by the charterer of the port of loading.

2. Shipping \$\infty\$58(3)—Sum for which vessel may be chartered measure of damages for detention by charterer.

The sum for which a vessel can be chartered in the market is the best evidence of her value for computing damages for her detention, and in the absence of a market value the value of her use to the owner in the business in which she was engaged becomes a proper basis for estimating damages.

3. Shipping \$\infty\$ 58(3)—Time charter value of vessel determined.

The time charter value of a vessel may be arrived at by estimating the time which is ordinarily consumed in making a voyage, where she is employed in carrying cargoes at a fixed rate of freight.

4. Shipping \$\infty\$58(3)—Interest on damages for detention by charterer.

Interest on damages awarded against a charterer for detention of the vessel should be computed from the termination of the detention rather than from the beginning.

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Suit in admiralty by the Mobile & Gulf Navigation Company against the Sugar Products Company. Decree for libelant, and respondent appeals. Modified and affirmed.

For opinion below, see 256 Fed. 392.

Palmer Pillans and Alexis T. Gresham, both of Mobile, Ala., for appellant.

Harry T. Smith and Wm. G. Caffey, both of Mobile, Ala., for appel-

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Appellee, as owner of the schooners W. D. Hossack and G. J. Boyce, filed its libel in personam against appellant, as charterer, to recover damages for breach of a charter party of each of said schooners.

The charter parties, which were in all respects similar, were dated March 27, 1918; recited that the vessels were then bound to Cienfuegos, Cuba; provided for return cargoes of molasses from the port of Mariel or Bahia Honda, Cuba, to Gulfport, Miss., or Mobile, Ala. (owner's risk); and contained the following provisions:

"It is agreed that the lay days for loading and discharging shall be as follows (if not sooner despatch): Commencing one clear day from the time captain reports his yessel ready to receive or discharge cargo at such safe anchorage as charterer may direct. Ten days to be allowed charterers for loading and discharging. And that for each and every day's detention by default of said party of the second part, or agent, \$60 per day shall be paid by said party of the second part, or agent, to said party of the first part, or agent."

The breaches relied on were wrongful detentions, resulting from the charterers' failure to designate loading ports. The decree awarded damages for delay of the Hossack in the sum of \$712.25, with interest from May 3, 1918, and for delay of the Boyce in the sum of

\$1,857.96, with interest from April 30, 1918.

The respondent admits liability. The only contention here is that the award is excessive. In the first place, it is urged that the per diem allowance for each vessel was too much, and, in the second place, that the Boyce was detained only 15 days, whereas the court allowed for a detention of 18 days. It is conceded that the court rightly allowed a detention of 7 days as to the Hossack. The per diem allowance to the Hossack was at the rate of \$101.75, and to the Boyce was at the rate of \$103.22.

During the year 1918, these schooners were engaged in carrying cargoes of lumber from Gulf ports to North Cuban ports. The Hossack had a capacity of 286,000 feet of lumber, and the Boyce had a capacity of 290,000 feet. There was an active demand for vessels of the size of the Hossack and Boyce in this trade. At the time these vessels were detained, there was a uniform rate of \$20 per thousand feet of lumber. This rate was established by the Shipping Board, and vessels were not allowed to charge more. There was evidence which showed that the rate would have been higher, but for this action of the Shipping Board. There was also evidence that the market value of these vessels was as high as \$175 per day, and other evidence that it was as low as \$104 per day.

This testimony as to the per diem market value of these vessels was based on the average length of time consumed in making the round trip to Cuba, including time for loading and unloading. The time in which such a voyage is usually made is variously fixed at from 35 to 50 days. The court allowed 50 days for such a trip, and it is conceded that the per diem allowances made on this basis are correct; but it is the contention of the respondent that the libelant should be limited in the amount of its recovery to the demurrage rate of \$60 per day.

[1] The wrongful detention of these vessels does not fall within the express terms of the charter parties providing for demurrage, and

therefore the demurrage rate does not afford a correct measure of damages; either party may show that demurrage is not a true measure of

loss by detention,

[2] The sum for which a vessel can be chartered in the market is the best evidence of her value, and, in the absence of a market value, the value of her use to the owner in the business in which she was engaged, becomes a proper basis for estimating damages. The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937.

[3] These rules for determining damages are recognized by the respondent, but it insists that the rule as to market value is applicable only to time charters, as distinguished from voyage charters. We have been cited to no case holding that view, and we have been unable to find any. Besides, there was evidence, as already stated, of the market value of the vessels in terms of time. It is true the time charter value was arrived at by estimating the time which was ordinarily consumed in making a voyage. Moreover, the respondent did not rely upon a time charter basis at the trial, but instead introduced evidence as to the length of a voyage from Gulfport or Mobile to North Cuban ports and return. There was ample evidence to support the finding of the court that such an ordinary voyage would usually require not more than 50 days. However, if the evidence is not sufficient to show market value, in the sense urged by respondent, it did show the value of the use of these vessels to their owner. It would not be fair or just, in estimating damages for the use of these vessels to their owner, to include periods of time when they were idle, or on demurrage; and only by these methods could it be shown that the damages awarded were excessive. In cases of this kind it is usually difficult to do more than estimate damages; but it is not for the party by whose default damages accrue to complain of this difficulty.

It is contended that the court erred in refusing to require libelant to produce its books, showing the earnings of the vessels. These assignments must fail, in view of the fact that the record shows the

books were produced and tendered to respondent.

The court found that the Boyce was detained 18 days; respondent asserts that the evidence shows she was detained only 15 days. The dispute as to these 3 days forms the basis for the second contention that the damages awarded are excessive. The Boyce finished discharging her cargo at Cienfuegos on April 24, and was ready for her return voyage on that date. The respondent failed to name the loading port until May 9, during which time the vessel remained at Cienfuegos. The court below fixed the beginning of the detention as of April 30, for the reason that on April 29 the libelant notified respondent that the Boyce was at Cienfuegos awaiting orders. Respondent concedes liability for detention of 10 days elapsing up to May 9; and very well it might, because the evidence shows beyond dispute that before April 24 it was seeking to cancel the charter party, and that as early as April 27 it received a letter from libelant requesting immediate designation of loading port. The trial court might very well have allowed for 2 days' additional detention at Cienfuegos. On May 9 respondent requested that the Boyce proceed to Havana, and not to

either of the ports designated in the charter party. The vessel arrived at Havana on May 17, and was wrongfully detained there until May 25, when it was ordered to Bahia Honda, for its cargo, at which port it arrived on May 26, thereby suffering a clear loss of at least 8 days. Libelant claims a delay at Bahia Honda, due to the failure of respondent to comply with its undertaking to furnish clearance papers; but, without considering this claim at all, there was ample proof of detention for at least 18 days.

[4] The decree awarded interest from the beginning of the detention of each vessel. In this we think there was error, and that the interest should not be calculated until the expiration of the detention. However, the item of interest is so small as not to justify an allowance of costs to respondent, in the absence of an offer by respondent to pay the amount of the decree, with interest from the time the period of detention was at an end. The decree should be modified, so as to allow interest on the amount awarded for detention of the Hossack from May 9, 1918, and so as to allow interest on the amount awarded for detention of the Boyce from June 6, 1918.

As so modified, the decree is affirmed.

in re FRED D. JONES CO.

HELDMAN V. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920. Rehearing Denied December 9, 1920.)

No. 2432.

Bankruptcy

 1.60—In determining question of preference, bankrupt not treated as going concern, unless in fact such.

The rule that, in determining the question of a bankrupt's insolvency at the date of an alleged preference, the valuation must relate to the bankrupt's condition as a going concern, does not apply, unless the debtor was in fact a going concern.

2. Bankruptcy \infty 160—Fair value of assets under actual circumstances test of insolvency at time of preference.

In determining the question of a bankrupt's insolvency at the time of an alleged preference, the inquiry is simply as to the fair value of the assets under the actual circumstances.

3. Bankruptcy 5-160—Master held not compelled to accept face value of accounts in determining question of preference.

Where a large part of the business of a retailer of jewelry on the installment plan, who became bankrupt, was with denizens of the red light district, and a large part of the accounts were from four months to three years behind, the master held not compelled as a matter of law to accept the face value of the accounts in determining whether the bankrupt was solvent at the time of an alleged preference.

Conceding that a master's report under an ordinary reference is advisory only, and only presumptively correct, yet when the chancellor, after a full hearing on exceptions, confirms the report, appellant is in no

better condition to base error on the chancellor's refusal to accept his testimony, as against that of appellee's witnesses to the contrary, than if he were attacking a jury's verdict.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the Fred D. Jones Company, bankrupt; the Central Trust Company of Illinois, trustee. From a decree approving a finding of the master that he had received an illegal preference, Julius N. Heldman appeals. Affirmed.

Edward Maher, of Chicago, Ill., for appellant. John P. Barnes, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. Appellant assails the trial court's approval of the master's finding that appellant received an illegal preference. Nothing is directly involved but two questions of fact: Did the liabilities of the Jones Company exceed the fair value of its assets when appellant took security for an antecedent debt? Did appellant then have reasonable cause to believe that the Jones Company was

insolvent?

Witnesses testified orally before the master. Then, in order to follow and verify or reject conflicting arguments of counsel, the master caused the evidence to be reduced to writing. With his report of findings he turned into court 1,780 pages of testimony and 171 exhibits. After appellant had been given full opportunity to show from that record that any material finding of the master was erroneous, the trial court confirmed the master's report. On this appeal the condensed certificate of evidence comprises over 400 pages. Appellant presented 120 pages and appellee 76 pages of argument respecting the facts established by the record. Additionally we have had the benefit of a full oral presentation of the case.

Ordinarily we should consider it enough to say that we have found no error in the trial court's approval of the master's findings of fact. But throughout appellant's arguments run certain misconceptions of

the law, which may justify notice.

[1, 2] 1. Respecting insolvency: Appellant quotes from Butler Paper Co. v. Goembel, 143 Fed. 295, 74 C. C. A. 433, 16 Am. Bankr. Rep. 26:

"The valuation for the test of solvency or insolvency under the issue must relate to the conditions, as a going concern, when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy intervened."

This statement on its face was intended to apply to a situation in which the debtor was in fact "a going concern" when the alleged preference was given. It cannot be accepted as a general rule that in every situation the debtor must inevitably be regarded as "a going concern," even if at the time of giving the alleged preference he was financially dead or mortally wounded. 2 Remington on Bankruptcy, § 1352; Woodman on Trustees in Bankruptcy, § 304; Spencer v.

Nekemoto, 24 Am. Bankr. Rep. 517; Louisiana National Life Assurance Co. v. Segen (D. C.) 196 Fed. 903, 28 Am. Bankr. Rep. 19; In re Coddington (D. C.) 118 Fed. 281, 9 Am. Bankr. Rep. 243. The inquiry is simply this: What in the actual circumstances was the fair value of the assets of the debtor (afterwards the bankrupt) when he

paid or secured the antecedent debt?

[3] In this case the Jones Company was a retailer of jewelry in Chicago on the installment plan. Its salesmen solicited and procured three-fourths of its business from the denizens of the red light district. At the time now in question the concern had pledged a large part of its stock in trade as security for current loans with which to go on with its business, and the cream of its installment accounts had likewise been hypothecated. Petition in bankruptcy was filed on January 20th. Between the 12th and 18th of that month appellant received alleged preferences; and on the 14th he went from Chicago to New York to try to have the principal creditors compromise and make extensions. During this period the books of the Jones Company showed installment accounts in the sum of \$76,000, divided as follows: Less than four months old, \$20,000; four months behind, \$14,000; one year behind, \$6,000; one to three years behind, \$36,000. Considering the character and financial standing of the purchasers in the red light trade and the scatterings due to police raids and other causes, the master was not compelled, as a matter of law, to accept the face value of these accounts; and we find from the evidence that the master gave appellant the benefit of a fair valuation in the circumstances as they existed at the time of the alleged preferences.

[4] 2. Respecting appellant's knowledge or reasonable cause to believe: Granting appellant's contention, based on Kimberly v. Arms, 129 U. S. 515, 9 Sup. Ct. 355, 32 L. Ed. 764, and other cases, that a master's report under an ordinary reference has not the binding force of a jury's verdict, is simply advisory to the chancellor, and is only presumptively correct, yet when the chancellor after a full hearing on exceptions has confirmed the report, and on appeal we are asked to base error on the chancellor's refusal to accept appellant's testimony on a matter of fact as against testimony of appellee's witnesses to the contrary, we find appellant in no better position than if he were assaulting a jury's verdict. Neither the chancellor nor ourselves saw the witnesses; the master did; and the master's report involved a finding on credibility of witnesses personally appearing before him and nowhere else. One instance will suffice to illustrate the point. Jones Company's credit man testified for appellee that he had informed appellant that the accounts were worth at least \$30,000 less than face. Appellant testified that no such information had ever been given to him and that he believed the accounts were of full face value. Which was the more credible witness? We do not know; but we can at least say that the printed page affords us no means of deciding that the chancellor erred in accepting the master's estimate of the opposing witnesses.

The decree is affirmed.

BALDRIDGE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1920.)

No. 5467.

1. Trespass \$\infty\$46(2)\topAction not supported by evidence.

An action by the owner of land for conversion of the crops by a trespasser *held* not supported by evidence showing that the crops belonged to a tenant and not showing that plaintiff had any lien thereon.

2. Trespass \$\iiint_50\$—Damages for conversion of grass by trespasser not rental value of land.

In an action for conversion by a trespasser of grass growing on land the rental value of the land is not the measure of damages, and evidence of such rental value is not admissible.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by the United States against L. L. Baldridge. Judgment for plaintiff, and defendant brings error. Reversed.

T. J. Leahy, C. S. Macdonald, Swan C. Burnette, and F. W. Files,

all of Pawhuska, Okl., for plaintiff in error.

Frank E. Ransdell, Asst. U. S. Atty., of Oklahoma City, Okl. (Herbert M. Peck, U. S. Atty., of Oklahoma City, Okl., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

CARLAND, Circuit Judge. This is an action brought by the United States, in its own behalf and in behalf of Amelia Girard and Mary E. Girard, noncompetent Indians, against plaintiff in error, hereafter called defendant, to recover damages for a trespass committed by defendant upon the allotted land of said Indians during the years 1908, 1909, 1910, and 1911. There were two causes of action pleaded in the complaint. The first related to the trespass upon the homestead and surplus allotment of Amelia Girard; the second, to the trespass upon the homestead and surplus allotment of Mary E. Girard. Each cause of action contained two counts. The trespasses upon the allotments were pleaded in the following language:

"Trespassed in and upon the land above described, and caused and permitted cattle owned by him, the said L. L. Baldridge, to so continuously during said time, trespass in and upon the said land, causing great injury to same, and unlawfully converted to the use of him, the said L. L. Baldridge, during said period, the crops, grasses, stalks, cotton, and products grown thereon."

[1] The case was tried by the court; a jury having been waived in writing. The court found for the plaintiff in behalf of Amelia Girard in the sum of \$160.50, and in behalf of Mary E. Girard in the sum of \$529.50; total, \$690. Defendant brings error, and contends that the trial court committed error in refusing to sustain a demurrer to the evidence, for the reason that the evidence was insufficient to establish the cause of action pleaded. The evidence at the trial showed without

dispute that the corn, cotton, and corn stalks were the property of one Voyles, who had rented the allotments in question from the allottees for the year 1911. It is now sought to sustain the recovery for said items, because section 3806, Revised Laws of Oklahoma 1910, provides that any rent due for farming lands shall be a lien on the crop growing or made on the premises, and that such lien may be enforced by action and attachment therein as provided in section 3809 of the same laws. This last section provides that if a tenant intends to remove, or is removing, or has within 30 days removed his property, or his crops, or any part thereof, from the leased premises, the person to whom the rent is owing may commence an action, and upon making affidavit, stating the amount of the rent for which such person is liable, etc., attachment shall be issued in the same manner as provided in other actions. Section 3831 of the same laws provides that, notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien. There is testimony in the record that Voyles had absconded, but the allottees had never attached the property or taken possession of the same before the trespass was committed, nor did the complaint plead a cause of action for the conversion of property subject to a lien, nor was a lien mentioned therein. The evidence having failed to show that the allottees or the United States had any title to the corn, cotton, or corn stalks, the action pleaded wholly failed, and the defendant was entitled to have his demurrer sustained on this branch of the case.

[2] We now come to the recovery for grass converted. The only evidence introduced by the plaintiff to show the value of the grass converted was evidence tending to show the fair and reasonable rental value of the land upon which the grass was growing. At the time this evidence was offered, counsel for defendant objected to the same, because it was not the proper measure of damage. The objection was overruled, and the evidence admitted. It was clearly error to admit this evidence, and without it there is no evidence in the record of any damage as to the grass.

Counsel for the plaintiff contends that this action is one of trespass for the wrongful use and occupation of the land, and was brought under section 2873 of the Revised Laws of Oklahoma 1910. The section referred to reads as follows:

"Sec. 2873. Wrongful Occupation.—The detriment caused by the wrongful occupation of real property, in cases not embraced in sections 2874, 2880, 2881 and 2882, is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession."

Counsel for defendant is mistaken when he says that the action was brought under this section. A simple comparison of the complaint and the law demonstrates that the claim is unfounded. The present action is to recover damages for the conversion of property. The section quoted relates entirely to the wrongful occupation of real property.

Counsel also contends that the case of Frank Watson v. United States (C. C. A.) 263 Fed. 700, a case decided by this court, is authority for the proposition that in the present case the rental value of the land

would be the value of the grass converted. The opinion in the case referred to plainly states that each count of the complaint in that case contained in substance the allegation that the defendant went upon such tract of land during the aforesaid period of time, and inclosed, used, and occupied the same and appropriated the grass thereon without the consent of said allottee Indian or the Secretary of the Interior. The opinion further states that the counts of the complaint showed a wrongful entry and an unlawful holding of possession, which were the elements of an action of trespass for mesne profits in which reasonable rental value may measure the damages to be recovered. The case is no authority whatever for the proposition that in an action for conversion of grass the rental value of the land is the measure of damage. The other cases cited by counsel were all cases for wrongful use and occupation. There is no evidence of damage to the land itself. The demurrer to the evidence should have been sustained.

Judgment reversed, and a new trial ordered.

STRATTON et al. v. BULLER et al.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1920.) No. 5506.

1. Waters and water courses 5 156(3)—Contract to convey "water rights"

not breached; "right."

A contract to convey certain lands, together with all water rights used and enjoyed therewith, was satisfied by an instrument conveying the land, together with all water rights and appurtenances thereunto belonging, although the vendor had sometimes used more water than he was entitled to, since the term "water right" means legal right to use water from irrigation stream, and a "right" is an interest that a person actually has in property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right; Water Right.]

Appeal and error \$\infty\$=1011(1)—Conflicting evidence sustains trial court's finding.

Where the evidence conflicted as to whether the vendor made false representations regarding the water rights appurtenant to the land involved, the trial court's finding will prevail.

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Action by Thomas L. Stratton and others against Joseph Buller and others. Decree for defendants, and plaintiffs appeal. Affirmed.

J. D. Skeen, of Salt Lake City, Utah, for appellants.

Barnard J. Stewart, of Salt Lake City, Utah (Daniel Alexander and James L. White, both of Salt Lake City, Utah, on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. An appeal by the plaintiff below presents the question whether the decree of the court in favor of the de-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

fendant is supported by the pleadings and the evidence. The plaintiff contracted in writing to purchase from Joseph Buller 40 acres of irrigated land in Utah, and the "water rights used and enjoyed therewith and all easements, waterways, and other appurtenances and privileges pertaining thereto, including shares of stock in the Utah Lake Land & Water Power Company." Soon afterwards Buller executed a deed to the plaintiff, which conveyed the land, "together with all water rights and appurtenances thereunto belonging." A portion of the purchase price was paid in money, and a mortgage on the property conveyed was given by the vendee to secure notes for the remainder of the price agreed to be paid for the land. One of these notes was transferred after its maturity. This suit was brought to rescind the contract of purchase, to cancel the note and mortgage, and to recover the money paid towards the purchase, because of alleged breach of the contract, and because of alleged misrepresentations made by the vendor. The mortgagee denied the allegations of fraudulent representations and of the breach of contract. The defendant Buller filed an answer, but it is not preserved in the record on appeal. After hearing the testimony a decree was rendered in favor of the defendants and dismissing the plaintiffs' bill.

The only contention made by appellant is that Buller's deed to him did not comply with his contract to convey the water right, and that this breach of the contract entitles appellant to rescind the contract, tender a reconveyance of the land, and recover the amount paid on the

purchase price.

[1,2] Was there a breach of contract? The bill alleges a contract. in writing and sets forth a copy of it, whereby the vendor agreed to convey the lands "together with all water rights used and enjoyed therewith." The bill assumes this to be a contract for the conveyance of a right to the same quantity of water that the vendor had theretofore actually used, and which is alleged to have been a stream of water measuring 100 miner's inches for 3 hours for each acre of land, at intervals of not over 15 days, and charges that the vendor did not have the right to use that amount of water. The term "water right," as used in the contract, has a well-defined meaning. It is the legal right of the riparian owner to use water from the irrigation stream (Smith v. Denniff, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408; Booth v. Chapman, 59 Cal. 149; Kinney on Irrigation [2d Ed.] §§ 759, 761; Long on Irrigation, § 2), and, in general, "a right" in any subject of property is the interest that a person actually has in that property (Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436; 34 Cyc. 1763, 1764).

A water right is usually founded upon a grant, express or implied, by which the vendee acquires the privilege of using a certain amount of water. In some seasons an owner of irrigated land may have the use of much more water than that to which he is entitled, when the supply is ample and the company furnishing the water does not choose to enforce careful measurement; but such tolerance does not measure the legal rights of the owner under his grant. When Buller contracted to convey the water right used with this land, he did not covenant a supply of any specific quantity of water, but only contracted to convey

whatever interest he possessed in the water right that he had used. The deed conveyed the land and all water rights that pertained to the land, and was a compliance with, and not a breach of, the contract. While this disposes of the only question urged by appellant, it is proper to notice the fact that the bill also alleges that the vendee was induced to make this contract because the vendor falsely represented that the water right appurtenant to the land included all water which had theretofore been used for the irrigation of the land. The evidence was directly in conflict between Stratton and Buller as to whether this representation was made, and the finding and decree of the District Court against the plaintiff must prevail, as it is not clearly shown to have been an erroneous consideration of the evidence. Adamson v. Gilliland, 242 U. S. 350, 37 Sup. Ct. 169, 61 L. Ed. 356; North American Exploration Co. v. Adams, 104 Fed. 404, 45 C. C. A. 185; Nichols v. Elken, 225 Fed. 689, 140 C. C. A. 563; Conkling Mining Co. v. Silver King Coalition Mines Co., 230 Fed. 553, 144 C. C. A. 607; United States v. Grass Creek Oil & Gas Co., 236 Fed. 481, 149 C. C. A. 533.

The conclusions which have been stated make it unnecessary to consider the legal effect of the representation, if it had been made as claimed.

The decree will be affirmed.

RAMSEY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1920.)

No. 3404.

 Criminal law = 1044—Review of evidence unnecessary, in absence of motion for directed verdict.

Where accused made no motion for a directed verdict, the Circuit Court of Appeals is under no obligation to consider the sufficiency of the evidence, although it may do so.

2. Criminal law \$\infty\$=1159(2) \to Appellate court cannot weigh evidence.

If there is substantial evidenc@stending to sustain the conviction, a Circuit Court of Appeals cannot weigh the testimony.

 Criminal law = 1156(1)—Denial of new trial reviewable only for abuse of discretion.

A motion by accused for new trial is addressed to the judicial discretion of the trial judge, and the denial of such motion in the exercise of such discretion cannot be reviewed, unless the discretion was abused.

Witnesses ⇐=372(1)—Limiting cross-examination as to interest of witness held within discretion.

In a prosecution for illegal sale of intoxicating liquor, where the witnesses had already been cross-examined to show their motive and intent in their activities with reference to the sale in question, it was not an abuse of the trial court's discretion to reject further cross-examination in the same general line.

5. Criminal law \$\iiint 37\text{\text{\text{-}Purchase}}\$ by decoy witness no defense to prosecution for sale of liquor.

The fact that a witness who purchased intoxicating liquor was a decoy, acting on behalf of a government officer, is no defense to a prosecution for the illegal sale.

In Error to the District Court of the United States for the Western

District of Tennessee; John E. McCall, Judge.

A. B. Ramsey was convicted of selling distilled spirits for beverage purposes, in violation of the War-Time Prohibition Act, and he brings error. Affirmed.

Abe Cohn and Jesse Edgington, both of Memphis, Tenn., for plaintiff in error.

Thomas J. Walsh, Asst. U. S. Atty., of Memphis, Tenn. (W. D. Kyser, U. S. Atty., of Memphis, Tenn., on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error was convicted of selling distilled spirits for beverage purposes on July 12, 1919, in violation of the War-Time Prohibition Act, Nov. 21, 1918, c. 212, subd. 4 (Comp. St. Ann. Supp. 1919, §§ 3115¹¹/12f-3115¹¹/12ggg). This writ is to review the judgment.

A motion in arrest of judgment, on the ground that the War-Time Prohibition Act (a) was unconstitutional, and (b) had ceased to be operative, was overruled. A motion for new trial was denied. The sufficiency of the evidence to sustain conviction is challenged, and complaint is made of the exclusion of certain proffered evidence. There was no exception to the charge of the jury, which is not sent up.

1. The contentions of plaintiff in error made under the motion in arrest of judgment have been foreclosed by the decision of the Supreme Court in Hamilton v. Kentucky Distilleries Co., 251 U. S. 146,

40 Sup. Ct. 106, 64 L. Ed. 194.

- [1, 2] 2. There was no motion to direct verdict. We are therefore under no obligation to consider the sufficiency of the evidence, although we may do so. Crawford v. United States, 212 U. S. 183, 194, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Sylvia v. United States (C. C. A. 6) 264 Fed. 593, 594. There was substantial evidence tending to sustain the conviction. We cannot weigh the testimony. Burton v. United States, 202 U. S. 345, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Kelly v. United States (C. C. A. 6) 258 Fed. 392, 406, 407, 169 C. C. A. 408; West v. United States (C. C. A. 6) 258 Fed. 413, 421, 169 C. C. A. 429.
- [3] 3. The motion for new trial was addressed to the judicial discretion of the trial judge. This discretion was not abused in the denial of the motion, and we therefore cannot review the exercise of discretion in so doing. Robinson v. Van Hooser (C. C. A. 6) 196 Fed. 620, 116 C. C. A. 294.
- [4] 4. The evidence excluded was offered by way of cross-examination to show the motive and intent of the respective witnesses in their activities with reference to the sale in question. There had already been cross-examination evidently addressed to the same purpose. Plainly there was no abuse of discretion in rejecting further examination in the same general line. Memphis St. Ry. Co. v. Bobo (C. C. A. 6) 232 Fed. 708, 712, 146 C. C. A 634.

[5] 5. The record contains what appears to be a suggestion that the conviction ought not to stand, or, perhaps more specifically, that the government is estopped from prosecuting the case on the ground that the commission of the offense, if any, was procured by one of the witnesses referred to, acting on behalf of a government officer. The record is not such as to give this proposition any force. The fact that the witness was a decoy is not a defense to prosecution for the sale. Grimm v. United States, 156 U. S. 604, 610, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. United States, 159 U. S. 663, 669, 16 Sup. Ct. 136, 40 L. Ed. 297; Goldman v. United States (C. C. A. 6) 220 Fed. 57, 62, 135 C. C. A. 625; Goldstein v. United States (C. C. A. 7) 256 Fed. 813, 168 C. C. A. 159. The case does not fall within Woo Wai v. United States (C. C. A. 9) 223 Fed. 412, 137 C. C. A. 604.

The judgment is affirmed.

MATTHEWS BROS. v. PULLEN et al.

(Circuit Court of Appeals, First Circuit. November 19, 1920.)

No. 1469.

Corporations 565(1)—Stockholder cannot be transmuted into creditor by executory contract for sale of stock to corporation.

A stockholder of a corporation cannot, through an executory contract for the sale of his stock to the corporation, cease to be a stockholder and become a creditor, with the right to share in competition with other creditors in the assets of the corporation, when insolvent.

Appeal from the District Court of the United States for the District of Massachusetts; Charles F. Johnson, Judge.

Matthews Bros., a creditor, appeals from a decree directing William L. Pullen, receiver of the D'Arcy & Sons Company, to pay dividends on certain claims. Reversed in part.

Graften L. Wilson, of Boston, Mass. (Hale & Dorr and John M. Maguire, all of Boston, Mass., on the brief), for appellant.

Edward W. Bancroft, of Boston, Mass. (H. P. L. Partridge, of Boston, Mass., on the brief), for appellees D'Arcy and Shepard.

Before BINGHAM and ANDERSON, Circuit Judges, and AL-DRICH, District Judge.

BINGHAM, Circuit Judge. This is an appeal from a decree of the District Court of Massachusetts allowing a master's report and directing the receiver to pay a dividend of 10 per cent. on the claims of Gerald J. D'Arcy and Maria B. Shepard as determined by the report.

D'Arcy & Sons Company was a Massachusetts corporation organized March 9, 1904, and conducted a wholesale and retail lumber business. On April 29, 1918, it was put into the hands of a receiver. Its capital stock was \$78,000, and the par value of its shares was \$100 each. Seven hundred and twenty shares were owned by Michael F. D'Arcy. In 1909 Maria B. Shepard purchased from D'Arcy 300 of the shares

for \$20,000. January 2, 1917, she sold her shares to the corporation for \$20,000; the purchase being authorized by the directors. For this stock she received notes and cash. She retained one of the notes on which there is due \$8,702.96. The other notes she sold and transferred to Michael F. D'Arcy, who sold and transferred them to his son, Gerald J. D'Arcy. The amount due on these notes is \$7,798.37. The corporation has never parted with the stock. It is the allowance of these claims and the order directing the payment of a dividend of 10 per cent. upon them that is in question on this appeal.

It is found that at the time the stock was purchased and the notes were given the corporation was solvent, that the purchase of the stock was made in good faith and did not make the corporation insolvent, and that Michael F. D'Arcy and Gerald J. D'Arcy knew of the purchase of the stock and the giving of the notes at the time the transaction took place. The corporation is now insolvent, and Maria B. Shepard and Gerald J. D'Arcy are seeking to have the claims allowed, and to share pari passu with the other creditors in the assets of the

corporation.

In Keith v. Kilmer, 261 Fed. 733, decided by this court November 15, 1919, the question was:

"Whether, by executory contract between a Maine corporation and one of its stockholders, such stockholder may be transmuted from a stockholder into a creditor, and as such be permitted to share in the assets, pari passu with merchandise and other ordinary creditors, proving claims in bankruptcy."

It was there pointed out that, while a Massachusetts corporation may, under certain circumstances, purchase its own capital stock, a stockholder cannot—

"through an executory contract cease to be a stockholder, and become a creditor, to share in competition with other creditors in the assets of the corporation when bankrupt."

We regard the facts in that case as differing in no material respect from those here presented, and the conclusion there reached as decisive of the matter now before us. See, also, In re Fechheimer Fishel Co., 212 Fed. 357, 129 C. C. A. 33; In re Brueck & Wilson Co. (D. C.) 258 Fed. 69.

The decree of the District Court as to the above claims of Maria B. Shepard and Gerald J. D'Arcy is vacated. In other respects it is affirmed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

HAZLEWOOD v. EMPIRE GAS & FUEL CO.

(Circuit Court of Appeals, Fifth Circuit. November 17, 1920.)
No. 3483.

Contracts \$\insert 10(2)\$—Unilateral contract for services binding only to extent of performance by promisee.

A written offer by defendant to pay plaintiff a stated sum per acre for obtaining oil and gas leases within a designated territory, plaintiff being in no way obligated, *held* to become a binding contract only to the extent of plaintiff's performance, and defendant *held* liable only for such leases as were secured by plaintiff prior to withdrawal of the offer.

In Error to the District Court of the United States for the Northern District of Texas; James Clifton Wilson, Judge.

Action at law by R. R. Hazlewood against the Empire Gas & Fuel Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. R. Hazlewood, of Amarillo, Tex., and J. E. Cockrell and L. C. McBride, both of Dallas, Tex. (R. R. Hazlewood, of Amarillo, Tex., and L. C. McBride and Cockrell, Gray, McBride & O'Donnell, all of Dallas, Tex., on the brief), for plaintiff in error.

Thomas F. Turner, of Amarillo, Tex., and T. F. Garver, of Ft. Worth, Tex. (R. H. Hudson, of Bartlesville, Okl., T. F. & R. D. Garver, of Ft. Worth, Tex., and Thomas F. Turner, of Amarillo, Tex., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. On March 31, 1917, the defendant in error (herein referred to as the defendant) addressed to the plaintiff in error (herein referred to as the plaintiff) a written communication, signed by the former only, of the body of which the following is a copy:

"Confirming conversation of even date, this company will pay you on the basis of 10 cents per acre for all land on which you secure oil and gas lenses for us in Quay and Union counties, state of New Mexico, and in Oldham and Deaf Smith counties, state of Texas, acreage to be taken as nearly as possible on a basis of one-tenth of the total acreage situated in the abovenamed counties, taking as near as possible one quarter section out of a block of nine quarter sections."

Shortly thereafter the plaintiff entered upon the task of obtaining oil and gas leases for the defendant, and was so engaged until July 13, 1917, when he was notified by the defendant not to take any more leases. Up to that date the plaintiff had obtained 511 leases, embracing 140,000 acres in Quay county, N. M., and 101,000 acres in Union county, N. M. For all the leases so obtained the defendant paid the plaintiff the stipulated price. By this suit the plaintiff asserted the claim that he was entitled to recover from the defendant the amount of the profits the former could and would have realized, if the latter had not refused to accept any more leases. The court ruled against that claim.

The above set out instrument amounted to an offer by the defendant to the plaintiff. It did not evidence a promise or obligation of the plaintiff to do anything. There was no consideration to make the defendant's offer binding upon it until the plaintiff did that for the doing of which compensation was promised to be paid to him, and there was no consideration moving to the defendant, except in so far as the plaintiff performed the acts for which he was to be paid. The contract which came into being as a result of the plaintiff doing what the defendant promised to pay for was a unilateral one, and the defendant did not become bound to pay anything but the agreed price for leases obtained by the plaintiff prior to the cancellation or withdrawal of the offer in pursuance of which the latter acted. Richardson v. Hardwick, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; Johnson v. Staenglen, 85 Fed. 603, 29 C. C. A. 369; 13 Corpus Juris, 335; Wald's Pollock on Contracts (3d Ed.) 22, note. We are of opinion that the court did not err in making the ruling complained of.

The judgment is affirmed.

SAUCEDO V. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 23, 1920.) No. 3511.

- 1. Criminal law 37—Sale to government agent held to sustain indictment.

 That the purchaser of a quart of whisky from defendant was a government agent held not to relieve defendant from liability to prosecution, where any sale by him was in violation of law.
- Intoxicating liquors \$\iff 223(6)\$—Variance in name of purchaser immaterial.

Proof that a sale of liquor charged in the indictment as having been made to John F. Burke was made to J. L. Burk held not to show a material variance, in view of Rev. St. § 1025 (Comp. St. § 1691):

In Error to the District Court of the United States for the San Antonio Division of the Western District of Texas; Duval West, Judge.

Criminal prosecution by the United States against Guadalupe O. Saucedo. Judgment of conviction, and defendant brings error. Affirmed.

Samuel Belden, of San Antonio, Tex., for plaintiff in error. Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiff in error was convicted under an indictment charging him with the sale of intoxicating liquors, in violation of the Act of November 21, 1918 (Comp. St. Ann. Supp. 1919, § 3115¹¹/₁₂f), which provides:

"That after June 30, 1919, until the conclusion of the present war, and thereafter until the termination of demobilization, * * it shall be unlawful to sell for beverage purposes any distilled spirits," etc.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

It is assigned as error that the evidence was insufficient to show a sale. An internal revenue agent, suspecting that plaintiff in error was engaged in selling intoxicating liquor, in violation of law, purchased a quart of whisky from him, and received and paid for it. Just afterwards plaintiff in error was arrested. Every element of a sale was present in the transaction. The circumstance that the purchaser was a government agent did not preclude a conviction. Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; State v. Smith, 152 N. C. 798, 67 S. E. 508, and note to case reported in 30 L. R. A. (N. S.) 946.

The indictment alleged that the sale was made to John F. Burke, but the proof was that the sale was made to J. L. Burk. The variance in the surname is not assigned as error, but that in the Christian name and middle initial only. Under practically all the authorities, the middle initial need not be alleged, or proven, if alleged. Therefore the matter stands as if the indictment had alleged a sale to John Burke and the proof had shown it was made to J. Burke. The evidence was silent as to Burke's Christian name. The question of variance almost, if not wholly, disappears. In view of section 1025, Revised Statutes (Comp. St. § 1691), and in the absence of any contention that plaintiff in error was prejudiced or surprised, we are of opinion that the variance, if any, was immaterial.

We have examined the other assignments, and consider them to be without merit.

The judgment is affirmed.

McCALLUM v. PITTSBURGH & CLEVELAND COAL CO.

(Circuit Court of Appeals, Sixth Circuit. October 5, 1920.)

No. 3361.

1. Patents \$\infty\$ 328-934,562, for suspending device for trolley wires, held valid, but not infringed.

McCallum patent, No. 934,562, for suspending device for trolley wires, held valid, aithough first two claims thereof held too broad; also held not infringed.

2. Patents = 165-Intentional limitation binding, though voluntary. An express, intentional limitation of claims is binding on the patentee,

although entirely voluntary. 3. Patents \$\infty\$237\topin\text{of obtaining same result not mechanical equivalency.

In patent infringement suit, held, there was no mechanical equivalency, where defendant's device, although effecting substantially the same result as complainant's, effected it in a different way, and probably not as

Appeal from the District Court of the United States for the South-

ern District of Ohio; John E. Sater, Judge. Suit by William A. McCallum against the Pittsburgh & Cleveland Coal Company. From a decree of dismissal, complainant appeals. Affirmed.

L. M. Hosea, of Cincinnati, Ohio (Hosea, Knight & Phares, of Cincinnati, Ohio, on the brief), for appellant.
Drury W. Cooper, of New York City (Brown & Nissen, of Chi-

cago, Ill., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Suit for infringement of United States patent to McCallum, No. 934,562, September 21, 1909, on suspending device for trolley wires. This appeal is from a final decree dismiss-

ing the bill for noninfringement.

- [1] The device of the patent consists of duplicate clamping ears (for holding the trolley wire); their upper parts being tapered in the form of a cone frustum, the ears being normally held together by a conical compression cup seated upon and embracing the external surface of the tapered ear-extensions. A cylindrical suspending stem, whose upper end is externally or internally screw-threaded to conform to the hanger connection which it is to engage, extends downwardly through the compression cup and into an aperture formed in and near the base of the tapered ear extensions, where through a circumferential groove near its lower end it engages an inwardly extending annular ledge in the aperture in the ears, thus permitting a complete rotary, but only a limited longitudinal, movement of the stem within the ears. A collar, shown as of hexagon shape, is seated upon the upper edge of the compression cup (but is not integral with the cup), and embraces the upper end of the stem. Adjustment is effected by grasping the device by its compression cup, thus allowing the stem to drop to its permitted limit, and so spreading the ears enough to receive the wire, whereupon (the device being then held by the clamping ears) the compression cup falls into position over the tapered ear portions. Rotation of the collar (by means of a pin there through engaging a longitudinal slot in the stem, or by a wrench applied to the collar) brings the latter into contact with the under surface of the hanger and raises the stem, whereby the head on its lower end comes into contact with the ledge on the ear aperture, drawing the ears up tightly together, and firmly seating the compression cup thereon. The collar acts as a jam nut. The stem does not directly contact with the under surface of the hanger. This clamping movement does not necessarily involve rotation of the ear itself, which, however, is free to rotate sufficiently for effecting adjustment to any desired radial relation with the hanger. The first claim, which is the broadest, reads as follows:
- "1. A suspending device for trolley wires, said device comprising a twopart holding ear, adapted to receive and clamp a trolley wire, a member mounted on and movable relatively to the ear for retaining the two parts of the latter together in their clamping position, and a member rotatively mounted in the ear and having means for the attachment of a hanger or support."

The second claim, which is more specific, reads thus:

"2. A suspending device for trolley wires, said device including a two-part holding ear, adapted to receive and clamp a trolley wire, means comprising a compression member mounted on the exterior of the ear, adapted to retain the two parts of the ear in their clamping position, and a stem rotatively mounted in the ear and having a threaded portion to screw into engagement with a hanger or support and to thereby increase the clamping effect of the ear upon the wire."

The remaining claims are more detailed and require no present

reference to their language.

Both validity and infringement depend, of course, upon the extent of the advance made in the art, which was old and crowded when McCallum applied for the patent in suit. Duplicate clamping ears were old, and in substantially the form shown by the patent in suit, running back to Fricker (1891), and continuing down through to Richardson (1906), Davis (1909), and Aalberg (1909). The clamping of the jaws by external compression upon upward extensions of the ears, and by means of a member moving relatively to the ear, was also old, as illustrated, for example, by Fricker's screw cap, Gilmore's conical compression sleeve (1907), and Richardson's collar forced down by an insulator bolt. It was also old to simultaneously lift the ears and press down the compression member so as to clamp the ears. Mc-Callum himself had in 1900 secured a patent (No. 659,823) upon a device embodying every element of the 1909 patent in suit (and with substantially the same form and mode of operation), except the complete rotativeness of the stem. In this 1900 device the lower end of the retaining bolt was nonrotatively held (in the sense in which the term "rotatively" is used in the patent in suit), by means of a head or nut thereon, within a recess in the upper part of the jaws. It had, however, a pair of clamping members whose upper parts formed a cone frustum, a compression cup, and a hexagon nut (nonintegral) seated upon the bolt whose movement drew upward, tightened, and locked the clamping members.

The specification of the 1900 patent declares that the device there shown "permits not only unlimited longitudinal adjustment of the clamp in relation to the wire, but also unlimited annular or radial adjustment of the trolley wire in relation to the brace or other initial support." In the 1909 patent rotativeness of the stem independently of both the hanger and the clamping ears is accomplished by the already described method of engagement between stem and hanger connection at the upper end and the aperture in the ear extensions at the lower end—thus equalizing the pressure against the hanger and wire and effecting a practically simultaneous "through grip" between those members. This feature of complete rotation of stem

is the most prominent idea of the patent in suit.

There was, however, nothing novel in the broad idea of a stem rotatively mounted in the ear. Setting to one side the use in the prior art of a hanger or insulator bolt rotatively mounted in a nut or similar device within the ear, we find in Davis an internally threaded stem embracing an externally threaded hanger rod, the rotation of the stem pressing the lower end of the hanger rod against the clamping block, and lifting the ears through the medium of a shoulder on the stem which contacts with the under surface of the upper seg-

ments of the ear, effecting a "through grip" between hanger and wire; this action including the forcing of the clamping means in opposite directions, and being of a similar nature to that of the device of the patent in suit, although Davis had strictly no compression ring, and the compressing action of his clamping block differs somewhat from that of McCallum's ring or cup.

True, Davis discloses a longer hanger rod, not suitable for mines, car barns, and other places of limited overhead space, for which uses the device of the patent in suit is specially adapted, and his stem is much shorter than McCallum's; but not only does McCallum's specification broadly declare his invention to relate to "suspending devices used to maintain trolley wires of electric railways in position for use," but Davis' specification expressly states that, while his device is specially adapted for use with grooved trolley conductors suspended from messenger wires or cables, "it may be employed in connection with conductors of circular cross-section that are supported from brackets or cross-wires in accordance with a wellknown practice for low potential lines." It seems clear that the two devices must be considered to be in the same art. Davis' device could apparently be adapted by ordinary mechanical skill to mine use, and the length of stems standardized to meet different sizes of trolley wires.

From what has been said, it is apparent that the device of the patent in suit marks but a short advance in a crowded art, although, in view of the specific construction and functions of the rotating stem and the favorable reception of the device by the public, we are disposed to recognize the presence of invention therein, except that (as we are inclined to think) the first claim is too broad to be sustained in view of the prior art; the same being true of the second claim so far as the compressing element of Davis' clamping block may be thought to be (as we think it is essentially) mounted "on the exterior of the ear."

Defendant's clamping jaws are not held together by a cup, ring, or other compressing member, but by a hinge pin passing longitudinally of the jaws through perforations in lugs thereon. This hinge pin also passes through and secures against rotation a pin extending downwardly from the lower section of the stem, and so mounted therein as not to interfere with the stem's rotation above the pin last referred to. The upper extensions of the clamping jaws are not tapered as in McCallum, but are spread outwardly above the hinge pin; the clamping being effected by the entering of an (inverted) conical extension of the hexagonal nut into the chamber made by the flaring upper portions of the ears, spreading them apart, and there-

¹ The specification says: "I regard the functional arrangement of the rotatable stem in relation to the ear as one of the important features of my invention," etc.

² While the Davis' clamping block lies largely between the upper extensions of the ears, it engages them externally, and also externally grasps and compresses the clamping jaws themselves.

by bringing together the lower parts of the jaws, through the action

of the hinge therein.

Each claim of the patent in suit calls, not only in express terms for a stem rotatively mounted [or socketed] in the ear, but by necessary construction for an external compression member—the language of the first claim in the latter respect being "mounted on and movable relatively to the ear"; that of the second, "mounted on the exterior of the ear"; that of the third, "a compression ring enclosing the ear"; that of the fourth and fifth, "a ring tapered to fit upon and hold the ear parts in compression"; that of the sixth, "a compression ring for holding the ear parts clamped," etc.; that of the seventh, "a compression ring." No claim of the patent in suit reads in terms upon defendant's device, for obviously defendant has no external compression member; and unless the spreading extension of his hexagonal nut operating within the ears is the mechanical equivalent of McCallum's external compression collar, there is no infringement.

Whatever might be thought of the question, were there a different state of the prior art and a different record, we think the prior art and the record before us clearly preclude a finding of equivalency. This art embraced two distinct and oppositely operating types of clamping devices, the external compression and the internal spread-McCallum belongs to the former type; defendant to the latter, which is prominently represented by Wood (1894) and Brodie (1897), as well as by McCallum's 1900 device. Apart from the consideration about to be stated, it is to our minds at least doubtful whether the permissible range of equivalents could be extended to a type so readily distinguishable from that described in the claims. Railroad Supply Co. v. Elyria Iron & Steel Co., 244 U. S. 286, 294, 37 Sup. Ct. 502, 61 L. Ed. 1136. The record, however, indicates that Mc-Callum deliberately chose the external compression type in both of his patents, because of what he deemed its manifest superiority over the internal or spreading type, for several reasons clearly stated in his testimony.

[2] The patent in suit nowhere suggests the possibility of adapting his device to the outwardly spreading hinged-ear type, nor even to the existence of such a type, although evidently well known to him. In our opinion, his claims are expressly limited to an external compression—not only by the specification and drawings, but by the language of the claims themselves. Such intentional limitation would be binding on him, although entirely voluntary. McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Cimiotti v. American Co., 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100; Ohmer v. Ohmer (C. C. A. 6) 238 Fed. 182, 193, 151 C. C. A. 258.

The Patent Office history confirms the conclusion of deliberate choice, and wholly apart from the question of estoppel, which we do not find it necessary to consider. In the first claim as originally drawn the collar element was described as "means for retaining said parts together by compressive action applied to the members ex-

teriorly"; in the second claim, as "means for holding said parts clamped upon the wire by compressive action applied to the clamping members"; in the third, as "a compression ring adapted to hold the parts of the ear in compression against the trolley wire." Each of these claims was rejected upon the prior art, including McCallum (1900), Richardson, and two other references. Objection was also made to the "ambiguity and obscurity of the expression found in these claims—'means for engaging the device to a hanger or other support by rotative action," etc. The applicant accordingly presented new claims 1, 2, and 3, in which were substituted for the original definitions the following, respectively—"mounted on and movable relatively to the ear," "a compression member mounted on the exterior of the ear," and "a compression ring inclosing the ear."

The antithetical use in some of the claims of the words "or" and "in" with regard to the mounting of the compression ring and stem respectively in their relation to the ear is not without significance.

In defendant's device the compression ring is wholly omitted, for the obvious reason that the form of the device otherwise was such as to make it not only unnecessary but wholly inappropriate. The most that defendant can be thought to have taken from McCallum is the rotatable stem (found also in Davis), which stem is made an element of the claims of the patent in suit only in combination with the externally mounted and operating compression cup or ring. Infringement is thus lacking, regardless of the question whether the spreading element of defendant's device should be considered a part of the rotating stem.

[3] While, therefore, defendant's device effects substantially the same result as McCallum's, it effects that result in a different way, and probably not as well. This is not mechanical equivalency. Showcase Co. v. Baker (C. C. A. 6) 216 Fed. 341, 354, 355, 132 C. C. A. 485.

We think Judge Sater properly reached the conclusion of noninfringement, and that the decree dismissing the bill should be affirmed.

THOMSON SPOT WELDER CO. v. FORD MOTOR CO.

(District Court, E. D. Michigan, S. D. October 5, 1920.) No. 246.

1. Patents \$\infty 328-1,046,066, for electric welding, invalid.

The Harmatta patent, No. 1,046,066 for a process of electric spot welding and the resulting product, *held* void for anticipation in the prior art and lack of invention.

2. Affidavits = 18—Not best form of testimony.

Affidavit testimony is subject to the weakness that it is usually not the composition of the affiant and it generally suffers in substance because another mind intervenes with interpreting and diluting effect between the witness and the auditor of his testimony.

3. Patents 62—Prior use of machine established by sufficient evidence.

The testimony of the maker and user of a machine which practiced the process of a later patent, corroborated by that of a number of inde-

pendent disinterested witnesses who could be disbelieved only on the ground that they committed willful perjury as to the dates when they saw the machine in use, and that its product was commercially sold, supplemented by the production of the machine itself, clearly identified, and a demonstration of its mode of operation, held sufficient to establish prior use, under the rule that such defense must be proved beyond reasonable doubt.

4. Patents €=129—Equitable estoppel to claim validity.

The owner of a patent, which in interference proceedings between such patent and a pending application, strenuously contended for priority of invention, filing the affidavit of the patentee, which supported such contention, and pending such proceedings brought suits for infringement of its patent, relying on the very claims in controversy, but which, on becoming owner of the pending application, abandoned its contention and secured the issuance of a patent thereon to itself, and thereafter filed a disclaimer of the disputed claims in the prior patent as having been inadvertently made, held equitably estopped to assert validity of the second patent, the effect of which would be to extend the term of its monopoly as against the public and such patent held void.

In Equity. Suit by the Thomson Spot Welder Company against the Ford Motor Company. Decree for defendant.

Frederick P. Fish and J. L. Stackpole, both of New York City (H.

F. Lyman, of New York City, of counsel), for plaintiff.

Barthel, Flanders & Barthel, of Detroit, Mich. (Melville Church and A. S. Pattison, both of Washington, D. C., and O. F. Barthel, of Detroit, Mich., of counsel), for defendant.

KILLITS, District Judge. [1] This is an action for infringement of United States patent No. 1,046,066, allowed December 3, 1912, to the plaintiff's predecessor in title, as assignee, upon an application filed December 3, 1903, by Johann Harmatta. The patent is one for improvements in electric welding, and has 16 claims for process and 5 for product. The specific character of welding involved is that known as spot welding. The complaint alleges that all claims are infringed. Counsel for plaintiff treat and build their argument upon three claims as typical, namely:

"3. The herein described method of uniting two pieces of metal, consisting in pressing them together while passing a heating electric current from one to the other and localizing the flow of current and the heating throughout the operation in a spot or spots of circumscribed or limited area as compared with the area of the immediately opposed surfaces so as to limit the union of the pieces to a spot or spots."

"8. The method of electrically welding two plates or sheets of metal together face to face between electrodes, consisting in restricting the area of contact of an electrode with said plates to a spot, passing a heating electric current from said electrode to the co-operating electrode through said spot to heat the work to welding temperature and applying pressure to the work in line with said spot to effect a welding of one plate to the other."

"17. Metal plates fastened together by a number of distinct or isolated welds on their meeting surfaces and in spots comprising meeting portions of the metal plates, the backs of said plates being practically unaltered in their metallic condition and the spots on the meeting surfaces being separated from one another by distinct unwelded areas."

The defendant does not actively question title nor the truth of the more or less formal allegations of the complaint. The special defenses which we deem important are:

(a) Anticipation in the prior art, citing patents and publications

which are hereafter discussed in some degree.

(b) Reduction to successful use prior to Harmatta's crucial dates by parties named, those particularly depended upon being F. B. Mc-

Berty, at Warren, Ohio, and Adolf Rietzel, at Lynn, Mass.

(c) The subject-matter, as finally set forth and claimed in the grant, was not set out in the application, and was not subsequently entered under cover of an oath of the inventor in the process of amendment.

(d) Lack of substantial variation from prior uses and publications,

and hence lack of invention.

(e) Plaintiff, by the declarations and representations first made in its behalf, as assignee of United States patent 928,701 to Adolf Rietzel, issued July 20, 1909, upon an application filed February 24, 1905, and thereafter in interference proceedings between the Rietzel grant and the Harmatta application, is estopped to deny that Harmatta was effectively anticipated by Rietzel, and may not therefore assert the validity of the patent in suit.

The patent before us was adjudicated in 1915 at the suit of the Thomson Electric Welding Company (predecessor and privy in title to the plaintiff here) against Barney & Berry by a decision in the First Circuit Court of Appeals. Opinion by Judge Putnam, 227 Fed. 428,

142 C. C. A. 124.

There is substantial identity between the Thomson Electric Welding Company and plaintiff; wherefore, for brevity, we will hereafter refer to each as the Thomson Company in discussing transactions to which either was a party. Some of the questions in this case were determined in the adjudication referred to, but not all. Important references are not the same in the two actions, and the prior uses now alleged and specially depended upon here were not set up in the other case; besides, present defenses, as indicated above as (c), (d), and (e), are new. We have the record of the old case before us as part of this case.

The District Court in the former case (Circuit Judge Dodge sitting) found no patentability in Harmatta. It is regretted that the opinion of the Circuit Court of Appeals, reversing him, is so drafted that it is not helpful in elucidating the solution which it attempts. It is little more, in fact, than a formal reversal of Judge Dodge, who analyzed the prior art in finding anticipation. The Circuit Court of Appeals does not attempt to meet the reasoning of the District Court. Giving the opinion, however, all due respect, we still feel at liberty, in light of our larger and different record, to review the questions which the court in the First circuit has decided.

The application of Harmatta had many vicissitudes. It was filed December 3, 1903, and granted December 3, 1912. The specifications, as they finally appeared, are so different from those offered at the outset, that it is a matter of close analysis to trace their genealogy

to the latter. Eight times was the application rejected, after original and amendments were under scrutiny of three different examiners. The allowing examiner (the fourth one in charge) finally passed the case, as it then stood, to an allowance with evident reluctance, venturing the opinion that certain citations anticipated many of the claims. He (examiner Rich) concludes in his allowance as follows:

"Inasmuch as the claims of this case have previously been considered allowable, and those noted above have been contested in an interference with a patent wherein similar claims were granted, a formal rejection is not now made, since upon consideration and explanation it may appear that the references cited have been formally or informally considered in the examining division earlier having jurisdiction of the applications and held not pertinent. It is thought best, however, to note them, in order that, if the claims do differ from the patents, such differentiation may appear in the record."

February 9, 1909, the third examiner (Shaw), after the eighth rejection of the application, made this suggestion:

"It is thought that if there is any patentable matter in this case it resides in the securing of the sheet metal parts together by means of the small, round, sharply defined place of welding which answers the purpose of a rivet, as is set forth on page 6 of the original specification."

The original specification was canceled May 9, 1904, and the specification and claims had been repeatedly amended and twice entirely rewritten before 1909: each time excluding that in the original which Examiner Shaw qualifiedly approved. At no time prior to the latter's suggestion, not even in the original specification, was any claim made for patentability upon this specific idea; but, January 27, 1910. more than 11 months after the hint came from the examiner, two claims attempting to specifically cover it, were offered by way of amendment. They were rejected March 22, 1910, by Examiner Shaw. In the meantime the Rietzel patent (928,701) had been allowed. The examiner suggested that, in accordance with rule 96 of the Patent Office, applicant adopt Rietzel's claims for the purpose of interference, directing attention to the rule that, unless that were done, the application would be finally rejected as covering nothing new. Harmatta's counsel followed the suggestion, taking altogether 11 claims from Rietzel, and interference proceedings were begun with a declaration dated April 26, 1910.

Final allowance to the Thomson Company, as assignee of Harmatta, resulted after the close of the interference in 1912, but under circumstances which not only take away most of the force of the presumption of invention and patentability which otherwise would follow allowance, but give opportunity to reflections upon the good faith of plaintiff itself in its dealings with the Patent Office. We discuss this matter at length hereafter. We think the presumption in question gets all the honor due it in this case, if we do no more than to keep in mind that

it exists.

Something analogous in suggestive flavor attends the situation which finally developed in and from the litigation in Boston which adjudicated for the First circuit. The record shows that counsel for defense in that case prepared their work ably in their briefs against the validity of

the patent. They are exhaustive and persuasive, but the presentation was lamentably lacking in the offering of known facts. Thus, while the McBerty alleged prior use, which figures so largely and importantly in this case, was known, it was neither pleaded nor vigorously offered. Likewise the Rietzel matter was ignored, although the losing counsel had also lately defended another client in a suit by the Thomson Com-

pany brought on the Rietzel patent.

Even if it be a fact that our views respecting the effect of the Mc-Berty and Rietzel matters are in each instance unsound, it must be admitted that each is at least so significant in scope and application as to justify and very loudly suggest offering it to the court in a vigorous defense to a patent with which it is in seeming collision. After the adjudication in the case in Boston terminated, the successful litigant bought out its rival and gave the latter's responsible head, who, underhis counsel, managed the defense, a most advantageous connection with the exploitation of the Harmatta process. This court does not permit itself to adjudge, to any extent, anything sinister in these matters; but, because of them, we not only find special occasion for regret that Judge Putnam did not write an opinion in reversing Judge Dodge's conclusions, which met the latter's reasoning in some detail at least. but there is an additional strong call for extreme care in this court, although the importance of the issue is itself so great as to demand our very best attention.

Passing upon the defenses, we may discuss together those designated above as (a) and (d), dealing with patentability in 1903 because of the then state of the art and prior uses. The file wrapper indicates a very unanimous opinion by the Patent Office examiners that Harmatta was treading a path barely, if at all, distinguishable from that marked out in the art, and their individual and independent judgments, as the case passed the years of its pendency by, seem confirmed by acquiescences in the repeated rejections. The record justifies Judge Dodge's ob-

servations (227 Fed. 428, 432, 142 C. C. A. 124, 128):

"That only with unusual difficulty was Harmatta able to suggest, or the Patent Office to find, in his spot-welding process, however described, anything capable of being regarded as patentably new in view of the prior art."

After careful consideration of the record, giving full respect to the unanalytical opinion of the Court of Appeals of the First Circuit in the Barney & Berry Case, the mind of this court concurs with that of Judge Dodge that the disclosures of the prior art were so illuminating that patentability did not rest in the Harmatta process, event as it was developed by the aid of Examiner Shaw after it had been in the office for more than 6 years. In our judgment, a question, the solution of which determines the issues here, abides in this record of greater scope than that of mere patentability of this process; but, that counsel may know the trend of this court's thought respecting them, we will consider as briefly as possible the matters of patentability and invention.

Counsel for plaintiff state the alleged novelty and advantage of the invention in these words:

"Harmatta for the first time in the art devised an electric welding process having the following characteristics and novel principles of operation:

(268 F.)

"(1) The current is concentrated solely by the electrodes, and not by the articles being welded;

"(2) The metal, heated for welding, is entirely surrounded by compara-

tively cold metal;

"(3) The area of the weld is determined by the size of the ends of the electrodes, and not by the extent of the overlap of the articles being welded;

"(4) There is and can be no extruded metal; and

"(5) The parts are united in situ, as they are not caused to approach one another bodily during the process."

In our judgment, particular idea 1, as counsel designates it, is clearly exhibited in the Thomson patent, No. 444,928 (where Judge Dodge found it also), in Lemp, 553,923, as well as in Thomson's 496,019, which, although it called for electric soldering, is evidently important here for its disclosure effect, as the Patent Office itself recognized. All three of these patents, since their inception as applications, have been owned by plaintiff. The specification in Thomson's 444,928 states that—

"The frames F(F), being of conducting material, may be connected with any suitable source of electric current of large volume through cables C(F), or by other means, so that an electric current may be caused to pass from one roll to the other, and through any pieces of conducting material held between them in pressure contact."

It is obvious that this current is concentrated and applied from the faces of the rolls R R' held in the frames F F'. We think that counsel for defendant in this case were fully justified in saying that the purpose of the invention of this patent is:

"To unite plane sheets of metal, face to face, by pressure and an electric welding current applied to the sheets to be united; the pressure being applied to the work through the electrodes that feed the current to the work, and the welds being formed between the contacting faces of the work at the point of pressure only."

Lemp so understood this Thomson invention, as evidenced by that language of his specification which speaks of the prior art, and he adopts the same device where he wishes to employ pressure at the time the current is applied; for he says that he uses rolls as terminals when he wishes to apply the welding or forming pressure in connection with the current. See lines 64 to 69, page 2, Lemp, 553,923, describing the operation of the device indicated by Fig. 3. In Thomson's electric soldering patent, No. 496,019, the "pressure pieces" C C' of Fig. 6 perform the same office. Burton says in his specification to his patent, No. 647,694:

"In the use of this apparatus the pieces to be lap welded are adjusted or placed with their ends overlapping on the bed electrode 100. Then the foot lever is depressed, and one of the electrodes of the electrode head is brought into contact with the work, whereby the circuit is closed and the current passes through the work in transverse direction across the overlapping ends of the parts to be heated."

Of course lap welding is a form of flat welding. Any plates that can be lap welded may be generally flat welded by adaptation of the jaws holding the electrodes to permit the insertion, to a necessary degree, of the metal to be worked upon; that is to say, it is a mere matter

of slipping the two sheets to be united further along over their flat surfaces than is necessary for mere lap welding. Harmatta's device, for instance, is suitable either for lap welding, or for work more extended within the limits of the boundaries of the pieces worked upon, and the converse is true with mere lap-welding machines, if the jaws are sufficiently modified to meet the demands of the work. Harmatta's original specification was for lap welding. In his concluding paragraph therein is this suggestion by way of illustrating what he is working upon:

"If then two superposed sheet metal ends to be welded together are introduced," etc.

In Parkinson (English, 1894, No. 14,536), by Fig. 3, and in Bernados (German, 1890, No. 50,909) by Fig. 2, devices having the same function are shown. In the American translation in evidence, Bernados says:

"This process may serve to directly weld together relatively thin metal sheets and rods, of one and the same or of different metals. * * * This process is clearly distinguished, both from the point of view of the inventive idea on which it is based and from that of its mode of operation, from * * * the electric welding process of Elihu Thomson."

The idea is, we think, also very plainly in the Perry patent, No. 670,808. Other references are in evidence which defendant's counsel insist have a bearing here. Some of them will be discussed later in another connection. Enough, we think, is offered above to indicate lack of novelty in this first characteristic.

Going, now, to particular 2, that "the metal heated for welding is entirely surrounded by comparative cold metal" leaving a condition of "spot" welding, what do we find? Obviously, that the result is determined by the shape and character of the application of the current-concentrating electrodes. If these are roller forms and applied by rolling, as in Thomson, No. 444,928, and in Lemp and in Harmatta's discarded roller specification, the welded strips would be bounded on the sides only by comparatively cold metal. If roller electrodes are applied with either intermittent pressure or intermittent current, or if pin electrodes are used, of course there will be an entire surrounding of the weld by cold metal. Indeed, the idea that spot welding may be done with roller electrodes is present in both the Thomson (444,928) and the original Harmatta specifications. In the former, after directing that the plates, being between the rolls, should be squeezed together to form an electric contact, he says (page 1, line 88 et seq.):

"The electric current, being now turned on, as it passes from one roller to the other and across the point of pressure, will heat the work to the welding temperature and soften the same slightly, after which the screw may be given a few more turns to effect a solid union. The work, having been thus started, may now be moved along through or between the rollers, so as to bring successive parts of the joint into position to be pressed and heated in the same operation."

Harmatta says (file wrapper, p. 3, second paragraph):

"The pressure being exerted by roller electrodes, whereby the advancing series of single points * * * is united to a whole," etc.

In Thomson, 496,019, undoubtedly the result effected in plate L, at least of Figs. 4, 5, and 6, is to leave surrounding the welded portion an area of cold metal; also it seems clear that the flanges of the part (to be welded) designated as P' would be only incidentally and slightly heated in the process, merely because of their adjacence to the "pressure piece" C'. In Thomson's riveting patent, 396,015, the same thing is shown. There the so-called plunger and anvil, G and E', really are the termini of electrodes, performing upon the material of the plates to be riveted, after the particular rivet is swaged and set, the same function, except in annular result rather than as a filled spot, which they obviously would accomplish if the applicable ends of each were flat, and not concave, and were used in plain spot welding.

Thomson says that, if the current is allowed to pass under pressure longer than is merely necessary to swage and set the rivet, "the application of pressure to the pieces to be riveted will weld them together around the rivet." Plainly this would be the work of whatever circumferential surface there is to the concave-faced electrodes, and just as manifestly these riveted places, surrounded by a ring of welding, would be further surrounded by areas of cold metal. When we contemplate the unequivocal form of this statement, and know that the result which it plainly suggests will follow, it is to be marveled at that Thomson, in endeavoring to assist the Thomson Company to obtain a patent on Rietzel's application, and in speaking of this patent of his (No. 396,-015), should say that (see file wrapper, Rietzel, No. 928,701):

"The only possible welding that could be produced by that process would be possibly some sticking of the edge of the perforation in the metal sheet to the side of the rivet which is a mere incident of the invention and there is no welding of the superposed plane surfaces or opposed faces of the plates to one another by welds disposed over such plane faces."

Notwithstanding this statement from such eminent authority, it seems to us that we are clearly given to know that there would result from the process of Thomson, 396,015, an annular welding together of the plane surfaces of the riveted plates beyond the rivet, the breadth of the welded surface within the circumference to be determined by the amount of annular plane surface on the faces of the electrodes which are concave at their centers. Besides, it seems that a deduction from the roller method is obvious that the question whether the weld shall be partially or wholly surrounded by cold metal depends either on the shape of the electrodes or on the size of the flat surfaces to be welded, or on the extent or manner in which the electrodes are applied to the face of the material to be worked on. For instance, if roller electrodes are first applied within the boundaries of the plates and stopped before any edge is reached, the result would be an elongated spot weld. So, also, would be the result if the plates operated upon in Thomson's, 444,928, had dimensions greater than the working face of his segment electrodes (Fig. 2). It is obvious, as noted above, that if roller or segment electrodes are simply applied to the plates with current and pressure, but not rolled, a spot weld would result.

The importance in Harmatta's field of the Kleinschmidt patent (No. 616,436), issued in 1898, was recognized by him in his final specifica-

tion, in which is disclaimed any feature disclosed by the Kleinschmidt grant. Whatever else may be said of the latter, it cannot be doubted that its welds are surrounded by areas of cold metal. Harmatta himself seems not to have considered, in his original application, the advantage of this particular (2) as an element of his invention. What he then thought he was inventing was, to use his language, a process which consisted:

"In one of the electrodes (or both of them), not only serving to feed the current, but also being employed for exercising a more or less strong pressure either before and during the period of supplying the electric current, or only at the moment of this supply, at the place at which the welding is to be done. The member which feeds the electricity is thus at the same time the tool, and in this manner the most favorable conditions of working possible are secured, since, as is well known, in really effective welding processes the place of welding, brought to the proper temperature, must be at once well hammered or pressed, in order that the welding may be thorough."

His only process claim in the original application was in this language:

"1. The process of electric welding, consisting in employing the electrodes not only to conduct the current to the objects being welded, but also to exert a regulable pressure on the same, substantially as described."

His remaining three claims were for apparatus. He treated spot or intermittent welding as if it were obviously, as it seems to us it is, but a variety of result, depending upon the choice of the operator. He illustrates two forms of apparatus for its accomplishment, and speaking of one of them says:

"Thus, if it is required to weld, for instance, sheets of metal only at particular places, the apparatus shown in Fig. 5 may be advantageously employed, the electrodes a b having the form of pins. * * * If then two superposed sheet metal ends to be welded together are introduced between the electrodes, and the latter then firmly pressed together and the circuit closed, a small, round, very sharply defined place of welding is caused, which perfectly answers the purposes of a rivet."

All this part of his specification he omitted in seven successive amendments and modifications, until, January 27, 1910, more than 6 years after his filing date, his counsel observes the hint of an examiner, made 11 months before, and then, for the first time, claimed this feature as the essence of his invention.

Should a patent have been allowed Harmatta on the original application, it cannot be said that he would have been protected against spot welding accomplished by any method not covered by his apparatus claims and without the limits of his process claims. Yale Lock Co. v. Greenleaf, 117 U. S. 554, 559, 6 Sup. Ct. 846, 29 L. Ed. 952.

It is plain that Harmatta applied in the first instance in ignorance of the state of the art. The original specification contains the clause quoted below, and upon the erroneous conception, therein indicated, that the field was wide open, he predicated his alleged invention:

"According to none of the present known electric welding processes are the articles to be welded firmly pressed together during the welding operation by one or both electrodes, for the purpose of favoring welding. Hitherto either no pressure has been exerted at all, or it has been exercised at a certain dis-

tance from the place of welding, or at all events not centrally, direct upon the electrodes pressing on the place to be heated. In short, hitherto direct electric welding pressure has never been exercised by means of the electrodes located in the direction of the current directly above the surface or point being welded."

It took nearly 7 years of experience in the Patent Office and the enlightenment of 8 rejections to finally convince him and his counsel that, at the best, a most restricted opportunity of invention was before him.

Judge Dodge finds that the only possibility of invention lay in making welds small in area, isolated in comparatively large areas of unwelded surface. Speaking of this he uses language which we would adopt:

"It is difficult to regard the above as an inventive idea. Referring again to the Thomson patent, No. 444,928, the process therein described, while it is said to be 'especially applicable to the welding of plates together at their edges, instead of riveting,' is just as applicable to the welding of plates or sheets at other places within their area as at their edges. The roller electrodes employed, when brought together on each side of the work, and until something more is done, will pass the electric current and make the weld at the spot or point of pressure and nowhere else. See claim 1 of the patent referred to. If, having there made the weld, they should be again separated, instead of having the work fed between them while their pressure upon it continued, they would leave an isolated spot weld joining the plates and be in readiness to make another weld isolated from the first by any desired area of unwelded surface."

We are unable to appreciate the distinguishing significance of particular 3:

"That the area of the weld is determined by the size of the ends of the electrodes, and not by the extent of the overlap of the articles being welded."

The very same conclusion, we think, is demanded from a consideration of the process and apparatuses disclosed in the patents already referred to. Thus, if in the overlapping offers room enough, the area of the resulting weld depends upon the form of the applied surface of the electrodes whether roller, pin or otherwise. It is only a matter of slipping the plates to be joined far enough over each other.

Nor are we able to agree with counsel's conclusion in particular 4. that there is and can be no extruded metal. Whether or not some metal, softened by the heat, through applying the method in question, will pass beyond the boundaries marked by the electrode faces, depends. not upon the method, but upon the skill and care of the operator in controlling the heat and pressure. That seems to be the clear effect of both testimony and example before us, and, without proof, it seems to be an entirely obvious deduction. In demonstrating for us the process in suit upon one of plaintiff's improved machines, plaintiff's expert, Gravell, burned a hole through the plates to be welded. He employed an excess of both current and pressure. Had he used less pressure, it is to this court unimaginable that some of the oversoftened metal of the plates would not have escaped beyond the peripheries of Too much pressure, too much heat, either or both, it seems, must bring about extrusion. If the point to be welded is well within the limits of both plates, the related pressure outside of the heated area may confine extrusion to microscopic lines. If the spot operated on is near the edge of a plate, extrusion will be more apparent. To say that there is no extrusion whatever is not borne out by the facts. This is actually illustrated in this case in plaintiff's Exhibit 2 to interrogatories, showing an alleged infringing product. In that the second weld from the top shows plainly slight extrusion, and at the bottom weld the escape of some metal under the pressure is still more apparent.

Particular 5 is not exclusively an advantageous incident of the process in question. Parts are united in situ, and while stationary in the process described in the patents considered above. Any movement they make is that preliminary to the welding, to arrive at the welding place, and not in the immediate process. In these disclosures, as in Harmatta's process, the plates to be united are not brought together for the purpose of thus conducting the current as they contact, but are fed together to the electrodes which carry the current to them as they are

in contact.

We are of the opinion, therefore, that this invention is anticipated in all senses and particulars in the prior art, a consideration of which art also suggests that there is no room to claim here for a new process, which is worked out through a novel aggregation of old ideas not hitherto found in combination. None of these advantages seem to us to be new, nor is their association novel. We are pleased to note that Harmatta's attorneys (when there was a real contest on the merits in the interference; that is, before the Thomson Company took both sides of that controversy) held to a view which, if good, supports our conclusions respecting the illumination of the prior art. Defending against the insistence of Rietzel's attorneys that silence in the specification as to spot welding from the amendment of 1904 to that of 1910 amounted to an abandonment or disclaimer, Messrs. Duffy & Sons (brief) argued to the Patent Office that spot welding was saved on the ground of mechanical equivalency, citing Hunt Bros. Fruit Packing Co. v. Cassidy, 62 O. G. 1965, 53 Fed. 257, 3 C. C. A. 525. On this theory there is little question that the prior art has occupied the field, except the possibility suggested by Judge Dodge (Thomson Electric Welding Co. v. Barney & Berry, 227 Fed. 431, 142 C. C. A. 124), which he concluded was noninvention, that Harmatta cannot be credited with any new idea—

"beyond that of making his electric welds small in area, rather than large, in comparison with the areas of the opposed surfaces to be joined, and isolating them so as to leave each surrounded by a comparatively large area of unwelded surface."

But if the exact idea is not found in the prior art—if the idea was new in 1903—was it so significant a variation as to call upon inventive ability to develop it? We are fully aware of the danger in retrospective analysis, and we appreciate the demand that mere narrowness of departure from previous disclosures must not be allowed to defeat a meritorious invention. We likewise understand that the personal equation on the bench embarrasses a just application of the principle that that is invention which may be seen to be something more than

that fair deduction from prior art or usages which should readily occur to one reasonably skilled in the art and reasonably intent on its application. In the judgment of this court, more mistakes, pro and con, are perpetrated by the bench in the application of this principle than any single other. So much depends upon the vision or imagination of the individual who sits in judgment.

But, after all, what does this record plainly show? First, that suggestions of more or less potency did abide in the prior art. Second, that it required a hint from an examiner, after the applicant had suffered years of reverses, to advise the latter that he may have stumbled on a patentable idea. He suffered final judgment against himself in Canada upon a duplicate of his American application before he awoke, and, what is the plain inference from his preliminary statement in the interference case, rejections in several other countries where it is the practice to carefully examine the prior art before allowance. Third, it is in evidence here that the prior art so far advised others that they, before Harmatta's filing date, readily modified existing apparatus to do, with success, precisely what we have before us in the Harmatta patent.

We are not confined to reasoning merely that the idea in question was one which one reasonably skilled in the art and intent on its application should entertain without inventive effort. We find two instances, at least, where, when the demand came for the practice, the idea came also. This does not happen to be an instance where the art was broadened ever so lightly by one mind to meet a great demand of progress, with no contemporaneous effort meeting the situation as adequately. Nor is it a case where the substance of the invention was not followed until the method of the alleged inventor in question became well known, to the effect that such a circumstance, itself, would be "pregnant evidence of its novelty, value and usefulness." Magowan v. New York Belting & Packing Co., 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781. The infringing machines have a genealogy even anteceding Harmatta's in this country, and they were earlier on the general market than their rivals. So we sympathize with the reluctance of Examiner Rich in passing the application for allowance, for we do not consider that Harmatta was an inventor entitled to a patent in the instance before us. It appears to us that, considering the prior art:

"The improvement described in the patent was within the mental reach of any one skilled in the art to which the patent relates, and did not require invention to devise it, but only the use of ordinary judgment and mechanical skill." Phillips v. Detroit, 111 U. S. 604, 607, 4 Sup. Ct. 580, 28 L. Ed. 532.

Respecting the application of the principle in question, we think the case on the facts is in the same general category and controlled by the fact conclusions of such cases as Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702; Hollister v. Benedict & Burnham Mfg. Co., 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901; Hendy v. Miners' Iron Works, 127 U. S. 370, 8 Sup. Ct. 1275, 32 L. Ed. 207. If, for instance, Brady did not invent anything patentable (Atlantic Works v. Brady, supra), by projecting from the stem of a dredge, ex-

tending a substantial distance below the bottom of the boat, a so-called mud fan, being a set of revolving blades somewhat similar in shape to those of a propeller, but sharper on their fronts and less inclined on their faces, which, propelled by an extra engine in the bow, were to stir up a river bottom by their rapid revolutions, that the sand and mud might be carried off in a current of muddy water, because it was not an uncommon practice theretofore to disturb the bottom of a channel to be dredged through the action of vessels' propellers, whether the dredge proceeded backwards or forwards, it is difficult to see where any more dignity should be accorded to Harmatta's spot-welding idea, which involved and did nothing more than apply electric current and pressure to superposed metal plates to the same effect, substantially, as if the roller electrodes of the prior art were employed for pressure and current, but not revolved.

We have alluded above to the McBerty alleged anticipatory use. The evidence in this case is clear that from an experience McBerty once had with a butt welder was evolved the infringing machines, producing a large business which is imperiled by this litigation. There is no fair opportunity in the record to even suggest that this evolution was initiated or assisted by any knowledge of what Harmatta was doing. We are compelled to find that this was wholly an independent

matter.

To make the defense of prior use, the defendant has the burden to prove, beyond a reasonable doubt, that at a date prior to December 3, 1903, the Harmatta idea was reduced to successful practice in one or more of the instances pleaded. We think the defense is made in the proof of McBerty's experience in 1901. McBerty's credibility is savagely and most skillfully attacked, but, in our judgment, not always fairly. Several instances are noted where the record is somewhat violated to make a point against his veracity. For instance, plaintiff says in its brief that the Warren catalogue of 1901, offered in evidence, is inconsistent with McBerty's claim that steel centers were used at that time; but the quotation from the catalogue used to make the point applies only to the high-class machines described as A-fans, whereas McBerty is speaking of the cheaper fans known as G-2, which, according to other witnesses than McBerty, had pressed steel centers in 1901. There is no representation in the catalogue that the G-2 fans had brass centers. It attempting to describe the much-discussed Exhibit M and its relation to Exhibit P, counsel insist in the brief that-

"McBerty admits that Exhibit P was not made at the same time as Exhibit M, and not until long after, because he says that the piece which has been cut from the fan of Exhibit M, and which he says appears in Exhibit P, was not cut off from Exhibit M until 'quite a long while' after the fan blade of Exhibit M was welded to the spider."

But it is very plain in the record that McBerty is not talking about Exhibit P as cut from Exhibit M a long time after, but he is speaking about another piece cut from the extremity of the blade, the balance of which remains as Exhibit M.

There is, however, so much plain room for debate whether we

should receive Exhibit M and the cut of a G-2 fan in the Warren 1901 catalogue for everything that McBerty claims for them, that if Mc-Berty were not strongly corroborated in the indispensable details of his story, we could not say that reasonable doubt whether the alleged prior use was had is eliminated from the proof. In saying this we do not mean to say that he is to be regarded as an altogether unreliable witness, or that we do not believe the essentials of his story: but even taking him as counsel for complainant picture him—go as far as they do in discrediting him as offering to suppress evidence by sale to the Thomson Company; assume with them that Exhibit M is a recent product, bearing a false date; reject as wholly fabricated his story that the cut of G-2 fan in the 1901 catalogue was made from a photograph of one with spot-welded blades; quote to the limit his concessions of conduct in 1913 which was devoid of frankness to Howe and others; judge his value as a witness in the light of his very great interest in the outcome of this case—still we find convincing testimony from others which not only makes evidence directly, but effects complete corroboration of the essential features of McBerty's claim. is not indispensable to the defense of prior use in the Warren factory that we should be convinced either that Exhibit M is just what Mc-Berty says it is, or that the illustration of the G-2 fan in the 1901 catalogue is from a photograph of a spot-welded fan. If true, these circumstances afford strong proof; if false, the defense is affected only through the discrediting of one witness.

We think it is proven here beyond a reasonable doubt that some time early in 1901, whether February or later is not material, a machine was operated in the Warren Specialty & Electric Company's plant at Warren, Ohio, adapted by McBerty from a butt welder, which successfully spot-welded a small quantity of fan blades, and that these, in assembled form, went into distribution in trade. No one is here to dispute by any direct testimony that Exhibit B (McBerty's alleged welder) did not do in 1901 in the Warren factory what the court saw it do in the progress of this hearing, and there are many unimpeachable witnesses who identify it and speak for it and as to what it did then. That what is successfully exploited then was the Harmatta pro-

cess there is no room for question.

Of course, witness Lipps is weakened by his mistake as to the year he worked in Warren, and we must not overlook Capt. William E. Smith's relation to the case; but no other witness is subject to any reasonable discrediting suggestions. Maj. Crafts, Powers, Gilder, and McDonald are convincing witnesses; so are others to minor matters. This court believes them, and, believing them, we find some additional evidence in the McBerty and Lipps testimony, and very much in that given by Capt. Smith. Indeed, there is no good reason at all in discrediting the last as a witness in any degree, for his connection with this case is in no wise inconsistent with an entirely fair position as a witness, and he offers nothing that is not entirely credible. Five highly credible witnesses not only identified Exhibit B as the machine they saw in 1901, each of them having an individual and appealing reason for identification; but they fix the general date beyond question

by reference to contemporaneous matters of both public and private interest. Some of them saw it successfully spot-weld, and all of them saw its product as worthy of and in the process of entrance into commercial channels.

To say that these witnesses are not telling the truth is to say substantially that they are deliberately perjuring themselves, for their testimony is so individualistic that there is no fair chance to say that it is the product of a stimulated retrospective imagination induced by interest or friendship, or for some other reason not highly discreditable. When McDonald, for instance, says that not only did he see McBerty weld a complete fan in 1901, but that he, in 1901, used a spotwelded fan as a test fan in the performance of his own duty as the final inspector of completed devices, and, with it as the criterion, tested and passed to the packers the product of that grade to go into the market, some of which had spot-welded blades, he is either reciting an important fact or is perpetrating a deliberate fabrication. We may make the same observation of the essentials of the testimony of Maj. Craft, Capt. Smith, Gilder, and Powers. Taylor's testimony also has some corroborative value because of his statement that in 1903, in the Peerless works, he saw Exhibit B, which he identifies, and used it to make spot welds.

In addition, the plaintiff itself introduced the affidavit of Frank G. Brown (deceased), given to Mr. Howe in 1913. Brown fixes the date of a Sunday visit to the Warren factory as prior to May 6, 1901, by reference to other transactions. There he saw Exhibit B and some spot-welded fan blades, but, there being no current on Sunday, he did not see a spot-welding operation. Subsequently, in the Peerless factory, he saw the same machine in use for both butt and spot welding. The testimony of Ensor has some importance as corroboration. Of him, also, must it be said that he must have told the truth as to the essential feature of his testimony or he deliberately fabricated it. If he saw in 1910 or 1911 in the scrap room of the Peerless factory a completed fan having spot-welded blades, the fact is important. From what we are permitted to know in this record of the sleuthing activities and disposition of the man Newton A. Smith, an agent of the plaintiff, who was present in the courtroom, but who did not deny the somewhat discreditable reflections upon him given by witnesses for the defense, little surprise is called for by the fact that subsequent to his visit to the Peerless factory this fan seen by Ensor could not be found.

[2] Some inconsistencies, discrepancies, and omissions do, in fact, appear in the affidavits Mr. Howe took in 1913 from some of the witnesses spoken of above; but such situations are usual and are the wellrecognized weaknesses of affidavit testimony. It is usually not the composition and verbiage of the affiant, and it generally suffers in substance because another mind intervenes, with interpreting and diluting effect, between the witness and the auditor of his testimony. Aside from this, plaintiff meets this evidence with testimony, largely negative in character, which is, if disputatious at all, only inferentially

and feebly so.

It cannot be said that the work at Warren was a mere experiment afterwards abandoned. The fact that witnesses speak of the incident as an experiment is not proof. Whether it was such is a mixed question of law and fact, to be determined from all the evidence, and not by the loose terminology of lay witnesses. The force of the testimony is that the trial was successful, and that its product got into commercial channels. Not only was there no abandonment, as that word is used in this connection, to be interpreted by the nature of the work as merely experimental, but a few years later Capt. Smith constructed a successful spot-welding machine for the Carnegie Company as a result of his knowledge of what Exhibit B would do, gained in 1901, and Taylor, aided by his knowledge of Exhibit B. designed for the Winfield Company a line of spot-welding machines which came into general use before the devices emanating from Harmatta were generally known in this country. The contest here is actually against alleged infringing processes performed on machines lineally descending from McBerty's apparatus of 1901.

[3] It is urged upon us by the plaintiff that the case on the facts and as to prior uses is within the authority of a number of decisions, the principal and most authoritative being the Corn Planter Patent, 23 Wall. 181, 23 L. Ed. 161, Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952, the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, and Deering v. Winona Harvester

Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153.

The question is one of the force of the evidence as affected by the quantum and character of the testimony and the possibility of coloration through lapse of time or interest, as well as the credibility of witnesses. The cases cited establish the salutary principle contended for by the plaintiff, but the question in each recurring case is whether its particular evidence meets the requirement. Compared with the character of the testimony in this case, the Goodyear Case, on the facts, loses any precedent value; there is a wide disparity in evidential force. The same may be said of the facts in the Deering-Harvester Case. There every one of the witnesses was under some sort of discredit; and the situation on the fact record is incomparable with what we have before us. Of the Supreme Court decisions (and we are discussing only them, because they control the lower courts relied upon by plaintiff), the facts in the Corn Planter Patent, 23 Wall. 181, 23 L. Ed. 161, and the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, most nearly approach, in character and force of the evidence derived from them, the record we have here; but neither of them present established facts of the cogency of those of the record before us.

In the Corn Planter Case the decision points out how the alleged prior uses in fact departed in substantial practices from the functions of the invention under attack. In the Barbed Wire Case the facts were under special and direct dispute, and there were elements of some improbability respecting the actual existence of a pertinent use. In the case of Warren Bros. v. City of Owosso, 166 Fed. 309, 92 C. C. A. 227, a decision by our own Circuit Court of Appeals and cited by plaintiff, the court not only found definite abandonment, but that the use it-

self, in its very essence, was experimental. We think these cases and the other cases cited are clearly distinguishable on the facts from the case at bar, respecting the force of proof of prior use.

The case of Lipps is a good example of the wisdom of the rule that proof should exclude reasonable doubt. There is nothing in the record to discredit him for integrity. He has no interest in the case. That he came on the stand and tried to be truthful there is no question. but he was mistaken respecting one very important identifying feature; hence, uncorroborated, he, like McBerty, lost much weight. But witnesses, in whose testimonies are weaknesses which disable them from substantially assisting a clear conclusion, when they are considered by themselves, or with other witnesses whose credibility is also weakened, may be so corroborated by the unembarrassed and impregnable testimony of others that, as to the indispensable details, they again may be heard with a large degree of favor. That is just what has happened here. If all of defendant's witnesses were open to the attacks which were more or less successful in the cases of Lipps and McBerty, the authorities just considered, and others from the lower courts argued to us, might be allowed to control our judgment respecting the conclusiveness of the proof.

But the situation is vastly different. On the controlling matter to which those two men speak-did McBerty, in 1901, on Exhibit B, successfully spot-weld, to their spiders, a quantity of fan blades, whether six or two dozen is immaterial, which fan blades were assembled to their motors, and the fans, so manufactured, placed in the completed stock of the Warren Company, to go into the market there are five witnesses directly, and one or two more of indirect value, no one of whom is impeached, and they corroborate these weak witnesses. Lipps and McBerty, then, do in fact contribute very much that is credible to the court's information. This case, therefore, appears to us to fall within that category of cases represented by Supreme Court decisions, such as Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821, Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755, and Brush v. Condit. 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251, and to be a stronger case on the facts to carry the burden peculiar to a defense of this sort than even Coffin v. Ogden, supra.

If we did not have here Exhibit B so clearly identified, as well as the character of its early operation and product, there would be more force to the cases cited by the plaintiff. Exhibit B is a continuing concretion, a piece of evidence the existence of which does not depend, as in the alleged anticipating devices in the cases in question, upon oral testimony. It is to be noted how much more effective is Exhibit B in this case to support the defense than were the alleged Drawbaugh devices in the Telephone Cases, 126 U. S. 1, 566, 8 Sup. Ct. 778, 31 L. Ed. 863. Much of Exhibit B, just as it was in 1901, is before us, and its present reconstruction as it was then is well established by those, besides McBerty, who had every reason to know all its details as they were then. That it will successfully spot-weld was demonstrated. So Exhibit B appeals to us as established as a concrete, visible, contemporaneous, and most important matter of "proof which tells its

own story." The reason for the rule demanding conclusive proof of prior use is the ease with which such proof may be fabricated or colored, either corruptly or generally, through the effect of interest or friendship stimulating a memory to confuse fact with imagination,

We have seen the witnesses as they spoke on the stand. The naturalness of their stories suggest want of co-operation. They corroborate each other in the varying scopes of their experiences with Exhibit B. Their testimonies are to such important things that, if unreliable in substance, there is no escape but to assign willful perjury as the cause by a number of men whose credibility is not subject to attack from anything that appeared before us. The testimony of Smith, Crafts, Powers, Gilder, McDonald, Taylor, Ensor, and Brown (by affidavit) is all perjured—every one of these men, as well as Lipps and McBerty, is foresworn—if this allegation of prior use is substantially untrue. Perjury is unthinkable with such men as these men appear Besides, their stories have in them no element of the unusual or unexpected. What they say McBerty did in 1901 is just what we can see one interested in the matter might readily do in due course of satisfying his interest. The incident was a logical step, plainly indicated in the condition of the prior art. Rietzel's experience is an independent parallel.

[4] The defense designated by (c) above, that the subject-matter of the grant was never entered under cover of the inventor's oath, is new to this case. If, however, the decision of the Barney & Berry Case, 227 Fed. 428, 142 C. C. A. 124, should be regarded as decisive, it would fail because it is based upon the theory that, while the case was pending in the Patent Office, there was a substantial departure from the original specification and claims, and the final grant was for something not in the case at all, as Harmatta's invention, until January 27, 1910. In the Barney & Berry Case, the ninth defense was that Harmatta's original application did not disclose the method of the final grant, and that while the application was pending it "was unlawfully broadened with intent to cover the successful method and article of the defendant and others." Although the Circuit Court of Appeals of the First Circuit said that this defense was specially urged to it, again, as to it, the decision is aggravatingly uncertain, and we are left to conjecture very largely to determine just what was the thought of the court respecting this matter, although the inference is impelling that judgment on this defense is against the defendant. If the court reaches that conclusion, however, on the basis of facts as it attempted to recite them, we are privileged to give the decision only perfunctory consideration. What is said about the matter is indefinitely confined to but a few lines, in which occurs this statement, to which we cannot agree:

"The patent was applied for on December 3, 1903, and was not issued until December 3, 1912; but the claim for spot welding was always in the application."

As already indicated by us, we are unable to find any claim for spot welding, as such, before the amendment made in 1910, following

the hint of Examiner Shaw, given more than 11 months before. Certainly there is no direct claim for spot welding in the original application. Everything that even indefinitely touched upon it was taken therefrom in 1904, and was not put back for nearly 6 years. This condition of the record was the subject of elaborate argument by counsel for Rietzel in the interference proceedings between the Rietzel grant and the Harmatta application. In support of a motion to dissolve, upon the ground, for instance, among others, that Harmatta had no right to predicate the article claims in interference, because there was no supplemental oath attached to his amendment of 1910 to support them. counsel for Rietzel, in behalf of the Thomson Company, before the examiner, and before the Commissioner on appeal, produced arguments which seem to us to conclude the proposition in their favor. It is interesting to note that in the interference proceedings the question raised and so ably argued was not decided; the holding in each instance being that it was not to be heard on interference—that it was purely an ex parte matter.

While the defense is broadly stated in this case, it is, in argument, raised specially to the article claims, 16 to 21, inclusive, which were taken bodily from Rietzel and were never, prior to 1910, claims in any form in the Harmatta application. The question is not argued at all by counsel for plaintiff in this case. Whatever may be said respecting the abandonment or disclaimer of whatever disclosure there was in Harmatta's original application of spot welding, as very persuasively argued at one time in the proceedings by counsel for the Thomson Company, it is true that there was no hint of a demand for article claims until 1910. It seems to us inevitable that under the decision in Steward v. American Lava Co., 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139, affirming our own Circuit Court of Appeals, these claims (16 to 21) must fall, and that a decree in that respect, at least, should run against plaintiff. See, also, Yale Lock Co. v. Greenleaf, 117 U. S. 554, 559,

6 Sup. Ct. 846, 29 L. Ed. 952.

We prefer to discuss the alleged Rietzel prior use in connection with a defense which is peculiar here, which is, in our judgment, the most important, because it not only affects the interests of the parties immediate to this case, but it raises a question of great public concern. when we consider what the public relation to a patent grant is. While the defense is ostensibly but incidental estoppel, although as to an important matter, in effect it goes much farther because there is measurably involved in it the very integrity of the principle of patent monopoly. Judge Baker, in Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 274, 138 C. C. A. 23, 36, explaining the reason why a presumption of validity of the grant should be indulged, and why priority of use must be established beyond a reasonable doubt, called attention to the fact that a patent is a "contract between the government on behalf of the people and the patentee," and that it is the fruit of an examination "on behalf of all the people" by public experts. Clearly the function of the Commissioner of Patents is to shield the public from the imposition of an unjustified monopoly. One is given a patent monopoly for 17 years as a premium for a real contribution to science and useful arts. As Chief Justice Marshall said in Grant v. Raymond, 6 Pet. 242, 8 L. Ed. 376:

"It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions."

No one is entitled to this reward, unless he produces some cogent proof that this contribution has first been made by him or in his behalf. His proof must be to those appointed to safeguard the public against an improvident grant. He is protected by a presumption of the validity of his grant, and he cannot be allowed to obstruct, directly or indirectly, that intelligent and full examination which only secures provident action by the public's representatives. The time within which he may enjoy the fruit of an invention by way of monopoly is strictly limited by the power of Congress. Defendant claims that the conduct of the Thomson Company in the obtaining of the patent to Rietzel, and also perpetrated in the Rietzel-Harmatta interference proceedings, estops it from asserting priority of Harmatta over Rietzel, and from questioning a prior use by Rietzel which would invalidate the grant sued on. If that contention is good, plaintiff's case must fall. What are the facts? February 25, 1905, Rietzel, then superintendent and general manager for the Thomson Company, applied for a patent assigning to his employer. The original specification stated that it was for-

"a method of forming an electric welding union between the plane surface of a piece of metal and another piece of metal and is especially useful in uniting two plates or sheets of metal at their plane surfaces."

One claim (No. 8) was broad enough to cover the alleged invention of Harmatta. In June, 1908, while the application was on an appeal to the Board of Examiners in Chief, from a rejection by the primary examiner, the latter found an anticipating reference in Harmatta's English patent, No. 22,981, of 1903, granted August 25, 1904, upon the filing of a complete specification July 25, 1904. Thereupon the case was remanded upon the insistence of the Thomson Company's counsel that they desired to be heard before the primary examiner upon the reference. An amendment was then filed in the form of a complete new specification, with an enlarged list of claims (23 in number), manifestly drawn to meet every conceivable phase of the Harmatta disclosure. In support of the amendment, Rietzel's affidavit of October 23, 1908, was filed to the effect that he successfully practiced the invention in the application as amended some time in June, 1904. His practice was described in detail. In December, 1908, his claims were rejected, particularly upon certain French patents to one Egel, who was Harmatta's assignee in France. These patents were published February 18, 1904. The Harmatta patents in England and France (one of those to Egel) made the same disclosures as Harmatta's original specification in this country. Thereupon, to meet the examiner's rejection, the Thomson Company filed Rietzel's affidavit of February 18, 1909, to the effect:

"That prior to the 18th day of February, 1904, he repeatedly successfully practiced the method of fastening two sheets of metal together face to face

by welding them at spots in their meeting surfaces by confining the heating electric current passed from one plate to the other in such spots and localizing the welding pressure at said spots, as claimed broadly in said application."

The affidavit further stated that he successfully worked at the plates at the factory of the Thomson Company, and in further detail described the character of the practice, relating it undoubtedly to the alleged Harmatta invention. Through the assistance of these affidavits, allowance of the application was obtained, and the patent issued July 20, 1909, under the No. 928,701, with 15 process claims and 5 article claims. The pending Harmatta application (filed December 3, 1903)

was unnoticed.

We have already noted that the Harmatta application was enriched in 1910 by the adoption of a number of the claims from the Rietzel grant as the basis for interference proceedings. To succeed in this interference, it was necessary for Rietzel, who was the junior party, to file a preliminary statement to which his evidence should be addressed. This must claim a successful use antecedent to Harmatta's filing date, December 3, 1903. Therefore, June 14, 1910, Rietzel, produced by the Thomson Company, gave a verified preliminary statement to the effect that he conceived the invention set forth in the declaration of interference in 1897, and that, as nearly as he could fix the date, it was successfully reduced to practice in July, 1898, then being first explained and disclosed to others, and that the invention had been put to a very extensive use in the manufacture of metal work of various kinds. Thereafter the interference proceedings, declared April 26, 1910, progressed very slowly with several appeals prosecuted by the Thomson Company from the examiner to the Commissioner upon a variety of questions raised in the interest of the Rietzel patent. Numerous stipulations for extensions of time to introduce testimony. often at the manifest application of counsel for the Thomson Company, assisted to prolong the controversy. February 9, 1912, it was shown that Rietzel was in Europe, whereupon a further extension of time was obtained, so that Rietzel's testimony in chief was not to close until March 11, 1912. By this time the patience of the examiner of interferences was becoming somewhat weakened, wherefore an order was entered:

"That no further extension of Rietzel's time to take testimony in chief will be granted without a verified showing of reasons why the testimony was not taken within the time hereinabove allowed."

A month later (March 9, 1912), after the entry of this order, and only 2 days before Rietzel's time was to expire, a stipulation was filed extending the time for taking the testimony for 60 days, supported by the affidavit of Charles F. Tischner, a member of the firm of counsel representing the Thomson Company, defending the Rietzel patent, to the effect that for more than 6 months negotiations had been pending for settlement of the interference between the parties, and that the affiant, who had had the case in his personal charge for nearly 3 months immediately prior to the date of the affidavit (March 9, 1912), had been traveling to and from Germany, where he was negotiating for the purchase of the Harmatta invention in behalf of the Thomson Com-

pany; that the papers transferring the Harmatta application to the Thomson Company had been executed and were in transit, to arrive in a short time. The affidavit further stated, in face of the admission that the owner of the Rietzel patent had practically acquired the Harmatta interest, that—

"it is desired to take testimony in the interference on behalf of the party Rietzel; that it is expected that such testimony can and will be taken and completed within the 60 days extension of time now requested, and that the request is made in good faith and not for the purpose of delay."

How can it be said that the statements just quoted from Tischner's affidavit are true, and the promise therein offered in good faith? Later we deal with the contract between the Silesia Company and the Welding (Thomson) Company. It is there shown that, at the very time Tischner made this affidavit, he himself had closed a negotiation which made the statements of the affidavit impossible. Nevertheless, it served as a pulmotor for the Rietzel grant for the time being, for it caused to be approved a stipulation further extending time (to May 11) to take testimony, and undoubtedly was efficacious to effect still another delay to July 12. Later we note how it saved time to begin another suit on the Rietzel patent. When July 12 arrived, Rietzel, of course, was in default. The attorneys for the Thomson Company, who had in charge the company's Harmatta interests, demanded a hearing on a motion for judgment by default on July 23. On July 24 the Thomson Company's Rietzel side of the simulated controversy was granted 2 weeks to show good and sufficient cause why default judgment should not be rendered. Not answering this notice, on August 7 priority of invention of the subject-matter in issue was awarded to Harmatta, the senior party, with a limitation of appeal to August 27. There being no appeal, the Harmatta patent issued in due course as of the date December 3, 1912. The record shows that nothing substantial, if anything, stayed the granting of the Harmatta application early in 1910, except the filing of Rietzel's statement, in the interference under date of June 14, that he had anticipated by successful use Harmatta's filing date by a period of 5½ years; the use being followed by a successful reduction to practice in many ways. The delay occasioned by this affidavit was extended well into 1912 by that of Tischner.

The evidence before us shows that Harmatta executed an assignment of his application to the Thomson Company in Berlin February 3, 1912, undoubtedly while Tischner was there. There is in evidence also a contract executed in Berlin between the Thomson Company and the Silesia Company, the then owner of the Harmatta application. The date (April 3, 1912) to this contract (we have only a copy) must be an error, probably for February 3, for we find Tischner, who signed it in Berlin for the Thomson Company, swearing, on March 9 and in Washington, that it already had been executed. Harmatta's assignment to the Thomson Company was actually recorded in the Patent Office April 5, 1912. In the contract the Silesia Company agrees, in consideration of \$27,500 to deliver an assignment from Harmatta to the Thomson Company. Of the consideration, \$7,500 were to be paid

upon the delivery of the assignment, and the balance according to paragraph 5 of the contract, which should be read wth paragraph 6:

"5. The Welding Company further agrees to pay to the Silesia Company a further sum of twenty thousand (\$20.000) dollars immediately upon the issue of a United States patent to the Welding Company for the said invention and application for patent of said Johann Harmatta, provided said patent is granted with the present claim 1 of the Harmatta application or a claim of equal scope therewith. For identification said claim is as follows: "The process of electrically welding thin metallic sheets, which consists in introducing the sheet metal parts to be welded between electrodes, pressing said electrodes firmly together and closing the circuit, whereby the specified small round, very sharply defined place of welding which answers the purpose of a rivet is obtained, substantially as set forth."

"6. The Welding Company covenants and agrees to vigorously prosecute said application for patent at its own cost and expense, and to use its utmost endeavours and those of its legal advisors and attorneys to secure the grant of said patent with a claim of the scope defined in the fifth clause hereof."

This claim 1 was originally claim 2 of the application as amended January 27, 1910. A further amendment was made when the Rietzel claims were taken over for interference purposes, and it became claim 1, followed by the claims taken from the Rietzel patent. After the interference was "won" for the Harmatta application, further amendment dropped this claim. Evidently the expansion, by this last amendment, of the claims from 15, which was the number existing when the interference was ended, to 21, as allowed, was considered to occupy the ground covered by this claim 1. Under the contract the Silesia Company retained certain rights of importation, which made it necessary to it to have the patent include the scope of the required claim.

Although the Thomson Company was already under this solemn contractual obligation to discard the Rietzel patent and allow the Harmatta patent to issue, for the latter displaces the Rietzel patent to the extent that they conflict, we find it suing the United States Metal Products Company in the United States District Court for the Eastern District of New York on a bill of complaint filed March 28, 1912. setting up the Rietzel patent and asserting, over the oath of its secretary, that Rietzel, prior to February 24, 1905, was the inventor of useful improvements in welding "since commonly known in the art as electric spot or point welding"; that is, asserting for the Rietzel patent precisely the force which the Thomson Company had solemnly agreed to allow to Harmatta's claim. Also, November 17, 1910, while the interference proceedings were continuing, and nearly 5 months after the Thomson Company had filed Rietzel's affidavit to anticipate Harmatta, this company, as Rietzel's assignee, began an action in the Circuit Court of the United States for the Southern District of New York against the National Enameling & Stamping Company for infringement of the Rietzel patent, alleging Rietzel to have been, prior to February 24, 1905, "the original and first inventor of certain new and useful improvements in uniting component parts of sheet metal structures. since commonly known in the art as electric spot or point welding." The evidence is also before the court that, during the extended period of the interference proceedings, and while the Rietzel patent had an apparent vitality afterwards denied it by concessions of the owner,

the Thomson Company asserted it in several instances to the extent of demanding and receiving profits upon it as a monopoly, although un-

der contract to displace it.

Another curious circumstance, which is of some interest, at least, in this connection, appears in the record to this effect: Patent having issued to the Thomson Company, as the assignee of Harmatta, after this company, as the assignee of Rietzel, in the interest of the new patent, had abandoned all its solemn insistence of priority in Rietzel, and while the appeal in the Boston case was pending, a disclaimer was filed by that company of claims 1 to 6 and 16 to 20 of the Rietzel patent, being claims 1 to 6 and 17 to 21 of the Harmatta patent, and a further disclaimer of that part of the final specification of Rietzel which identified broadly the Rietzel invention with that of Harmatta. The necessity for the disclaimer was obvious under the circumstances, and we are not as much interested in the fact as in the reason which was given, as follows:

"That your petitioner has reason to believe that through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the patentee, in said letters patent, has claimed more than that of which he was the original or first inventor or discoverer."

This is a remarkable statement, in view of the facts—that twice in the process of amending the specification the clause now disclaimed, which was the foundation for the disclaimed claims, was insisted upon; that even after allowance to Rietzel the specification and claims, including these disclaimed portions, were held up for the two successive revisions in the last of which was added one (No. 20) of the claims sought to be disclaimed; that as soon as Harmatta's work became known, through the English disclosure, Rietzel's counsel occupied the ground by amendment and by expanding the claims in number from 3 to 23, with a brief asserting very definitely that Harmatta was to be anticipated; that to support this occupation of the Harmatta territory Rietzel was made to affirm on oath his priority (affidavit of October 23, 1908); and that prior to the second of the amendments containing these now disclaimed matters, and for the evident purpose of definitely sustaining them as essential portions of his invention. Rietzel was caused to file another affidavit (that of February 18, 1909). in which he more specifically identified, as that which he had done to anticipate the disclosures of the Egel (Harmatta French) patent, the very things afterwards repudiated, as unintended. How this evident taking of Harmatta's ground could have been "through inadvertence, accident, or mistake" is, in view of these facts, beyond comprehen-The disclaimer is equivalent to saying that Rietzel's affidavits just referred to were fabrications, and willful ones, too, for they (especially so in the second) were too particular and pointed to allow it to be said of them that their statements were the result of "inadvertence."

In this same connection the mind reverts again to Thomson's affidavit, already referred to, of November 30, 1908, filed to support that amendment which was the first to contain this alleged inadvertent and accidental matter. In this affidavit Thomson says: "That he is familiar with the process of electric welding set forth in the above-entitled application of A. F. Rietzel for uniting sheets of metal together by what has been known as the 'spot-welding process,' and which forms a practical substitute for the riveting of plates together or for other mechanical expedient for fastening them together face to face.

"That one of the methods of uniting pieces of metal together by riveting, and for which the aforesaid spot-welding process forms a valuable substitute was patented by him by United States letters patent dated January

8, 1889, patent No. 396,015."

These paragraphs precede the one already quoted, in which Thomson endeavors to contradict the import of the specification in his patent 396,015. Thomson, when he gave this affidavit, surely knew that Rietzel was being made to claim the things which were afterwards disclaimed. He was not only then and at all times an officer of the disclaimant, but its expert on these very matters.

The question of the candor and good faith of this disclaimer grows in seriousness when we recall that it was upon these identical features of the Rietzel patent that the Thomson Company brought the two suits above referred to and proceeded to issue many licenses, and further, when we note that Harmatta's allowance was stalled for more than two years by a further repetition of the "inadvertence, accident, or mistake" in the shape of Rietzel's affidavit of June 7, 1910, filed in the interference proceedings. The "invention set forth in the declaration of interference," which his assignee (the Thomson Company) had him then swear he conceived more than a dozen years before, was, as the counts in the declaration show, precisely that which the specification paragraph and the claims now attempted to be disclaimed were in the application to cover. It was to maintain them that the affidavit was filed. The statement in the disclaimer, explaining why Rietzel took Harmatta's ground, is plainly untrue; it is difficult to resist an impulse to say that it is deliberately untrue. The Thomson Company made a record which very plainly belies its assertions. The incident is more illustrative than directly applicable to the special defense in question, but its illuminative powers are very important.

The Thomson Company will have made this "inadvertence, accident, or mistake" extremely profitable, if plaintiff is allowed to maintain its Harmatta patent, for then it will follow that it has obtained protection of its monopoly of this invention from July 20, 1909, to December 2, 1929. It is clear to this court that such a result, upon this record, should not be allowed to follow through the favorable adjudication of plaintiff's right to maintain action on the Harmatta grant. It seems to us clearly against public policy and subversive of equitable principles to give plaintiff a decree which, in sustaining this patent, will

operate to give it a monopoly not sanctioned by law.

Pomeroy (Equitable Jurisprudence [3d Ed.] vol. 2, § 805), upon authority of many decisions, sums up the conditions which must be met that equitable estoppel may exist as follows:

"(1) There must be conduct—acts, language, or silence—amounting to a representation * * * of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party

claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. * * * (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse."

Each of these six conditions are present in this record, when we consider that a patent grant is adverse to the public, which is a party to the allowance through representation. The disclaimer which we have just been considering is to be regarded in connection with Pomeroy's fourth requisite, that "the conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party," etc. Of course, when the Thomson Company caused the Rietzel application to be amended to cover the Harmatta territory, and obtained from him the two affidavits under consideration, and from its welding expert, Thomson, another, the purpose was to affect the judgment, in these precise matters, of the public's representatives in the patent office. So, also, that was the object of Rietzel's affidavit in the interference, as well as that of Tischner, asserting that it was proposed, in good faith, to show, if the time for taking testimony were further extended, that Rietzel had priority over Harmatta—an affidavit made immediately following affiant's return from Europe, where, for his principal, he had entered into a contract to perform which made it impossible to meet the terms of the promise in his affidavit. purpose of these affidavits was to vitalize, against opposition, the Rietzel claim of monopoly to precisely the features of invention which were afterwards attempted to be disclaimed. They effected their obvious purpose, to the great advantage of the Thomson Company, which the latter pugnaciously held until, obtaining the Harmatta interests, it no longer needed the protection of the Rietzel grant.

To allow the affidavits to be repudiated now is to allow plaintiff to take advantage, to the disadvantage of the public, of what it now would admit was its own wrong against the public. The case before us is in principle covered by Union Manufacturing Co. v. Lownsbury, Fed. Cas. No. 14,368. Either the Rietzel affidavits state the truth, or they were deceptive—intentionally so, or most recklessly devised and employed. If they state the facts, we have in the circumstances a prior use displacing Harmatta as an inventor. If they are subject to criticism as untrue, the plaintiff, who is intelligently responsible for them, is in this court with unclean hands. It cannot be heard to plead a culpability from which it so greatly profited. It is fair to Rietzel to say that he had no part in the disclaimer. He was not aware that even Harmatta had prevailed over him in the interference until so advised by We must hold that plaintiff has estopped itself to deny priority in Rietzel which it so frequently and pertinaciously asserted against the public for years, and that the estoppel is available to defendant here. This alone defeats plaintiff's demand for a decree.

It is difficult to understand how the Patent Office should have allowed itself, without investigating the truth of Rietzel's claim of prior

use, to allow by default to Harmatta the invention, after it was apprised that both sides were occupied by precisely the same interest, and that to the Thomson Company there was a very great advantage that the office should quietly act as it did. No matter what the Office practice was, here it operated to give Harmatta's assignee an undue advantage over the public.

A decree may enter, finding the patent invalid, and dismissing the

bill.

MINERALS SEPARATION. Limited, v. MIAMI COPPER CO.

(District Court, D. Delaware. July 13, 1920. On Application to File Supplemental Bill, July 29, 1920.)

No. 331.

1. Patents \$\iiint 326(4)\$—Contempt proceeding not appropriate to determine

new infringement of patent.

A proceeding for contempt for violation of an injunction restraining infringement of a patent for a process, by the use of new processes adopted by defendant since the decree, *held* not appropriate for determining the question of infringement by the new processes, in view of their nature as disclosed by the petition.

2. Patents \$\infty\$ 310(10)—New infringements after interlocutory decree reached

only by new bill.

Where, after an interlocutory decree adjudging infringement of a patent for a process and granting an injunction, defendant adopted new processes, which complainant claims infringe, it cannot obtain relief against them by supplemental bill, but must proceed before the master in the accounting proceedings or by original bill.

In Equity. Suit by the Minerals Separation, Limited, against the Miami Copper Company. On motion of defendant to dismiss petition for contempt, and motion by complainant for leave to file supplemental bill. Petition for contempt dismissed, and leave to file supplemental bill denied.

Order affirmed 269 Fed. 265.

Henry D. Williams, William Houston Kenyon, and Lindley M. Garrison, all of New York City, Joseph C. Fraley, of Philadelphia, Pa., and Thomas F. Bayard, of Wilmington, Del., for plaintiff.

Charles Neave, of New York City, and John F. Neary, of Wil-

mington, Del., for defendant.

MORRIS, District Judge. This cause was last before this court upon an application by the plaintiff for leave to file a supplemental bill. 264 Fed. 528. The plaintiff now charges by petition that the processes employed by the defendant since it stopped using the three processes heretofore adjudged to be infringements are also infringements, and prays that the defendant be adjudged guilty of contempt and/or that a further injunction be issued, specifically enjoining and restraining the defendant from using such processes.

The defendant by its answer denies that the new methods infringe the patents sued upon, and moves that the rule to show cause be vacat-

ed and the petition dismissed, upon the ground that, due to the character of the new processes, the present procedure is inappropriate for the determination of the questions raised. The plaintiff contends that it appears from the facts alleged that the new methods are the same in principle as those adjudged to infringe, and that the defendant has made only a substitution of equivalents resulting in a mere colorable change in the process, while the defendant contends that those facts disclose that it no longer uses the agitation of the patent. Much testimony touching the processes in question has been introduced by the plaintiff before the master upon the accounting now being had. In fact, it is conceded that little testimony of any other nature has

so far been presented.

[1] The present issues do not seem to make necessary a review of the cases upon contempt, or those in which the procedure by supplementary injunction has been recognized. Although embarrassed by the fact that I do not possess the full knowledge of the intricate facts of this case that might have been gained, had the testimony and argument in the main cause been heard by the court as now constituted, I am nevertheless satisfied that the facts set up by the petition are not of the character required to sustain a judgment of contempt. Nor do I find that the practice of enlarging an injunction or granting a supplementary injunction has been adopted in this circuit. But, be that as it may, in view of the nature of the new processes used by the defendant as charged by the petition, the questions raised thereby, and the decision of the Circuit Court of Appeals in this case (244 Fed. 752, 157 C. C. A. 200), I am of the opinion that the plaintiff must obtain the relief to which it is entitled, if any, touching the new processes, either through the proceedings now being had before the master and the decree to be entered thereon, or by a new bill, and not otherwise. Which of these procedures is the proper one under all the circumstances, or whether both must be resorted to, one as to some of the processes. and the other as to the remaining processes, need not now be determined.

An order vacating the rule and dismissing the petition may be submitted.

On Application to File Supplemental Bill.

This case is again before the court upon an application of the plaintiff for leave to file a supplemental bill, charging the defendant with new acts of infringement since its discontinuance of the three processes heretofore adjudged to be infringements. 244 Fed. 752, 157 C. C. A. 200.

[2] When considering the application heretofore made by the plaintiff that the defendant be adjudged guilty of contempt and/or that a further injunction be issued specifically enjoining and restraining the defendant from using the processes therein set forth, I arrived at and stated the conclusion that—

"In view of the nature of the new processes used by the defendant as charged by the petition, the questions raised thereby, and the decision of the Circuit Court of Appeals in this case (244 Fed. 752, 157 C. C. A. 200), I am of the opinion that the plaintiff must obtain the relief to which it is entitled, if any, touching the new processes, either through the proceedings now being had before the master and the decree to be entered thereon, or by a new bill, and not otherwise. Which of these procedures is the proper one under all the circumstances, or whether both must be resorted to, one as to some of the processes, and the other as to the remaining processes, need not now be determined."

The words "new bill" were therein used to indicate a new original bill. I have considered the argument made in support of the plaintiff's present application, and find nothing therein justifying a conclusion different from that at which I arrived when considering the petition hereinbefore mentioned.

The present application must therefore be denied.

UNITED STATES v. PETERSON et al., and four other cases.

(District Court, W. D. Washington, N. D. October 18, 1920.)

Nos. 5245, 5350, 5568, 5570, 5573.

1. Criminal law 201—Intoxicating liquors 213—Conviction under state law bar to prosecution under National Prohibition Act.

Section 2, of the Eighteenth Amendment to the Constitution, providing that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation," does not confer power on state courts to enforce a congressional act, but on the Legislature of a state to enact legislation, not inconsistent with congressional legislation, for enforcement of the amendment; and a defendant who has been convicted in a state court for violation of such a state statute, whether enacted before or since the amendment, cannot be again prosecuted in a federal court on the same facts for violation of the National Prohibition Act.

Criminal law 201—Conviction under municipal ordinance not bar to prosecution under National Prohibition Act.
 A conviction for violation of a municipal ordinance is not a bar to a

A conviction for violation of a municipal ordinance is not a bar to a prosecution in a federal court for violation of the National Prohibition Act, based on the same facts.

Criminal prosecutions by the United States against Gus Peterson and Ernest Wickstrom, with four other cases. On pleas in bar. Sustained in two cases; overruled in three cases.

Robert C. Saunders, U. S. Atty., of Seattle, Wash. John F. Dore, of Seattle, Wash., for defendants,

NETERER, District Judge. These cases are submitted together. The defendants in the several cases are charged with violation of the National Prohibition Act. Pleas in bar have been filed by each of the defendants in causes 5245 and 5568, setting forth conviction in the state court upon the same facts, and in causes 5573, 5570, and 5350, convictions in municipal courts upon the same facts. The sufficiency of the pleas is challenged.

The Washington Prohibition Law (Laws 1915, c. 2, p. 2) is more stringent in its provisions as to possession and use of intoxicating liquors than the National Prohibition Act (41 Stat. 305). It is sometimes

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

called a "bone-dry" law. To the same effect is the city ordinance. The question for decision is: What, if any, relation do the state law and city ordinance bear to the national act?

The Eighteenth Amendment to the Constitution reads:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power

to enforce this article by appropriate legislation."

The Supreme Court, in Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 64 L. Ed. 946, decided June 7, 1920, said:

"6. The first section of the amendment * * * is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a state Legislature, or by a territorial assembly, which authorizes or sanctions what the section prohibits. * *

"9. The power confided to Congress by that section [2], while not exclusive, is territorially coextensive with the prohibition of the first section,

* * and is in no wise dependent on or affected by action or inaction

on the part of the several states or any of them."

Section 2, article 6, Constitution, provides:

"That this Constitution and the laws of the United States, and the laws

* * made in pursuance thereof, * * shall be the supreme law of
the land."

Section 2, art. 18, and section 2, art. 6, must have harmonious relation, since no express declaration in the amendment was made, nor are the provisions necessarily inconsistent. The national legislation, therefore, is paramount, and the state laws, when in conflict, must yield, Ballaine v. Alaska N. Ry. Co., 259 Fed. 183, 170 C. C. A. 251, and cases cited. Much "bewilderment" is created by "concurrent power to enforce by proper legislation," granted by section 2, art. 18. This is a conferred power, not upon courts of the state, giving them concurrent jurisdiction to enforce a congressional act, but primarily a power conferred upon the state Legislature, and through it upon the state courts, by such legislation as it may enact in harmony with the National Prohibition Act, to enforce article 18, and while the amendment "of its own force repeals" all inconsistent laws, it preserves inviolate laws of the state consistent with its provisions.

[1] The state, then, may by appropriate legislation exert its power to enforce article 18, either by new legislation or appropriate existing legislation. Neither article 18 nor the Congress sought to destroy any existing remedies by a state to curb the drink evil, and where existing remedies are provided by a state, available for the enforcement of article 18, and in harmony with the Prohibition Act, supra, the power of the state, through its courts, may be invoked, and a conviction in a state court for conduct which is in violation of the Pro-

hibition Act, supra, is a bar to a prosecution in the federal courts. It seems manifest that it was not the intent that a person should be

punished by the state and federal law for the same offense.

[2] The concurrent power given to the state does not, however, authorize the state to delegate that power to municipalities. It is a power which must be exercised by the state itself. Everett School District v. Pearson et al. (D. C.) 261 Fed. 631. The state may confer power on municipal courts and officers to enforce under state authority article 18, but it has not done so. A conviction for violation of a municipal ordinance, pursuant to grant of power given by the state is not a bar to a prosecution in the federal court for violation of the provisions of the National Prohibition Act.

The plea to No. 5245 and No. 5568 is sustained, and to Nos. 5350,

5573, and 5570 is overruled.

UNITED STATES v. TWO CANS OF OIL OF SWEET BIRCH AND THREE CANS OF OIL OF GAULTHERIA.

(District Court, S. D. New York. March 10, 1920.)

Druggists \$11—Food \$24—Granting motion to release misbranded products under bond discretionary.

Motion of claimant of food products, seized on libel to condemn as misbranded, for release of the products under bond pursuant to Food and Drugs Act, § 10 (Comp. St. § 8726), would, under the discretion conferred by the permissive language of that section, be decied, where, although the articles seized were not deleterious, they had a much lower market value than the articles which the false labels described, the misbranding was fraudulent and injurious to competitors in the trade, and claimant had been convicted of a similar offense before, and had numerous other proceedings pending against him.

Forfeiture under Food and Drugs Act. Libel by the United States for the seizure and condemnation of two cans of oil of sweet birch and three cans of oil of gaultheria; T. J. Ray, claimant. On claimant's motion for release of the product under bond. Motion denied.

On December 9, 1919, the United States attorney for the Southern district of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for that district a libel for the seizure and condemnation of two cans, each containing 60 pounds, of a product purporting to be oil of sweet birch, and three cans, each containing 30 pounds, of a product purporting to be oil of gaultheria, consigned November 12, November 13, and November 20, 1919, remaining unseld in the original unbroken packages at New York, N. Y., alleging that the article had been shipped by T. J. Ray, Johnson City, Tenn., and transported from the state of Tennessee into the state of New York, and charging adulteration and misbranding in violation of the Food and Drugs Act (Comp. St. §§ 8717–8728). The alleged birch oil was labeled in part, "Oil Sweet Birch U. S. P." The alleged oil of gaultheria was invoiced as "Wintergreen Leaf Oil (Gaultheria)." Analyses of samples of the articles by the Bureau of Chemistry of the Department of Agriculture showed them to contain synthetic methyl salicylate.

Adulteration of the articles, considered as drugs, was alleged in the libel, for

the reason that they were sold under names recognized in the United States Pharmacopæia and differed from the Pharmacopæial standard of strength, quality, and purity as therein laid down, and further in that their own strength and purity fell below the professed standard or quality under which they were sold. Adulteration of the articles, considered as foods, was alleged, for the reason that synthetic methyl salicylate had been mixed and packed therewith, so as to reduce, lower, and injuriously affect their quality and strength, and had been substituted wholly or in part for said products.

Misbranding of the article purporting to be oil of gaultheria; and invoiced as "Wintergreen Leaf Oil (Gaultheria)," was alleged, for the reason that the product was represented as being derived solely from wintergreen leaves, a representation false and misleading when applied to a product consisting in part of synthetic methyl salicylate. Misbranding of this product, considered as a drug, was alleged, for the reason that it was an imitation of, and offered for sale under the (distinctive) name of, another article, to wit, oil of gaultheria. Misbranding of the article, considered as a food, was alleged, for the further reason that it was an imitation of, and offered for sale under the distinctive

name of, another article, to wit, oil of gaultheria.

Misbranding of the product labeled "Oil Sweet Birch" considered as a drug, was alleged in the libel, for the reason that it was an imitation of, and offered for sale under the name of, another article, to wit, oil of sweet birch. Misbranding of the article, considered as a food, was alleged, for the reason that it was an imitation of, and offered for sale under the distinctive name of, another article, and for the further reason that the packages containing the product bore a statement, to wit, "Oil Sweet Birch," regarding the product contained therein, which statement was false and misleading—false in that the article was not composed wholly of oil of sweet birch, but, on the contrary, consisted partly of synthetic methyl salicylate derived from sources other than sweet birch, and misleading, in that it led the purchaser to believe that such product was composed wholly of oil of sweet birch, whereas it consisted in part of synthetic methyl salicylate, derived from a source other than sweet birch.

On December 23, 1919, the said T. J. Ray, Newland, N. C., filed his claim for the product and also a stipulation for costs. Thereafter said claimant, by his attorney, filed a motion for the release of the product under bond. On February 27, 1920, the matter having come on for the disposition of said motion, after arguments by counsel, the matter was taken under advisement and on March 10, 1920, said motion was denied.

John F. Yawger, of New York City, for claimant.

AUGUSTUS N. HAND, District Judge (after stating the facts as above). The claimant transported in interstate commerce the abovenamed merchandise, which was misbranded. The articles seized had a much lower market value than the articles which the false labels described. They were branded as oil of birch and oil of wintergreen, which are used in the manufacture of confectionery. The imitations so branded contained but a small percentage of the ingredients, and consisted mainly of a chemical of different composition.

The claimant asks to be allowed to furnish a bond and to have the merchandise released, so that he can sell it by correct description. It is not denied that the merchandise is not deleterious. The release of these articles after bond is in my opinion discretionary with the court. Section 10 of the Food and Drugs Act (Comp. St. § 8726) provides that any article of food that is adulterated or misbranded and is a subject of interstate commerce "shall be liable to be proceeded against in any District Court of the United States within the district where the same

thereto.

is found, and seized for confiscation by a process of libel for condemnation." There follows, in a subsequent clause in section 10, supra, a provision empowering "the court * * * by order [to] direct that such articles may be delivered to the owner thereof."

This is not mandatory, but clearly permissive. The claimant here has been convicted of a similar offense before, and has numerous other proceedings pending against him. I regard the application as addressed wholly to my discretion, and I decline to exercise it in favor of the claimant under existing circumstances. The misbranding was fraudulent and injurious to competitors in the trade.

The motion to release on bond is denied.

In re JOHN H. PARKER CO.

(District Court, N. D. Ohio, E. D. March, 1920.)

1. Bankruptcy \$\insigm\$ 140(\(\frac{1}{2}\)) \to Subcontractor's title to material did not pass to bankrupt contractor.

Where a subcontractor agreed to furnish labor and materials and construct a floor in a building, and stored the materials on the premises until work could be commenced, *held*, that title to the materials did not pass to the contractor, and that its receiver in bankruptcy secured no right

 Bankruptcy \$\iff 212\$—Storage charges for material successfully claimed by subcontractor against receiver charged to subcontractor.

Where a subcontractor established its right to certain building material against the contractor's receiver in bankruptcy, the charges for storing the material prior to filing of the reclamation petition will be charged against the subcontractor.

In Bankruptcy. In the matter of the John H. Parker Company, bankrupt. Petition by the United Cork Flooring Company to reclaim personal property in receiver's possession. On receiver's exceptions to special master's report. Exceptions overruled, and report confirmed.

Charles Nadler and F. S. Shulman, both of Youngstown, Ohio, for receiver.

McKain & Ohl and Wm. W. Zimmerman, all of Youngstown, Ohio, for United Cork Flooring Co.

WESTENHAVER, District Judge. This matter is before me on exceptions to the report of Paul E. Carson, special master, to whom this matter was referred, finding that the United Cork Flooring Company is the owner of certain personal property in the possession of the receiver. This Flooring Company on June 8, 1917, made a subcontract with the John H. Parker Company, the principal contractor, to furnish the labor and materials and install a floor in the Butler Art Gallery, at Youngstown, for the construction of which the Parker Company was principal contractor. Pursuant to this contract, the Flooring Company specially manufactured in its own plant certain cork tile, and shipped same, together with certain other necessary materials, by railroad freight to its own order and address at Youngstown, Ohio, care of the

Butler Art Gallery. When these materials arrived, the building had not yet progressed to the point where the flooring could be installed, and the superintendent of the Parker Company, at the request of the Flooring Company, unloaded these materials and stored them on the art gallery premises, where other materials to be used in this construction were stored. After the Parker Company became bankrupt, and the receiver was appointed, this receiver, finding these materials in the original packages, stored the same. The Flooring Company's contract entitled it to be paid on estimates 85 per cent. for labor and materials only as the materials were placed and installed in the building. Shortly before bankruptcy of the Parker Company it sent to the Flooring Company a note for \$1,200, which the Flooring Company contends was received after bankruptcy and was never accepted. In point of fact the note was returned.

[1] The foregoing material facts are all found by the special master and are fully supported by the testimony. Upon these facts I agree with the master's conclusion of law. The title to these materials never passed to the Parker Company and still is in the Flooring Company. The authorities and legal principles relied upon by counsel for the receiver are applicable only to a contract of sale when possession has been delivered to the vendee, and the reservation of title has the effect in law of making the sale conditional or creating a chattel mortgage. In that situation, conditional sales contracts and chattel mortgages are void as against the vendee's creditors unless recorded.

These principles of law have no application to the foregoing facts because there was no contract of sale; but, on the other hand, the materials are and were intended to be the property of the Flooring Company until they became the property of the art gallery by being used in constructing a building on its premises. Even if a note had been given and accepted, it would be regarded only as an advance payment on a contract yet to be performed, and would not have the effect of changing the nature of the contract or converting it into a sale of materials.

[2] The exceptions will be overruled and the report will be approved and confirmed. The costs of this proceeding will be imposed upon the bankrupt estate. An order will be made directing the materials to be delivered to the Flooring Company upon the payment by it of storage charges. These latter charges were necessary for the preservation of this property prior to the filing of the Flooring Company's reclamation petition and pending the determination by the court of the controversy respecting the title. They were expenditures really made for the benefit of the Flooring Company and should be paid by it.

An exception may be noted on behalf of the receiver.

JENKINS et al. v. UNITED STATES EMERGENCY FLEET CORPORA-TION.

(District Court, W. D. Washington, N. D. June 29, 1920.)

1. Seamen 5-Port of discharge north of Cape Hatteras is Atlantic port.

Under shipping articles for a voyage from New York "to a final port of discharge in the United States north of Cape Hatteras," *held*, that such port was one on the Atlantic coast.

2. Seamen = 13-Entitled to transportation to port of discharge.

Where seamen signed for a voyage from New York to "one or more ports in South America * * * and such other ports or places in any parts of the world as the master may direct and back to a final port of discharge in the United States north of Cape Hatteras," and the ship fully discharged her cargo and reloaded at Tacoma and Seattle, and on refusal of the seamen to sign for a new voyage to Cuba discharged them, held, that they were entitled to transportation to New York.

In Admiralty. Suit by I. W. Jenkins and others against the United States Emergency Fleet Corporation. Decree for libelants.

James Kiefer, of Seattle, Wash., for libelants.

Robert C. Saunders, U. S. Atty., and Howard G. Cosgrove, both of Seattle, Wash., for respondent.

NETERER, District Judge. On February 11, 1920, at the port of New York, the crew and master of the steamship Lake Flynus, operated by the United States Shipping Board Emergency Fleet Corporation, signed shipping articles bound—

"From the port of New York to one or more ports in South America, via coastwise ports and such other ports or places in any parts of the world as the master may direct, and back to a final port of discharge in the United States, north of Cape Hatteras."

The vessel sailed to South American ports, and then sailed to and delivered all of her cargo at the port of Tacoma, then sailed to the port of Seattle, where the vessel underwent repairs about the first of June, 1920. Because of repairs being made upon the vessel, the crew was not fed upon the vessel after June 6, 1920, and the men were furnished, upon demand, funds with which to pay their board on shore. Some of the men, prior to June 15th, requested to be discharged, claiming that the voyage had ended. A full cargo is loaded on the vessel for Cuba (a foreign port), and the men have been requested to "sign for the voyage," and declined.

The seamen, after refusal "to sign," were requested to report at the shipping commissioner's office and receive their wages. Men were employed to take the place of the men who had requested to be relieved. All of the men reporting at the shipping commissioner's office declined to receive the wages, unless furnished transportation to New York, the port of final discharge.

[1] It is contended on the part of the libelants that the port of Tacoma, where the entire cargo was discharged, was the final port of discharge, or at any rate the discharging of the entire cargo, and the

taking of the new cargo for the port of Cuba, was such a deviation from the voyage as abrogated the shipping articles and relieved the seamen from further service. The respondent contends that under the articles the ship had the right to call at the port of Tacoma or Seattle, to discharge or take cargo as it saw fit, inasmuch as the shipping articles provided that the ship may go to any port in the world, and the port of final discharge was definitely stated in the articles as north of Cape Hatteras, which all of the evidence shows means on the Atlantic Coast, and that, while the respondents agreed to the discharge of the libelants who so desired, it is not willing to pay transportation

[2] It is shown that the libelants were requested to sign "new articles" and refused. The shipping commissioner, on request of the agent of the respondent for a decision found that the seamen were entitled to transportation to New York. This fact, though, is not material here, except to show what the relation of the seamen to the voyage was considered to be by all parties. The vessel considered the voyage ended, or it would not have required the signing of the shipping articles as testified to by libelants, and not denied. The master, who, it is said, made this request, was not called, nor was his absence explained. The men were discharged through no act of commission or omission which would warrant such discharge. This was not the port of final discharge, and the men were not requested to continue on the voyage under the articles, but were requested to sign new articles for a new voyage. The vessel by its own conduct fixed the status of the men with relation to this proceeding, and they are entitled to their wages and board during detention, and transportation to New York, to such as desire to go to New York.

In re DAY.

(District Court, N. D. Georgia. November 27, 1920.)

No. 6606.

1. Bankruptcy 407(5) - Obtaining of credit on false statements ground for

denying discharge, though debt would not be released.

Bankruptcy Act, § 14b (Comp. St. § 9598), specifying the obtaining of credit on a false statement in writing made for that purpose as ground for denial of a discharge, and section 17 (section 9601), providing that liabilities for obtaining property by false pretenses are not released by a discharge, are not mutually exclusive, or even in pari materia, and such obtaining of credit is ground for denying discharge, though the debt so contracted would not be released by the discharge.

2. Bankruptcy \$\infty\$ 407(5) \to Obtaining credit on false statements is ground for denial of discharge to any bankrupt.

Bankruptcy Act, § 14b (Comp. St. § 9598), providing for denial of a discharge to one obtaining credit on a false statement in writing made for that purpose, is not limited to merchants, but applies to all who ask a discharge in bankruptcy.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. Bankruptcy \$\iff 407(5)\$—Obtaining credit by any material false statement of fact in writing is ground for denial of discharge.

Bankruptcy Act, § 14b (Comp. St. § 9598), relative to the obtaining of credit on false statements in writing, is not confined to statements of general financial condition, but covers any material statement of fact made in writing to the creditor to induce the credit.

In Bankruptcy. In the matter of Albert Lee Day, bankrupt. On application for a discharge. Discharge denied.

E. M. Habersham and W. I. Heyward, both of Atlanta, Ga., for objecting creditors.

Westmoreland & Smith, of Atlanta, Ga., for bankrupt.

SIBLEY, District Judge. [1] The application for a discharge is met by a creditor's objection, supported by proof that part of his debt represents a credit extended on the faith of a written statement of financial condition made by the bankrupt to the creditor, wherein the bankrupt states his liabilities to be about \$5,000, whereas his schedule in bankruptcy shows that they were at the time over \$60,000. The contention of the bankrupt is that, while this matter may make a case of a "liability for obtaining property by false pretenses or false representations," which will be unaffected by a discharge under Bankruptcy Act, § 17, as amended (Comp. St. § 9601), it cannot also be urged as a ground for denying a discharge under section 14b, and that the creditor's remedy is under the former and not the latter section, which are mutually exclusive.

[2, 3] Although section 17 can have no application to a bankrupt who has been refused a discharge under section 14b, I do not think the two sections are mutually exclusive, or even in pari materia. Section 17 is for the benefit of the creditor whose claim is covered thereby, and to be invoked by him only. It comes into operation only after the bankruptcy court has done its work, and can hardly ever be applied by such court, unless in a second bankruptcy. Section 14b is addressed to the bankruptcy court only, and is not for the benefit of any particular creditor or class of creditors, and by its express terms may be invoked on any application for discharge by the trustee or other party in interest to entirely defeat the discharge. The purpose of the section is to preserve the discharge feature of the Bankruptcy Act from abuse, and deny its benefits to one who has shown himself unworthy of them in any of the ways specified in the section. The section is at bottom one of penalty or forfeiture, and one of the things penalized is the commercial dishonesty manifested by obtaining a credit on a materially false statement in writing, made to induce the cred-This section, having its own purpose, must be construed according to its own terms, and independently of section 17. There is nothing in the words of the provision in question, nor in the history of its adoption and its amendment, to confine it in its application to merchants, as here contended. It applies to all who ask a discharge in bankruptcy. Nor is it to be confined to statements of general financial condition, but covers any material statement of fact made in writing to the creditor to induce the credit. It covers the case at bar.

This conclusion accords with that reached by this court in Re Reed, 256 Fed. 412. It accords, also, with the statement of the law made by the Circuit Court of Appeals of the First Circuit in Robinson v. Williston, 266 Fed. 970, in holding that the giving of a bad check did not bar a discharge only because there was no express written statement, but only an inferential one. The case of In re Hudson (D. C.) 262 Fed. 778, involving the giving of a mortgage on property not owned by the mortgagor, was correctly decided according to the Robinson Case. The discharge is denied.

UNITED STATES v. FORTMAN.

(District Court, W. D. Oklahoma. June 24, 1920.)

No. 2204.

Internal revenue \sim 2-Volstead Act supersedes revenue laws.

The Volstead Act, prohibiting the manufacture, and sale of intoxicants, supersedes prior revenue laws taxing such traffic, so that a person cannot be convicted for violating such revenue laws after the effective date of the Volstead Act.

Leonard H. Fortman was indicted for violating the revenue laws relating to intoxicating liquors, and moves to quash the indictment. Motion sustained.

Preslie B. Cole, Asst. U. S. Atty. (Herbert M. Peck, U. S. Atty., on the brief), for the United States.

J. B. Dudley, of Oklahoma City, for defendant.

POLLOCK, District Judge. Defendant in this case was indicted on four counts for violation of sections of the general revenue law. These violations are charged to have been committed April 7, 1920, after the Eighteenth Amendment to our national Constitution had become operative, and after the provisions of the Volstead Act (41 Stat. 305) putting national prohibition into effect had come into full force and operation. By the motion to quash it is sought to raise the question whether the general revenue laws of the government had, by reason of the terms and provisions of the Volstead Act, become inoperative at the date the offenses are charged to have been committed by defendant.

I am informed this question is now pending before the Supreme Court and will there soon receive authoritative decision. Meanwhile defendant herein is entitled to an assertion of his rights as a citizen. In all reason the government should not be permitted to occupy the dual and inconsistent positions of absolute prohibition in the enforcement of the Volstead Act against the manufacture and sale of intoxicating liquors, on the one hand, and at the same time recognizing that which is prohibited and made criminal by the Volstead Act to be a lawful source of revenue under the old revenue statutes. These positions are too inconsistent to be approved; and this, aside from the repealing clause of the Volstead Act, which reads as follows:

"All prior statutes relating to alcohol as defined in this title are hereby repealed in so far as they are inconsistent with the provisions of this title."

As the defendant, through his counsel, confesses his guilt of violating the provisions of the Volstead Act, in full force and operation at the time the offenses were committed, and as the penalties for the violation of the Volstead Act are less severe than for violation of the Revenue Act, and as defendant may not be twice placed in jeopardy or punished for the same offense, I recommend an information be filed or an indictment returned against him for violation of the Volstead Act, in order that he may plead guilty thereto, and that a motion to quash the indictment in this case, drawn under the terms of the Revenue Act, be sustained, and said indictment quashed.

It is so ordered.

T. C. HURST & SON v. FEDERAL TRADE COMMISSION et al.

(District Court, E. D. Virginia. October 2, 1920.)

Commerce \$\infty\$7—Constitutional law \$\infty\$62, 240(1), 296(1)—Eminent domain \$\infty\$2(1)—Trade Commission Act constitutional.

Federal Trade Commission Act Sept. 26, 1914, §§ 5, 6, 9, 10 (Comp. St. §§ 8836e, 8836f, 8836i, 8836j), in authorizing the commission to prevent unfair methods of competition in commerce by proceeding against any person, firm. or corporation believed to be using such unfair methods, with the right to have access to and require the production of documentary evidence, and after a hearing to order the respondent to cease and desist from using such methods, such order however being enforceable only by the Circuit Court of Appeals, in which a full transcript of the proceedings is required to be filed, and which is given exclusive jurisdiction to affirm, modify, or set aside the order, held not unconstitutional: (1) As beyond the constitutional power of Congress; or (2) as delegating legislative power to the commission, because it is empowered to determine what shall constitute unfair methods of competition in commerce; or (3) because it attempts to regulate intrastate commerce; or (4) because the proceedings authorized discriminate between persons engaged in the same line of business and take the property of one without due process of law and without just compensation.

Trade-marks and trade-names \$\infty\$68—Gifts or allowances to customer's employé by merchant, without knowledge of employer, held unfair.

The Federal Trade Commission has the right to decide that gratuities or allowances by a merchant to an employe or agent of customer, without the knowledge or consent of the employer, is unfair, and may order persons giving the same to cease and desist therefrom.

3. Injunction 7-Proceedings by Trade Commission will not be enjoined.

A District Court will not grant an injunction restraining the Federal Trade Commission from examining the books and records of a person charged with using unfair methods of competition in commerce, as authorized by Federal Trade Commission Act Sept. 26, 1914, § 9 (Comp. St. § 8836i), in view of the fact that by section 5 (section 8836e) of the act the Circuit Court of Appeals is given exclusive jurisdiction to review proceedings of the Commission.

In Equity. Suit by T. C. Hurst & Son against the Federal Trade Commission and its members and counsel. On motion for preliminary injunction. Motion denied.

Henry Bowden and H. G. Cochran, both of Norfolk, Va., for complainants.

E. C. Alvord and Charles S. Moore, both of Washington, D. C., for

defendants.

WADDILL, District Judge. The bill in equity in this case is filed by the complainants, who are engaged in carrying on and conducting business as ship chandlers, supplying ships with provisions and supplies, and delivering such provisions and supplies to ships within the state of Virginia, against the above-named defendants, to enjoin and restrain them and each of them, their agents, servants, employés, and subordinates, from prosecuting a certain complaint inaugurated by the commission pursuant to its order of the 29th of June, 1920, against the complainants, T. C. Hurst & Son, wherein it is averred and charged that the said T. C. Hurst & Son, at Norfolk, Va., while engaged in their business of furnishing merchandise and supplies, such as groceries, provisions, meats, and deck and engine supplies, for transportation in interstate and foreign commerce, to ships engaged in commerce between the states of the United States, and between the United States and foreign countries, and upon foreign and American owned vessels, in direct competition with other firms, copartnerships, and corporations similarly engaged, gave captains, engineers, and other employés of vessels, without the knowledge and consent of the owners thereof, sums of money and other gratuities, as an inducement to influence such employés or owners to purchase supplies from the respondents, the complainants herein, which said acts were charged to be unfair methods of competition in commerce, within the intent and meaning of section 5 of the Act of Congress of September 26, 1914 (Comp. St. § 8836e), creating the Federal Trade Commission.

The said complainants further sought to enjoin and restrain the commission, its members, agents, and attorneys, from enforcing, or attempting to enforce, or causing to be enforced against the complainants, its members, agents, servants, employés, or customers, any of the penalties, seizures, and forfeitures provided in the act of Congress aforesaid, creating the Federal Trade Commission, dated September 26, 1914, 38 Stat. 717 (Comp. St. §§ 8836a–8836k), entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and from arresting and presecuting, or in any wise interfering with, the proper business and affairs of the complainants, and from requiring them to produce before the commission, or its examiners or agents, the books, records, papers, and documents bearing on and showing their said business, and to enjoin and restrain the commission and its representatives from ex-

amining said books, records, papers, and documents.

[1] The complainants aver that sections 5, 6, 9, and 10 (Comp. St. §§ 8836e, 8836f, 8836i, 8836j) of the act creating the commission are unconstitutional and void: (a) Because beyond the powers vested in Congress by the Constitution; (b) because they delegate to the commission, legislative authority, in violation of articles 1 and 3, and Amendment 10 of the Constitution; (c) because the commission is

empowered to define and determine what shall constitute "unfair method of competition in commerce"; (d) because the act attempts to regulate intrastate as well as interstate commerce; and (e) because the order and proceedings sought to be enjoined discriminate between persons engaged in the same line of business, and take away the property of one without due process of law, and without just compensation, in violation of the fifth, sixth, ninth, and tenth Amendments of the Constitution, without molesting the other, and for other alleged grievances more particularly and specifically set up in the bill of the complainants.

The importance of this case to the government is manifest, as it seeks in effect to stay the hand and destroy the efficiency of one of the great commissions created by Congress to deal with matters committed to its authority and control. The constitutionality of the act itself is challenged; also the right of the commission to decide what shall constitute unfair competition, and of Congress to authorize it so to do, as well as the manner in which the commission may proceed in the discharge of its duties to determine what is unfair competition; the specific complaint being that the commission may not proceed against a particular person, firm, or corporation, believed to be engaged in unfair competition, but must in the same proceeding include all other persons similarly engaged.

[2] With a view of showing just what the commission is empowered to do, and what authority and jurisdiction this court has to act in respect thereto, reference should be had to the provisions of the act of Congress in question. Section 5 of the act is as follows:

"Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

"Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person. partnership or corporation to cease and desist from the violation of the law so charged in said complaint. * * * If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation or order such person, partnership, or corporation to cease and desist from using such method of competition.

"If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the

entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

"Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the cemmission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive."

The above extracts from the act of Congress make it clear just what the powers of the Federal Trade Commission are. The method of procedure for carrying out and executing these provisions by the commission is specific, as is also the effect of its decisions, and the manner in which the same may be enforced. The purpose of the act is to make unfair methods of competition in commerce, unlawful, and the commission is empowered and directed to prevent persons, partnerships, or corporations, other than banks and common carriers, subject to the acts to regulate commerce, from using unfair methods of competition in commerce. The power granted is far-reaching in its results, and of a most salutary character. Banks and common carriers were doubtless excepted from the provisions of the act, because each was subject to the direction and control of a separate commission largely similar to that of the Trade Commission.

The contention that the act of Congress is unconstitutional, for any of the reasons specified, is without merit, as it is manifestly within the power of Congress to legislate generally in respect to the burdens that may or may not be imposed upon foreign and interstate commerce, and it is also within its power to declare what would be fair and what unfair methods and dealings in relation thereto, and how the same should be ascertained and determined. The commission is given full power and authority to investigate, make findings of fact, and render its judgment and order in relation thereto, and before the same is carried into effect, the judgment of the Circuit Court of Appeals, the second highest court under the government, is to be sought by the commission, to enforce its order, and any party required by such order to cease and desist from using such method of competition may obtain a review of such order in the Circuit Court of Appeals, by filing its written petition praying therefor. The action of the Circuit Court of

Appeals is final, save that when its interposition is sought by the commission, certiorari lies from its decision to the Supreme Court of the United States. The jurisdiction of the Circuit Court of Appeals to enforce, set aside, or modify orders of the commission, is exclusive. In all of the proceedings, whether before the commission or the court, the amplest provision is made for notice to and full hearing of all parties interested, and for this court, for any of the reasons urged, to anticipate by injunction the action of the commission, and the judgment of the court charged under the law with the review thereof, would be clearly an usurpation of authority.

[3] Counsel urgently insist that injunctive relief be afforded to prevent the seizure and inspection of the complainant's private papers, books, and records, showing their business transactions, relating to the subject under investigation. While, undoubtedly, the relief sought may sometimes be afforded by injunction, still it does not seem to the court the proper remedy here, where the enforcement of the orders sought to be enjoined are exclusively within the jurisdiction of the Circuit Court of Appeals. Wilson v. Lambert, 168 U. S. 611, 618, 18 Sup. Ct. 217, 42 L. Ed. 599. From this court's action, as well in refusing as granting an injunction (Judicial Code, § 129 [Comp. St. § 1121]), an appeal lies direct to that court, and it, or a judge thereof, would doubtless stay proceedings sought to be enjoined, where the appeal was from an order refusing an injunction, if in the judgment of the court such action should be necessary to meet the ends of justice.

For the reasons stated, the court, being further of opinion that the commission acted entirely within its rights of and concerning a matter liable to injuriously affect commerce, doth decline to grant the injunction prayed for.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. CITY OF HOUSTON.

(District Court, S. D. Texas. September 4, 1920.)

No. 108.

Equity \$\infty\$=409—Findings of master not conclusive in suit to enjoin enforcement of state statute.

In a suit to enjoin enforcement of a state statute or municipal ordinance on constitutional grounds, the court must exercise its own judgment, unfettered by artificial rules, and cannot be concluded by findings of fact made by a master.

2. Telegraphs and telephones \$\iiii 33(1)\$—Valuation for fixing rates.

The value of the property of a public service corporation, as a telephone company, for the purpose of determining the reasonableness of rates, is to be taken as of the time of the inquiry, with allowance for increase or decrease in value above or below its original cost, and considering, also, the cost of reproduction.

3. Telegraphs and telephones \Longrightarrow 33(1)—Contract fixing valuation for rate purposes.

A contract embodied in a city ordinance, permitting the merger of two telephone companies and its acceptance, providing that there should be no increase in rates unless necessary to permit the new company to earn a

fair return on "its capital actually invested" in the local plant, where fully executed by acceptance of the ordinance and taking over and operating the property, held binding on the company, and to fix the valuation on which it was entitled to earn a fair return.

4. Telegraphs and telephones \$\iiii 33(1)\$—Valuation for rate purposes limited by contract.

Where a contract between a city and a telephone company, made by an ordinance and its acceptance, fixed the valuation of the company's property for rate purposes as "its capital actually invested" in the plant, no addition can be made to such valuation for going concern value of the plant.

5. Telegraphs and telephones \$\iiii 33(1)\)—"Working capital."

The "working capital," on which a telephone company is entitled to earn a fair return, in addition to the value of its physical property, is the amount of cash and supplies necessary to be kept on hand to meet current expenses and contingencies as they arise in the proper conduct of the business.

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, Working Capital.]

6. Telegraphs and telephones = 16—Contracts with controlling corporation

for supplies held not invalid.

Contracts under which complainant telephone company paid the American Telephone & Telegraph Company for apparatus and services in accounting and laboratory work, and a supply company for apparatus and supplies, practically all of the stock of both complainant and the supply company being owned by the American Company, held not invalid, in the absence of evidence that the prices paid were excessive or that they were not advantageous to complainant.

7. Telegraphs and telephones \$\iiins 33(1)\$—Ordinance rates held confiscatory. Rates for service by a telephone company fixed by ordinance held confiscatory and not enforceable, and the company held entitled to an increase which would enable it to earn a net return of 8 per cent. on the capital invested.

In Equity. Suit by the Southwestern Telegraph & Telephone Company against the City of Houston. Decree for complainant. See, also, 256 Fed. 690.

D. A. Frank, of St. Louis, Mo., Joseph D. Frank and William H. Duls, both of Dallas, Tex., and John Charles Harris, of Houston, Tex., for plaintiff.

W. J. Howard and Kenneth Krahl, both of Houston, Tex., for de-

fendant.

JACK, District Judge. In 1909 the city of Houston passed an ordinance fixing local telephone rates under which plaintiff company operated until 1915, when it acquired, by purchase and merger, the property of the Houston Home Telephone Company. The ordinance authorizing the merger, duly accepted by the plaintiff company, contained the following provision as to future increases in rates:

"The Southwestern Telegraph & Telephone Company agrees that it will not increase rates as at present charged by it for service in the city of Houston, unless it appears upon a satisfactory showing to be made before the city council of the city of Houston, of all receipts and disbursements, and said showing must, in order to justify or warrant a raise in the rates, reasonably prove that there exists a necessity for an increase of charges in order that said company may earn a fair return upon its capital actually invested in the Houston plant; and it is agreed for a term of five years from this date that a fair return upon said capital and investment is not less than 7 nor more than 8 per cent."

In December, 1917, plaintiff made application to the city council for authority to put in effect a schedule of increased rates. Hearings were had, but no final action on the application was taken by the council. In August, 1918, the federal government took control of all the properties of the defendant company, including the Houston exchange, and continued to operate the same through the Postmaster General, who, in February, 1919, adopted the proposed new schedule of rates. To avoid prosecutions, under the old ordinance of 1909, the telephone company as agent for the Postmaster General, brought suit against the city to enjoin it from seeking to enforce the old rates. This court granted the injunction, holding that, the property being operated by the President, through the Postmaster General, as a war measure authorized by Congress, his right to increase rates could not be questioned by defendant. 256 Fed. 690.

On July 31, 1919, the United States returned its property to the telephone company, and promptly thereafter the mayor of the city notified the company that, the injunction granted having become inoperative, the city would insist upon a return to the schedule of rates prescribed by the ordinance of 1909, whereupon plaintiff filed an amended and substituted bill, seeking an injunction on the allegations that the schedule of rates fixed by the ordinance of 1909 would not yield, and had for several years past not yielded, revenue in excess of the operating expenses, and that such ordinance was confiscatory of its property and in violation of the Fourteenth Amendment of the federal Constitution, forbidding the taking of property without due process of law.

With instructions to take the evidence and report his findings of fact and conclusions of law, the case was referred to Julian Llewellyn, special master, who, in a carefully prepared and well-considered report, found that the ordinance was confiscatory, and that its enforcement should be enjoined. The case is now before the court on defendant's exceptions to the master's report.

[1] The consideration and effect to be given by the court to the findings of fact by the master in a case of this kind, involving the public interest, is well expressed by Mr. Justice Moody in Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371:

"At the threshold of the consideration of the case the attitude of this court to the facts found below should be defined. Here are findings of fact by a master, confirmed by the court. The company contends that under these circumstances the findings are conclusive in this court, unless they are without support in the evidence or were made under the influence of erroneous views of law. We need not stop to consider what the effect of such findings would be in an ordinary suit in equity. The purpose of this suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an act of the Legislature that is attacked, but an ordinance of a municipality. Nevertheless, the function of rate-making is purely legislative in its character, and this is true, whether it is exercised

directly by the Legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the Legislature, and must be regarded as an exercise of the legislative power. * * * There can be at this day no doubt, on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact the invalidating facts must be proved to the satisfaction of the court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master, confirmed by the trial court, are without weight, or that they will not, as a practical question, sometimes be regarded as conclusive. All that is intended to be said is that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. We approach the discussion of the facts in this spirit."

The rule is well established that rate-making bodies must allow such a rate to public service corporations as will yield a fair return upon a reasonable value of its property used for the public. The total value of the property the master found to be, in round figures, as follows: Value of physical property, \$5,000,000; going concern value, \$765,000; working capital, \$238,000; total, \$6,003,000. The defendant excepted to this finding, claiming that the valuation should have been as follows: Physical property, \$2,750,000; going concern value, \$50,000; working capital, \$100,000; total \$2,900,000.

Physical Property.

[2] Under the general rule, as stated by the Supreme Court in Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, the value of the property is to be determined as at the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. In the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, the court said:

"It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law. * * * The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. The scope of the inquiry was thus broadly described in Smyth v. Ames, 169 U. S. 546, 547: In order to ascertain that value, the original cost of construction, the amount expended in permanent improve-

ments, the amount and market value of its bonds and stock, the present, as compared with the original, cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

With the high cost of labor and material, caused by the war, and which still prevails, the cost of reproduction of the plant would be far in excess of the original cost. Taking into consideration the cost of reproduction, the original cost, and these various elements which the courts have held should be included, the master found the value of the physical property to be \$5,500,000, from which he deducted \$500,000 for depreciation, leaving a net valuation of \$5,000,000, whereas the actual cost of the property, as shown by the company's books, was \$4,571,567.

[3] While under the general rule, and in the absence of any agreement to the contrary, both the cost of reproduction and the original cost must be considered in fixing present value, the present case is exceptional, in that, by the terms of the ordinance permitting the plaintiff company to purchase a competing telephone exchange in Houston, it is specifically provided that an increase of rates shall be permitted only when necessary to permit the company to earn a fair return, not upon the value of its property, but upon "its capital actually invested in the Houston plant." Thus, by the terms of its contract with the city, the telephone company has specifically waived its right to claim anything more than a fair return on its capital actually invested, which is the actual cost of the property.

It is true, as held by the master, that a municipal corporation under the Constitution and laws of Texas may not bargain away its right to fix rates (San Antonio v. Altgelt, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491), and it may be that it cannot bind itself by an agreement that the basis of valuation on which rates may be fixed shall be other than that which the courts have held to be the legal basis. Had the contract, evidenced by the ordinance and its acceptance, been attacked on this ground while yet executory, it may be that the courts would have annulled it for want of mutuality, but the contract is no longer executory. It has been executed; the plaintiff company has long since taken over and absorbed the property of the competing company, and it is now estopped from disavowing the agreement at the time made by it as a substantial part of the consideration for the city's consent to a merger of the two corporations. I therefore think that the master erred in treating as of no effect this provision of the ordinance.

[4] The physical value of the property on which plaintiffs is entitled to receive a fair return is the value as shown by the books, \$4,571,567.

Going Concern Value.

In the Des Moines Gas Co. v. City of Des Moines, 238 U. S. 165, 35 Sup. Ct. 811, 59 L. Ed. 1244, the Supreme Court held:

"That there is an element of value in an assembled and established plant doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use."

See, also, Denver v. Denver Union Water Co., 246 U. S. 178, 38

Sup. Ct. 278, 62 L. Ed. 649.

The master's inclusion of a going concern value, under authority of these cases, would have been proper, though I do not think it should have been fixed in excess of one-half of the amount named, had it not been for the plaintiff's agreement, in accepting the merger ordinance, that the sum on which it should receive a fair return should be the capital actually invested, which is equivalent to the actual cost

of the plant, plus the working capital.

In the statements previously filed with the city of the valuation of its property, it does not appear that any going concern value had been included, and it seems clear that none was contemplated in the merger ordinance. Over \$1,000,000 of the capital actually invested by plaintiff company, as shown by its books, on which it is entitled to receive a fair return, represents the price paid for the plant of the Houston Home Company, and, as the latter was at the time a going concern, that price included its going concern value. If now the going concern value of the merged corporations be included in the sum on which a fair return is to be paid, it is evident that there would be twice included the going concern value of the Houston Home Company property.

The cost of creating such going concern value was paid as expenses of operation out of the revenues of the company, much of it since 1909. When the council, in that year, fixed the present schedule of rates, as to which no complaint was made by the company until December, 1917, it must be presumed that the council gave full consideration to all operating expenses in determining a fair rate. Such expenses, so paid out of the company's revenues, cannot be said to be "capital actually invested," and should not be included in the total

valuation on which plaintiff is entitled to receive a fair return,

Working Capital.

[5] By working capital is meant the amount of cash and supplies necessary to be kept on hand, to meet current expenses and contingencies, as they arise, in the proper conduct of the business. The master allowed, on this item, \$238,000, being the proportion of the total estimated operating capital of the company at all of its exchanges in Texas allocated to Houston, as figured and estimated by one of the plaintiff's witnesses.

The plaintiff renders bills in advance to its subscribers. Its average monthly expenditures are about \$80,000, so that, if every subscrib-

er were a month and a half late in settling his bill, a working capital of \$80,000 would ordinarily suffice. Making due allowance for emergencies and unforeseen expenses, I think that \$120,000 would be a liberal allowance for working capital, and that the finding of the master should be reduced from \$238,000 to that sum.

Income and Expenses.

There is no dispute as to the amount of plaintiff's revenue actually received at the Houston exchange during 1919, nor is there any question as to the master's finding of the expenses paid out for the same period, though exception was taken to allowance of 6.33 per cent. reserve for depreciation. The total revenues, less excess collected over the old rates while the property was operated by the government, aggregated \$908,258, while the expenses, including reserve for depreciation, totaled \$1,214,462, leaving a deficit of \$306,204.

Division of Long-Distance Tolls.

It is contended by the defendant that the plaintiff, who owns certain toll lines running out of Houston, has not credited to the Houston exchange its just proportion of toll receipts for long-distance mes-The proportion so credited is 25 per cent, on all long-distance tolls collected in Houston, which the master found was greater than that allowed any one of the 8 independent exchanges in the state by independent long-distance toll lines with which they connect, that the rate is the same as that allowed the Houston exchange by independent long-distance lines running into Houston, and that the rate is larger than that paid by the plaintiff company to over 300 independent exchanges. Furthermore, 25 per cent. to the exchange, the master found, is the customary allowance made by state commissions throughout the country, and that it is not practical to segregate the cost of handling long-distance messages as between local exchanges and long-distance lines. The court will sustain the division, as the usual and customary one. See Cumberland Telephone & Telegraph Co. v. Louisville (C. C.) 187 Fed. 637.

American Telephone & Telegraph Company.

[6] Plaintiff's telephone supplies are purchased from the Western Electric Company, practically all of whose stock is owned by the American Telephone & Telegraph Company, which likewise owns 99 and a fraction per cent. of the stock of plaintiff company. The American Telephone & Telegraph Company has a contract with the plaintiff by which it furnishes certain telephone apparatus and renders certain service in accounting and laboratory work, for which it is paid 4½ per cent. of plaintiff's gross operating revenues. The amount paid for this service is claimed by plaintiff to be excessive as are likewise alleged to be the prices charged by the Western Electric Company. It is furthermore contended that such service by the American Telephone & Telegraph Company should be rendered at cost, and that the evidence offered fails to show what was such actual cost. The master, after careful consideration of the mass of conflicting testi-

mony, held against such contentions of the plaintiff, and found that the plaintiff gets full value for the amount of money paid the parent company, and unqualifiedly approved the 4½ per cent. payment, which in 1919 aggregated \$43,528.

As to the nature of the service rendered, the master quotes with approval from the Supreme Court of Michigan in the case of Detroit v. Railroad Commission and State Telephone Company, 177 N. W. 306, started April 10, 1920, in which that court quotes with approval the opinion of the Railroad Commission of Michigan, as follows:

"The American Telephone & Telegraph Company, itself a large corporation, financed by the issuance of its own securities, and occupying the same relative position to telephone companies of several other states, is able with practicability to, and does, maintain extensive laboratories and offices, where careful experiments are constantly being made, designed to produce improvements and economies in the service. It employs engineers, accountants, auditors, and others, whose services are highly beneficial to telephone companies, whose employment would be impossible to any of these associated companies individually. The cost to any individual company of maintaining a staff of skilled assistants of like character and ability would be prohibitive; yet under this arrangement the Michigan State Telephone Company now has the benefit of all that these men do or produce in the way of improvements, refinements, or economies in telephone facilities, service, or methods of operation. True, the results of the investigations and experiments of these men, once they are achieved, may be given to many associated companies as readily as to one; but that does not lessen the value of them to any one of the associated companies. The Michigan State Telephone Company's securities are taken and handled by the American Telephone & Telegraph Company at uniformly low interest rates and without large discounts. This service is one the value and importance of which it is impossible to calculate. * * * The effect of this arrangement is that the state company is given the benefit of the services of the most efficient engineers, accountants, traffic men, patent lawyers, and others possible to secure. They are furnished with certain standard parts of all telephone sets, which are kept in repair for them. They are aided in their financial matters extensively. These are services which the company needs, which are useful to it, inuring to the benefit of its patrons, which, if they could otherwise be had at all, certainly would not be obtained at any less cost than under their contract with the American Telephone & Telegraph Company. It is apparent that this contract should receive the approval of the commission. * * * It follows, in the opinion of the commission, that unless the contracts between the Michigan State Telephone Company and the American Telephone & Telegraph Company, under which certain facilities are furnished and certain engineering, accounting, and other services are rendered to the Michigan State Telephone Company, and between the Michigan State Telephone Company and the Western Electric Company, under which the applicant company purchases certain of its supplies and materials, amount to a fraud upon the public by reason of the price paid by the Michigan State Telephone Company being excessive, then the disbursements of the Michigan State Telephone Company, in pursuance of these contracts, must be considered legitimate and proper charges upon its revenues. It was made to appear upon the hearing before the commission by Mr. Burch that the prices and terms at which the Western Electric Company furnished property and facilities to the Michigan State Telephone Company were very favorable, that the facilities furnished by the Western Electric Company were a good standard, the world over, and furnish an excellent basis for fixing unit prices."

The scope of the inquiry in this case cannot be extended to the determination of a fair rate of profit to the American Telephone & Telegraph Company on its capital invested, or to such a rate of profit to the Western Electric Company, which is not a public service corpora-

tion, but a private corporation engaged in the business of manufacturing telephone apparatus. The problems presented by the relations of such holding and subsidiary corporations are serious ones, which vitally affect the public interest, but they are problems which pri-

marily call for legislative consideration.

The fact that the American Telephone & Telegraph Company dominates and controls both the plaintiff company and the Western Electric Company is sufficient to cause the courts to very closely scrutinize any dealings between these corporations whereby any unjust advantage might be taken by the parent company, or the effect of which might be to enable it to receive a larger return than that which forms the basis of the established rate for telephone service to the public. Such corporations, however, are not debarred from entering into contracts with each other, and where such contracts are fair and advantageous to the subordinate corporation, they will be recognized and given effect.

Reserve for Depreciation.

The plant's present condition, according to witnesses, is 92 per cent. perfect; that is to say, with the replacements which have from time to time been made, there is only a general depreciation now existing of 8 per cent. The company has not shown the actual amount paid out for replacements prior to 1909, when it first began a system of bookkeeping so as to show such costs. The realized depreciation for 1909 to 1917 is shown to have been only 4 per cent. of the book cost of the plant, but this does not cover replacements which will in the future have to be made, such as central office equipment, buildings, underground cable, etc. During 1918 and 1919, while the property was being administered by the government, a reserve of 5.72 per cent. was allowed for depreciation. The usual amount of replacements were not actually made during government control, because of the war and the priority given to war industries. The 6.33 per cent. reserve allowed by the master for depreciation would, I think, be too much, if figured on the value of the plant, not including depreciation, as was done; but if the percentage be taken on the book value, which under the merger contract should govern, I think it would, under present conditions, be a proper allowance.

Return on Capital Actually Invested.

[7] The master found that 8 per cent. under present conditions would be a fair return. In Lincoln Gas & Electric Co. v. City of Lincoln, 250 U. S. 256, 59 Sup. Ct. 454, 63 L. Ed. 968, the court said:

"It is a matter of common knowledge that, owing principally to the World War, the cost of labor and supplies of every kind has greatly advanced since the ordinance was adopted, and largely since this case was last heard in the court below; and it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants or similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

A return of 8 per cent. is, I think, under present conditions, a fair one, if restricted, as it should be, to the capital actually invested.

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Summarizing, the capital actually invested, on which plaintiff is entitled to receive a fair return, is as follows:

 Value of physical property.
 \$4,571,567.00

 Working capital
 120,000.00

\$4,691,567.00

It should receive on this a net return of 8 per cent., or \$375,325. Instead of receiving such income, under the master's findings of revenues and expenses, it sustained a loss during the year 1919 of \$306,-204. This includes an allowance of \$348,150 for depreciation, being 6.33 per cent. of \$5,500,000. Substituting for \$348,150, \$289,380, being the same percentage on the actual cost, would reduce the excess of expense over revenue to \$247,434, net loss for 1919. It follows that the said ordinance of 1909 is confiscatory of plaintiff's property and in violation of the Fourteenth Amendment of the federal Constitution, prohibiting the taking of one's property without due process of law. The master's findings, except as otherwise stated, are approved. A decree will be prepared and presented in accordance with the views herein expressed.

The findings of the court on the questions of fact herein presented are intended as a guide to the city council in enacting a new ordinance establishing a new schedule of rates. The court's decision relates only to the present. A year hence conditions may so change as to warrant a further increase or a decrease in rates. The decree will be without prejudice to either party, should conditions hereafter justify, to petition the court to rescind its injunction, or to grant such relief as may be necessary or needful under such changed conditions, and to that end the court will retain jurisdiction.

FEASEL et al. v. NOXALL POLISH MFG. CO. et al.

(District Court, E. D. Pennsylvania. October 21, 1920.) No. 1875.

1. Injunction 56—To prevent wrongful use or disclosure of trade secret. Where complainant, who had devised a process or formula for making a furniture polish, which he held as a trade secret, disclosed such formula to defendant under a contract by which defendant was to manufacture the polish and in reliance on its agreement not to divulge the formula, nor make use of it, except for purposes of the contract, but defendant continued to use it, and to make and sell the polish after the contract had been terminated, complainant held entitled to an injunction.

2. Trade-marks and trade-names \$\iiint_68\$—Representing defendant's product as comp'ainant's, unfair competition.

A defendant, which not only wrongfully used a secret formula of complainant in making a furniture polish, but sold the product under its own label, representing it, however, as the same as that made by complainant, held chargeable with unfair competition.

In Equity. Suit by Harry L. Feasel and H. L. Feasel's Laboratory, Incorporated, against the Noxall Polish Manufacturing Company and others. Decree for complainants.

Francis F. Burch, of Philadelphia, Pa., and Kenyon & Kenyon, of New York City, for plaintiffs.

Evans, Forster & Wernick, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. In looking for a support upon which to base the necessary fact findings to enable us to determine this cause, the trial supplies us with a footing which is more unstable than a quicksand and more changeable than shifting bars. A few general outline facts give us a little fast land upon which to stand. Beyond

this all is quagmire.

The plaintiff is the inventor, in the sense of having discovered or come upon a way to make a furniture polish. He named his product "High Luster Finish," and designated it "H. L. F." The recipe for making this polish and the process of making it was that conferred by right of discovery. He enjoyed a practical monopoly, because of his knowledge of this process and the ignorance of all others. This right of property continued exclusive as long as his knowledge was exclusive. He could, in consequence, retain his proprietary right only by

keeping his process from the knowledge and use of others.

Assuming patentability, he might have secured this exclusive right (for a limited time) by law. The same law which granted him the right would have protected him in its enforcement. The price which the law exacted for the aid thus given him was the disclosure of his process for the benefit of the public after his patent had expired. This aid of the law he did not seek, because he was unwilling to pay the price. He wished, however, notwithstanding, to secure his monopoly. The keeping of his process a secret was the only way this could be done. He was without the equipment of manufacture, and without financial

means to provide for one.

The defendant company was a manufacturer of polishes. It had a manufacturing plant, and the means to supply the product to the market. The plaintiff could find the purchasers to whom to make the sales, thus creating a market. This suggested a business combination, so that the defendant might manufacture the plaintiff's product, for which the plaintiff was to find sales. It necessitated a disclosure of the secret process. The combination was made. Its continuance was interrupted by the thought of what the situation would be when the contract between the parties was at an end with respect to the control of the trade built up. The plaintiff contributed, to the building up of that trade, his product and his efforts to create a market. The defendant contributed its capital, manufacturing skill, and business reputation. If the product sold was wholly known as the plaintiff's product, the good will established would be his, and he would secure the continuance of the trade. If the product was known to the trade as the manufacture of the defendant, the defendant would have a call upon the trade for the continuance of its custom.

The name under which it was sold would largely impress the trade—whether it was sold as a Noxall polish or as Feasel's "High Luster Polish." The former was the name by which defendant's product was known, and the latter the name given to plaintiff's product. If what

was jointly sold became identified as a Noxall product, plaintiff would be compelled to build up a new trade for it; if it was known as a Feasel product, he could retain the trade already established. Each party in consequence attached importance to the label, and to which of them kept in touch with the trade, and each insisted that prominence be given to his own name, and protested against any being given to the other.

The plaintiff was persistent in his demand that the product be wholly known as his and as manufactured for him. The name of the manufacturer was of no moment. The defendant was equally insistent that the product was its manufacture, and should be known as such, although made in accordance with the plaintiff's formula. The differences, which because of this arose, resulted in formal written notice from the plaintiff on December 9, 1918, of a cancellation of the contract by him. Following this, each of the parties sold a polish.

Thus far there is no dispute over the facts. The complaint made by the plaintiff is twofold. One is that the defendant unlawfully appropriated to its own use his property by making and selling "High Luster Polish" made in accordance with his formula. This was in violation of his rights, because his process was a secret process, disclosed to defendant in confidence, and, further, because its continued use of his

process was a flagrant breach of its contract not so to do.

The other branch of the complaint was that the defendant was guilty of unfair competition, in that it was falsely imposing upon the public its make of polish as his make. The plaintiff asks to have the defendant restrained from using his process, and from disclosing it, and from resorting to the methods of unfair competition, of which complaint is made.

The main difficulty in plaintiff's way he has created for himself, or it has been made for him by one of his witnesses. He undertook to prove, and testified himself to the averred fact, that the defendant had placed over the labels on bottles containing "High Luster Polish" labels proclaiming the product to be Noxall product, and had placed

the product with the changed labels upon the market.

The plaintiff further testified that he had discovered the fraud by finding the bottles upon the shelves of the store of a retail dealer in York. This fact (if it had been one) was highly significant. It was proof that defendant had sold plaintiff's product, and it was of still greater significance, in that it convicted the defendant of untruthful statements in testimony heretofore given. The plaintiff very dramatically described the circumstances under which he had "discovered" the fraud. In his testimony he was fully and in detail corroborated by a witness, whom he called to support him in the statement he had made. It developed subsequently that this very witness had himself placed the labels on the bottles, and there was no satisfactory evidence that the defendant had anything to do with it.

The difficulty to which we referred as one created by the plaintiff is that he had sought to establish as a fact an act of the defendant which, if its act, went far toward establishing his case. The whole of this testimony was baseless in fact. There is no justification for a finding that the testimony was false, in the sense that the plaintiff knew of

its falsity, and we acquit him of any intention to deceive the trial court. The fact is, however, that the court was very deeply impressed by this testimony, and in grave danger of being misled by it. We cannot acquit the witness called to corroborate him of any want of knowledge. The only explanation which can be made of his conduct in not only permitting a wrong impression to go uncorrected, but in supporting the testimony which made it, is the curious moral obliquity produced by partisanship in the case of some witnesses. His only explanation of his failure to testify to the real fact is that he was not asked.

The difficulty created, to which we again refer, is that this episode creates a want of confidence in the correctness of any finding based upon any of the other testimony in the cause. A similar difficulty has been created by the defendant for itself. This calls for the characterization of a shiftiness in the defense.

The defense, as finally presented (but not until final argument), is that the defendant had with the plaintiff a contract which gave it the right to manufacture and sell the plaintiff's polish. This contract the plaintiff, without right or justification, had attempted to terminate on December 9, 1918. The defendant claimed the contract to be still in force, and acted upon it to the time of the filing of the answer, continuing the manufacture and sale of plaintiff's product, as it was its right to do. When the answer came to be filed, however, the defendant decided that, although not bound so to do, it would accept the plaintiff's termination of the contract, and thereafter it had neither manufactured nor sold "High Luster Polish," beyond the sale of stock on hand, which the contract gave them the right to do.

An elaborate argument is addressed to us to show that this is consistent with the averments of the answer and the testimony of the defendant on the motion for a preliminary injunction, and the inconsistencies between this defense and the testimony given at the trial are explained away by the fact that the witnesses did not distinguish, and did not have their attention called to the distinction, between acts before and after the date of the filing of the answer. We do not feel called upon to make further comment upon this feature of the case than to make the finding that there are glaring inconsistencies between this defense and that presented in the testimony on behalf of the defendant, and that the explanation given of these inconsistencies is not accepted.

The motion for a preliminary injunction was denied, with the denial before the court that the defendant, after the contract had been called off by the plaintiff, had either made or sold the plaintiff's product, with the statement, on the contrary, that it had scrupulously confined itself to its own make of polish. The position of the defendant may have been misunderstood by the court, but there could be no mistaking what the court understood the defense to be. If the court was wrong, an opportunity to set it right was afforded by the trial. So far forth from any correction being attempted, the thought that this was the defense was confirmed by all the occurrences of the trial.

As a consequence, when the evidence was pronounced closed on

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both sides, as the main issue of fact was whether the polish which the defendant was making was or was not substantially identical with the plaintiff's product, the court asked if an analysis would establish the fact, and a continuance was granted to give the parties an opportunity to have a further hearing; the evidence to be taken, if either party asked it, in camera. It now appears that, for at least six months after the contractual relations between plaintiff and defendant had ended, the defendant continued to make and sell the plaintiff's product, employing itself in the meanwhile with experimentations in the effort to find a substitute.

Our final comment upon the acts of these parties is that the only satisfactory decree to be entered (if such were possible) is that it be one against each of them, without being in favor of either. As it is, we must content ourselves with a finding of the facts set forth below, with a statement of the conclusions of law based thereon. It may be added to the foregoing that the position taken by the defendant, that the averments of the answer are to be taken as admitted for want of

a replication, is not tenable since the promulgation of rule 31.

The further point sought to be made that the principle which controls the ruling is that which governs in cases of contract in restraint of trade is based upon a misconception of the governing principle. The doctrine of the law which is really applicable is the equitable doctrine that trust and confidence may not be abused and the abuse of them may be restrained. The doctrine further invoked, that equitable remedies are always of grace, and never of strict legal right, is an accepted doctrine. The only application it is asserted to have, however, is in view of the possible misuse of a decree in favor of the plaintiff. All such danger is avoided by the decree made. The further doctrines invoked, that the aid of a chancellor will not be given in doubtful cases, and that equity will not make amends for past injuries, are rendered inapplicable in this cause—the first by the fact findings made, and the second by the situation presented, which is that equity has jurisdiction of the cause to award injunctive process, and, having that jurisdiction, will proceed to afford full redress for all the injuries done. The argument urged, that the fact that the defendant had been detected in the violation of the confidence reposed in it, and of the obligations of its contract, would act as a deterrent from the commission of further wrongs, is not an argument of sufficient strength to induce us to withhold the injunction prayed for.

Findings of Fact.

[1, 2] 1. The plaintiff had a process or formula for making the furniture polish, known as "High Luster Finish," which was his

property, and preserved by him as a trade secret.

2. This formula was made known by the plaintiff to the defendant in trust and confidence, to enable it to manufacture the polish under the terms of the contract between the parties, and in reliance upon its promise not to divulge the secret to any one, nor use the formula, except for the purposes of the agreement.

3. The defendant used the formula by making "High Luster Finish"

in accordance therewith, and sold the same for more than six months after December 9, 1918.

4. The defendant was guilty of unfair competition, in that it made and sold "High Luster Finish" under the name of Noxall, thereby securing to its own product the benefit of whatever merits the plain-

tiff's product possessed.

5. The defendant was guilty of unfair competition, in that it represented the polish sold by it under the name of Noxall as the polish made by the plaintiff, thereby diverting to itself the value of the good will which the plaintiff had established for his product.

Conclusions of Law.

The plaintiff is entitled to a decree enjoining and restraining the defendant—

1. From making a polish according to the formula disclosed to it by the plaintiff.

2. From disclosing to any one the secret process or formula of the

plaintiff.

3. From representing any polish made by it to be "High Luster Fin-

ish" or substantially identical therewith.

A decree, in accordance with this opinion and these findings, and allowing costs to the plaintiff, may be submitted. Findings of fact 4 and 5 have been made, notwithstanding a possible inconsistency between them, because of the distinction that it is unfair in the defendant to build up a reputation and retain it for Noxall upon the merits of what "High Luster Finish" will do, and it is likewise unfair for the defendant to secure for Noxall the trade which "High Luster Finish" may have built up.

There are two practical difficulties in the way of a satisfactory determination of cases of this general character. One is to guard against giving to the owner of a trade secret more than that to which he is entitled. He is not entitled to the aid of the law in preserving his secret from becoming known to the public. All he is entitled to is protection against a breach of contract or of confidence on the part of any one to whom he has confided the secret on trust. The other difficulty is to guard against the possibility that a plaintiff may make an unfair advertising use of a decree in his favor. Because of this the decree will be limited to the defendant and to such of its agents and employees to whom it may have made known the secret, and will warn

the plaintiff against making any advertising use of the decree.

UNITED STATES v. MULLIGAN.

(District Court, N. D. New York. September 25, 1920.)

1. Searches and seizures \$\inspec 7\text{-Witnesses} \$\inspec 293\text{-Lever Act license and in-

spection provisions not unconstitutional; "private papers."

Lever Act (Comp. 8t. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½e-3115½kk, 3115½f), in providing for licensing of dealers in foods. feeds, fuel, etc., and for regulations requiring keeping of accounts and the inspection of business and records, does not violate Const. Amends. 4 and 5, forbidding unreasonable searches and seizures, and the compelling of one to be a witness against himself; the books and papers which the dealer is compelled to keep as a condition of doing business during the war not being "private papers" within the meaning of the Constitution, but records of a quasi public nature, the keeping of which is a condition of his doing business, by the acceptance of which condition he may be deemed to have waived the constitutional right which he would otherwise have.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Private Papers and Documents.]

2. Indictment and information \$\iiii 60\)—Test for sufficiency stated.

The sufficiency of an indictment is to be tested by ascertaining whether it contains every element of the offense intended to be charged and sufficiently apprises the defendant of what he must meet, and whether, in case other proceedings are taken against him for a similar offense, the record shows with accuracy to what extent he may plead a former acquittal or conviction.

- 3. Indictment and information \$\ifthermolean\$ 110(3)—In language of statute sufficient.

 Where a statute fully, directly, and expressly, without any uncertainty or ambiguity, sets forth all the elements of an offense, an indictment is sufficient which charges the offense substantially in the language of the statute.
- 4. War \$\infty 4\$—Indictment under Lever Act held sufficient.

An indictment under the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½e-3115½kk, 3115½-3115½r), which, after setting out the act and that accused was engaged in dealing in sugar, alleged that the government officers demanded an examination of his books, but that accused refused to give them any information, or to allow them to inspect his property, place of business, and records, and declared his books to be in the safe and did not take them out, was sufficient.

George E. Mulligan was indicted for violating the Lever Act. On demurrer to the indictment. Demurrer overruled.

Frank J. Cregg, Sp. Asst. Atty. Gen., for United States. Borst & Smith, of Schenectady, N. Y. (John H. Gleason, of Albany, N. Y., of counsel), for defendant.

COOPER, District Judge. [1] This is a demurrer to an indictment containing two counts, charging the defendant with violating section 5 of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½g). These two separate counts charge the same acts of violation, one on the 19th day of May, 1920, and the other on the 22d day of June, 1920. The acts constituting the violation as charged are that the

to permit them to enter and inspect the places of business of the defendant, and did refuse to furnish any information whatever as to his manner of conducting his business, or the amount of business done, or the sugar handled, or to whom sold, or any information whatever, and did refuse to allow said agents to inspect his property, his place of business, or the records of his business, stating that he kept his records in a safe, locked up, and he did not produce them.

The statute (the Lever Act) provided that it was essential to the national security and defense, and for the successful prosecution of the war, to secure an adequate supply of foods, feeds, fuel, etc., and that for such purposes the President was authorized to require that persons dealing in such necessaries should be licensed and he was authorized to prescribe regulations for the issuance of the license and requirements for the keeping of accounts of the licensee, for the inspection of his place of business, property, etc., by federal agents. The President duly issued such proclamation and prescribed regulations, which are set forth in the indictment. The defendant took out the license, and it is for failure to permit the inspection of his business and records, and specifically in preventing the federal agents from making such inspection, pursuant to the instrumentalities created by the statute, that the defendant is indicted.

The defendant demurred to the indictment on the ground of its general insufficiency and failure to state facts sufficient to constitute a crime, and more particularly on the ground that the statute and the regulations violated the Fourth, Fifth, and Sixth Amendments to the Constitution. Not much stress is laid by defendant upon the Sixth Amendment, but great stress is laid upon the Fourth and Fifth Amendments, to the Constitution. The Fifth Amendment is that no person shall be compelled in any criminal case to be a witness against himself, and the Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

It is not clear how the question of the Fifth Amendment is raised by this indictment and the demurrer thereto. The defendant has not been subposenaed nor otherwise compelled to attend court; he has not been compelled to give oral testimony relating to himself or his conduct of the business; nor has be been compelled, or sought to be compelled, to produce in court any books or papers which might be incriminating evidence against himself. The cases cited by both sides in the brief are either criminal prosecutions against the defendant for violations of similar statutes, or contempt proceedings based upon a refusal of the defendant to produce or exhibit his books before the grand jury or upon trial. No such situation confronts the defendant here. He is indicted for failure to permit inspection of his business, property, and records and to give, out of court, information as to his business.

But, assuming that, if he were compelled to permit inspection of his books and records, and to give information, the evidence might be used against him in court, the question then arises: Does this statute and the proclamation and regulations thereunder, violate his constitutional rights

under Amendments Fourth and Fifth of the Constitution? He is not a corporation and the authorities distinguishing the rights of the corporation from the individual, do not directly apply. It may also be taken for granted that in the absence of the exercise of the war powers of the government as contained in the Lever Act, if he were sought to be compelled to produce his records in court, or to testify against himself, any statute compelling him so to do would be unconstitutional, and violative of the federal Constitution.

The final question then is: Are the books and papers which defendant is compelled to keep under the statute, as a condition of doing business during the war, necessarily private papers, within the meaning of the Constitution, or are they records of a quasi public nature, which he is compelled to keep as a condition of doing business, and by the acceptance of which condition, in legal effect, he may be deemed to have

waived the constitutional right which he would otherwise have.

It has been held by the Circuit Court of Appeals in this circuit that the Lever Act is constitutional. That the government is technically in a state of war, and was in such state of war at the time set forth in the indictment, and will be until a treaty of peace has been duly entered into, has been held by highest authority. Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 160, 40 Sup. Ct. 106, 64 L. Ed. 194.

No federal decision has been cited by either side which is in close analogy to the case at bar; but there are various decisions of the highest courts of several states, where a similar regulative act was under consideration, and in which a similar state constitutional provision against compelling a person to be a witness against himself was in force. In those state decisions, of course, no war-time powers of the government were involved, but the decisions were based upon the right of the state to regulate the traffic, and to require the individual to comply with certain requirements as a condition of engaging in such traffic.

In State v. Donovan, 10 N. D. 203, 86 N. W. 709, the defendant was a druggist, who was required by statute to keep a record of all sales of intoxicating liquors made by him, which should be subject to public inspection at reasonable times. It was held that the privilege against self-incrimination was not available to him with respect to the books kept under the law, for they were—

"public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection."

On similar grounds in State v. Davis, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640, the courts sustained a statute to preserve prescriptions compounded and to produce them in court when required.

The doctrine of these cases is referred to and approved by Mr. Justice Hughes in deciding the case of Wilson v. United States, 221 U. S. 381–382, 31 Sup. Ct. 544, 545, 55 L. Ed. 771, Ann. Cas. 1912D, 558, in which he cites various other state decisions along the same line from West Virginia, Kentucky, Iowa, Michigan, Illinois, and South Carolina, and also cites an English case arising under a statute requiring the keeping of vestry books. Mr. Justice Hughes' interpretation of these decisions is given in the following language:

"The fundamental ground of decision in this class of cases is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection."

In another place (221 U. S. page 380, 31 Sup. Ct. 544, 55 L. Ed. 771, Ann. Cas. 1912D, 558) in the opinion in the Wilson Case, Mr. Justice Hughes says the principle applies, not only to public documents and public officers, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulations and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained.

There are other cases which seem to uphold this doctrine in other states, in all of which there is a constitutional provision against self-incrimination, like Amendment 5 of the Constitution. In St. Joseph v. Levin, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577, it was held that a city ordinance requiring every pawnbroker to enter in a book a description of the property left with him in pawn, and of the person

leaving it, is valid.

It had been held in People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345, 5 Ann. Cas. 790, that a city ordinance regulating the speed of automobiles and providing a punishment for violation thereof, and requiring each automobile operating in the city to carry a registration number, was not in violation of Const. art. 6, § 2, declaring that no person shall be compelled in a criminal case to be a witness against himself, or be deprived of his liberty or property without due process of law. The court said that it was clear the ordinance does not compel an automobile owner or operator to testify against himself, or deprive him of his property rights, and that the statute was merely a justifiable exercise of the police power, in the interest of the safety of the driving public.

On the question of the constitutionality of chapter 189, p. 307, Laws 1907, requiring registration and publication of internal revenue tax receipts, on the ground it infringes section 13 of the Constitution of this state, which guarantees immunity from self-incrimination, it has been decided that the constitutional immunity has not been infringed, and the Legislature, under its police powers, could require the utmost publicity in this respect. State v. Hanson, 16 N. D. 347, 113 N. W. 371. The case of People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977, Ann. Cas. 1915A, 161, goes even further. The defendant was indicted for violating subdivision 3 of section 290 of the Highway Law, which enacts punishment for not stopping after an accident and make himself known. After approving Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L. R. A. (N. S.) 622, Ann. Cas. 1913C, 923, the court says:

"In the opinion of the learned court of Missouri reference is made to statutory enactments, at least partially similar in principle to that before us, the validity of which has either been upheld by the courts or has never been questioned. As to motor vehicles, laws requiring the registry of the

names of their owners and chauffeurs and the display of the numbers of the vehicles, in a conspicuous place thereon for the very purpose of identifying the car and the person operating it have been upheld. People v. Schneider, 139 Mich. 673. See Frankford & P. P. Ry. Co. v. City of Phila., 58 Penn. St.

119: City of St. Louis v. Williams, 235 Mo. 503.

"Physicians are required to report deaths and their causes, druggists the sale of poisons, and failure to comply with these requirements is made a misdemeanor (Penal Law, § 1743; Public Health Law, § 235). Labor Law, § 87, requires a person in charge of any factory to report to the commissioner of labor all deaths, accidents, and injuries and the details thereof. Compliance with statutory regulations may, in the case of the commission of a crime by the person who is required to make the certificate or registry, prove an important factor in leading to his detection, but this is not sufficient to render the legislation invalid."

The Ohio court said 71 Ohio Laws, p. 146, fixing a penalty against railroads for overcharging for transportation, and declaring the allegations of the petition claiming such penalty not denied by answer, shall be taken as true, does not violate article 1, § 10, of the Constitution, which provides that no person in a criminal case shall be compelled to be a witness against himself. Cin. S. & R. Co. v. Cook, 37 Ohio St. 265.

The privilege and immunity of the citizen in his private affairs is carefully safeguarded and distinguished in the above cases. Without such distinction of the rights of the individual in his private unregulated business from his status when engaged in business only by permission of the government and under government regulations, the safe-

ty of the nation might be in danger.

Regulation which would not permit the government representatives to ascertain anything about the dealers' business would be no regulation. He might hoard, and withhold from the public and from the government agencies, things necessary for the conduct of the war. He might not only do this, but he might sell the same necessaries to the enemy. It is a very feeble government which, in time of war, can have no supervision over dealers in the sale of necessaries, without which the war could not be safely conducted. Otherwise, the government would need to directly deal in all the necessaries for the conduct of the war and the support of the people. Much private business would then end, and a burden be thrown on the government that might be unbearable.

[2] The defendant also raises a question as to the sufficiency of the indictment. The sufficiency of an indictment is to be tested by ascertaining whether it contains every element of the offense intended to be charged and sufficiently apprises the defendant of what he must meet, and whether, in case other proceedings are taken against him for a similar offense, the record shows with accuracy to what extent he may plead a former acquittal or conviction.

[3] Where a statute fully, directly, and expressly, without any uncertainty or ambiguity, sets forth all the elements of an offense, an indictment is sufficient which charges the offense substantially in the language of the statute. Peters v. U. S., 94 Fed. 837. See also U. S. v. Cook, 17 Wall. 168, 21 L. Ed. 538; Evans v. U. S., 153 U. S. 584.

14 Sup. Ct. 934, 38 L. Ed. 830; Cochan v. U. S., 157 U. S. 286, 15

Sup. Ct. 628, 39 L. Ed. 704.

[4] The indictment, after setting out the act and the fact that defendant was engaged in the business of importing, storing, etc., sugar, alleged that the duly authorized officers of the government demanded an examination of the books; defendant refused to give such agents any information whatsoever, did then and there fail and refuse to allow said agents to inspect the property, place of business, and record of said license, declared said books to be locked in the safe, and he did not take them out. This seemed to be a sufficient compliance, and sufficiently informs the accused of the nature of the charge against him.

The court is indebted to the careful and painstaking brief of counsel,

evidencing extensive research of authorities.

The demurrer is overruled. An order may be prepared accordingly.

In re SEDALIA FARMERS' CO-OP. PACKING & PRODUCE CO.

(District Court, W. D. Missouri, C. D. February, 1919.)

 Bankruptcy ⇐=54—"Fair valuation" of property, as respects insolvency, defined.

Within Bankruptcy Act, § 1, el. 15 (Comp. St. § 9585), providing that a person shall be deemed insolvent when his property shall not at a fair valuation be sufficient to pay his debts, "fair valuation" means the fair market value, or value which the bankrupt might realize for itself, or the value that can be made promptly effective by the owner of the property for payment of debts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fair Value.]

2. Bankruptcy \$\infty\$=60-Appointment of receiver because of insolvency need

not contemplate statutory definition of insolvency.

Under Bankruptcy Act, § 3a, cl. 4 (Comp. St. § 9587), specifying the appointment of a receiver because of insolvency as an act of bankruptcy, insolvency, as defined in section 1, cl. 15 (section 9585), need not be the ground of the appointment.

3. Bankruptcy 6-60-Bankrupt must be insolvent at filing of petition and

appointment of receiver.

When the appointment of a receiver because of insolvency is the act of bankruptcy relied on, the bankrupt must be actually insolvent within the meaning of the Bankruptcy Act (Comp. St. §§ 9585-9656), both at the time of such appointment and at the time of filing the involuntary petition.

4. Bankruptcy \$\insigma 60\$—Appointment of receiver because of common-law insolvency is act of bankruptcy.

Where the required degree of insolvency exists and is the proximate cause of a receivership, the appointment is because of insolvency, within Bankruptcy Act, § 3a, cl. 4 (Comp. St. § 9587), though the petition for a receivership alleges only common-law insolvency.

5. Bankruptcy 6-60-Appointment of receiver is act of bankruptcy, though petition for appointment was insufficient.

Where a receiver was appointed because of insolvency, and the property was placed in his charge, the act of bankruptcy was complete, though the petition did not give the court jurisdiction to make the appointment, or though it was improvidently made.

6. Bankruptcy 60-Receiver held appointed because of insolvency.

A receiver appointed by a state court for a corporation on a petition alleging that its assets were depreciating, that it was without funds to meet its obligations, etc., and asking the appointment of a receiver to manage the corporation, marshal its assets, etc., held appointed because of insolvency within Bankruptcy Act, § 3a, cl. 4 (Comp. St. § 9587).

In Bankruptcy. Proceeding against the Sedalia Farmers' Co-operative Packing & Produce Company. On exceptions to the report of a special master. Report confirmed and approved.

Mercer Arnold, of Joplin, Mo., for petitioning creditors. G. W. Barnett, of Sedalia, Mo., for bankrupt.

VAN VALKENBURGH, District Judge. August 29, 1918, creditors of the alleged bankrupt filed suit in the circuit court of Pettis county, Mo., making certain allegations upon which they prayed the appointment of a receiver, and upon due hearing such receiver was appointed. This step was first contemplated by the officers and directors of the company, who were advised the appointment of a receiver was the best thing that could be done; the idea being "to avoid being sued, to hold the business intact, and to try and realize all that we could." The creditors' bill subsequently filed was what is known as a friendly suit. The corporation entered its voluntary appearance by its president, but filed no answer and offered no opposition to the prayer of the bill. The court first made a temporary order appointing one H. F. Fricke receiver, and later, during the October term, said court rendered judgment, finding all the issues for the plaintiff, and confirming the appointment of Fricke to continue as receiver until the further order of the court. Later an involuntary petition in bankruptcy was filed; the act of bankruptcy counted upon being that, the corporation being insolvent, because of insolvency a receiver had been put in charge of its property under the laws of the state of Missouri.

November 18, 1918, in the absence of the District Judge from the Central division of the Western district of Missouri, the referee in bankruptcy appointed one A. L. Shortridge as receiver of the alleged bankrupt. The latter immediately qualified, and the following day the state receiver turned over to said federal receiver all the assets of said corporation; and the latter, acting under his appointment aforesaid, now has the care and custody thereof. The alleged bankrupt filed answer putting in issue the allegations of the petition in bankruptcy, denying insolvency, and denying the commission of the act of bankruptcy charged. The issues made by said petition and answer were referred to Holmes Hall, Esq., referee in bankruptcy, as a special master to take the testimony and report his findings of fact and conclusions of law to the court. This report was duly made, as stated, and the matter comes up on the alleged bankrupt's exceptions to this report.

Two questions are presented: (1) Was the alleged bankrupt insolvent when the receiver was appointed in the state court, and when the petition in bankruptcy was filed? (2) Was the receiver in the state court put in charge of its property because of insolvency?

[1] Upon the showing disclosed by the record, I have no hesitation in finding that the corporation was insolvent on both said dates. The referee has so found, and the evidence fully sustains him. The aggregate of its property was not, at a fair valuation, sufficient in amount to pay its debts.

"Fair valuation means a fair market value—that is at a value which the corporation might have realized on them for itse'f." In re Marine Iron Works (D. C. N. Y.) 20 Am. B. R. 390, 159 Fed. 753.

And as announced by Judge Amidon in Stern v. Paper (D. C. N. D.) 25 Am. B. R. 451, 453, 183 Fed. 228, 230:

"'Fair valuation,' within the meaning of subdivision 15 of section 1 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), means a value that can be made promptly effective by the owner of property 'to pay debts.' * * * 'Fair valuation' means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property."

Judged by this standard, insolvency appears with sufficient clearness. The petition in the state court alleges that much of the physical property was inconvertible, except at greatly diminished value, and that business in the ordinary course could not be conducted without continued loss. During the state receivership such losses did persist, aggregating a large amount. The enlistment of new capital was found to be impracticable and inexpedient. Dissolution and liquidation is inevitable and is in the process—the contest being whether it shall take place in the state court or under the paramount national law.

[2] We come, then, to the second and deciding point of whether a receiver was put in charge of the property by the state court because of insolvency. The question here is a nicer one, made so by a tendency toward what I regard as ultra-strict construction in a number of federal jurisdictions. The greater weight of the decisions thus far announced is that the word "insolvency," as here used, means insolvency within the definition of the Bankruptcy Act (Comp. St. §§ 9585–9656). This is founded upon the following provision in clause 15 of section 1 (section 9585) of the act:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient in amount to pay his debts."

Several courts in a number of decisions have held that this section sets forth the meaning Congress intended to be given to the word "insolvency," as well as to the word "insolvent," as used in section 3a, clause 4 (section 9587). While this conclusion is plausible under known rules of statutory construction, and at first impression seems unquestionable, nevertheless I cannot yield acceptance in view of the manifest spirit and purpose of the national act. It is true, of course, that no one can be insolvent within the meaning of this act except in conformity with the express definition of insolvency, both at common law and as recognized in the statutes of various states, which Congress may well have had in mind when dealing with procedure in such jurisdictions.

· It will be noted that Congress herein nowhere says that the word "insolvent" (or, by analogy, "insolvency"), as used within the provisions of this act, shall be defined thus and so. It merely declares under what conditions a person shall be deemed insolvent to such extent as to bring him within its provisions. This may be a fine distinction, but it is a significant one, because in the provision in question we are dealing with a proceeding in a court of a state, in which "insolvency" has its common-law meaning; to wit: inability to meet obligations as they become due; and the petitioning creditors charge that the receiver was put in charge of this property under the laws of this state because of such insolvency. It is a matter of common knowledge at the bar that receivers are appointed by state courts under precisely such circumstances. This is done because of such insolvency; and it would probably rarely, if ever, occur that the exclusive form of insolvency, as defined in the Bankruptcy Act, would be specifically stated in a petition addressed to a circuit court of this state; particularly would this be true if the pleader desired the estate to be administered and distributed by the state court and not by a court of bankruptcy. This would open an obvious avenue for evasion of one of the most important provisions of the national act. This seems to be the view of Judge Putnam in his dissenting opinion in Re Wm. S. Butler & Co. (C. C. A. 1st Cir.) 30 Am. B. R. 502, 514, 207 Fed. 705, 715, 125 C. C. A. 223, 233. He says:

"By giving the words 'insolvent' or 'insolvency,' as found in the amendment of 1903, the peculiar definition given them by the body of the act of 1898, we would practically defeat the purpose of the amendment, and the amendment would be inapplicable. No proceeding in either courts of equity or common law has ever yet, in appointing receivers or otherwise, used the words 'insolvent' or 'insolvency' in the special sense declared by the Bankruptcy Act of 1898. Giving these words the force which the opinion of the court gives them would be in substance declaring that no adjudication in bankruptcy based on the appointment of a receiver by a court of equity or common law was in fact and in substance justifiable, because there never has been any case where such an adjudication was secured in which the court which appointed the receiver has ever given to those words the peculiar definition given them by the Bankruptcy Act of 1898, or was ever asked to do so."

[3, 4] I concur in the language quoted, and I believe this construction is necessary to preserve the integrity and efficacy of the amendment in question. It is, however, of course, necessary to find that the bankrupt was actually insolvent, within the meaning of the Bankruptcy Act, both at the time of the alleged act and at the time of filing the involuntary petition. The reasoning of the learned district judge in Re Maplecroft Mills (D. C. S. C.) 33 Am. B. R. 815, 218 Fed. 659, is to the same effect. That case was reversed by the Circuit Court of Appeals of the Fourth Circuit, under the same title. 35 Am. B. R. 311, 226 Fed. 415, 141 C. C. A. 245. The latter court appears to have adopted the views in Re Wm. S. Butler & Co., supra; but in that case it will be remembered that the South Carolina statute expressly authorizes the courts of that state to appoint a receiver of a corporation when it is in immediate danger of insolvency, and such was the allegation of the complaint. That court did, however, permit the petitioners, if so advised, to amend their petition so as to allege insolvency, as contemplated by section 1, clause 15, of the Bankruptcy Act. This brings us to a consideration of what is meant by the words "because of insolvency." All forms of insolvency are certainly closely related, and because the petition for the state receiver alleges only commonlaw insolvency, it should not, therefore, necessarily follow that the receiver appointed under such a petition was not put in charge of the property because of insolvency as recognized by the Bankruptcy Act, if it be further found that such insolvency actually existed. There are, perhaps, holdings which intimate that the issues framed in the pleadings and the decree of the court, presumed to be responsive thereto. are decisive of this question, but to this I cannot agree at all. This, again, would suggest a ready means of evasion to the skillful pleader. The spirit of the Bankruptcy Act requires that this consideration must be one of substance rather than of technical pleading. The words "because of insolvency" should be, and are, broad enough to include all cases where the requisite degree of insolvency is present, and was the proximate cause of the receivership.

[b, 6] In the instant case, however, the Sedalia corporation was in fact insolvent, and in my opinion, as in that of the master, the word convincingly shows that the receivership in the state court was because of that insolvency. The petition is shrewdly drawn, with the evident purpose of avoiding the federal jurisdiction. It invokes no power, statutory or otherwise, of the Pettis county circuit court to appoint a receiver upon any other ground. That that court may, therefore, have been without jurisdiction and that the appointment may have been improvidently made, is beside the question. The receiver was appointed, the property was placed in his charge and the act of bankruptcy was complete. Exploration Mercantile Co. v. Pacific H. & S. Co. (C. C. A. 9th Cir.), 24 Am. B. R. 216, 177 Fed. 825-840, 101 C. C. A. 39. The petition sets out an intolerable condition. It shows that the assets are depreciating, that the company is without funds to meet its obligations, that the creditors are imperiled in the collection of their claims and that the real estate and equipment are not worth nearly so much, for purposes other than those for which it is now used, nevertheless that the defendant is running the business at a loss, and will continue to run it at a loss, unless restrained from further operating the plant; that a condition of temporary insolvency then existed, and that the business of the company will be greatly imperiled and weakened unless the defendant is restrained from continuing the business in the ordinary way. This makes out a pretty strong case of present insolvency. with no hope of improvement in the future.

What, then, is the state court asked to do? This is best gleaned from the prayer itself:

"Wherefore, the premises considered, the plaintiffs pray that the defendant corporation be enjoined and restrained from further buying stock or from operating said plant and from contracting any further obligations and be restrained from continuing the business, but that the management of the same be taken out of its hands and that in order to preserve the assets of said corporation and to protect the interests of these plaintiffs and other creditors that a receiver be appointed, to take charge of and manage the said corporation, to the end that such receiver may marshal the assets under the order of the court and collect the indebtedness due to the corporation and

realize on its assets, in order that these plaintiffs and others may be paid and for all other and further relief as to the court may seem proper and just."

If this does not state a prayer for dissolution, liquidation, and distribution of assets, it is difficult to discover what purpose is stated. No concrete subject of litigation between the parties is stated. The receiver is not asked for to conserve the property, and to prevent waste and loss pending some ultimate result of litigation, such as foreclosure, determination of title, or the like. No mismanagement or misconduct on the part of the officers or directors is alleged. Just a receiver, for an indefinite period, for what can be the only ultimate object contemplated, and that is, to marshal the assets, collect the indebtedness, and realize on the assets in order to pay debts and distribute the proceeds for the benefit of stockholders, creditors and all concerned. The only possible inference is that the receiver was put in charge of the property of this insolvent corporation to wind up its affairs because of its insolvency within the meaning of the Bankruptcy Act.

One of the general purposes of the bankruptcy law is to provide a uniform national law by which insolvent debtors can make a pro rata distribution of their assets among creditors. Prior to this amendment if a corporation sought to wind up its affairs and distribute its assets by means of a receivership, such a proceeding did not constitute an act of bankruptcy, and, consequently, creditors were entirely deprived of the valuable rights and safeguards provided by the bankruptcy law. This amendment was designed to correct that evil. In the view I have taken, I find myself convincingly supported by the Circuit Court of Appeals of the Ninth Circuit. In Exploration Mercantile Co. v. Pacific H. & S. Co. et al. (C. C. A. 9th Cir.) 24 Am. B. R. 216, 177 Fed. 825,

101 C. C. A. 39, Judge Morrow says:

"With respect to the application for a receiver it may be conceded that if it appears from the record and is established by proof that the application is made under some statutory authority or general equity jurisdiction having no relation to insolvency, then the act of applying for a receiver is not an act of bankruptcy. But when it appears that the application for a new receiver has relation to insolvency, and that the purpose of the proceeding is to have the corporation managed with a view to its dissolution and the distribution of its assets among the creditors of the insolvent, then the application for a receiver is clearly an act of bankruptcy."

It follows from the foregoing that the report of the master should be in all things confirmed and approved, and it is accordingly so ordered. With respect to the compensation of the master, both the bankrupt and its creditors are invited to aid the court by an expression of their views. It is apparent that the work of this reference was considerable. The questions presented required careful and exhaustive investigation and consideration. This must not be left out of mind in determining upon the measure of compensation to be awarded.

In re HANSEN.

(District Court, S. D. California, S. D. January, 1919.)

 Bankruptcy = 224—Referee has jurisdiction to determine validity of chattel mortgage.

After a claimant files a claim as one secured by a chattel mortgage on the property in possession of the bankrupt, the referee has jurisdiction to determine in a summary manner the validity of the lien of the mortgage, especially where no objection to such jurisdiction was made.

 Chattel mortgages = 192—Failure to record immediately invalidates as to existing creditors.

Under Civ. Code Cal. § 2957, requiring a chattel mortgage to be recorded immediately to be valid as against creditors, delay in recording invalidates mortgage, not only as against creditors who became such between the dates of the execution and the recording of the mortgage, but as against creditors who were such at the time the mortgage was executed.

3. Courts ← 366(1)—Construction of state Code by state court is binding on Federal Courts.

The construction placed upon a section of the Civil Code of California by the Supreme Court of that state is binding on the United States courts.

In Bankruptcy. In the matter of the estate of H. A. Hansen, bankrupt. A petition by the trustee for sale of the property free and clear of the chattel mortgage claimed by Celestine Dack was granted by the referee, and the claimant asks a review of the order. Order confirmed.

W. T. Craig, H. R. Archbald, and George M. Pierson, all of Los Angeles, Cal., for trustee.

V. J. Cobb, of Los Angeles, Cal., for creditor.

BLEDSOE, District Judge. Celestine Dack duly filed her verified claim before the referee as upon a debt secured by a chattel mortgage. Subsequently the trustee filed a petition with the referee, setting up that certain personal property, part of it being property covered by the alleged chattel mortgage, was in the possession of the bankrupt and belonged to the bankrupt estate, and alleging that the chattel mortgage was invalid, and asked that the property be sold free and clear of the claimed lien of the chattel mortgage, and that an order be issued and directed to the said Celestine Dack, requiring her to show cause why such sale should not be had, etc.

Celestine Dack answered the petition for order to show cause, asserting that the mortgage was valid, and also filed an answer to the objection to her claim previously interposed by the trustee. Upon the objection to the allowance of the claim, and upon the petition to show cause, a hearing was had, testimony taken, and an order made by the referee. At no time does it appear that any objection to the jurisdiction or authority of the referee to pass upon the matters presented and involved in the various reports was made. The referee found that the claim for \$2,000, filed as a secured claim, should be disallowed as a secured claim, without prejudice to the right of the claimant to urge

its allowance as an unsecured claim. The order to show cause was made absolute, and the trustee was directed to sell the personal property then and there in the possession of the bankrupt. Revision of this

order is sought before the court.

[1] Claimant having filed a secured claim, without doubt it thereupon became the duty of the referee to pass upon the question of whether or not the claim was secured by a chattel mortgage as asserted. The property being in possession of the bankrupt, and therefore in custodia legis, constructively, if not actually, the referee had the jurisdiction, as I understand the decisions, to determine in summary manner the existence or nonexistence of asserted claims to or liens upon such property. At least, no objection anywhere along the line to the jurisdiction of the referee having been made, it would seem that under the provisions of the Bankruptcy Act (Comp. St. §§ 9585–9656) summary jurisdiction, based upon consent of the parties involved, was proper. Bryan v. Bernheimer, 181 U. S. 188, 197, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. R. 623.

[2] The principal question in the case involves a determination of whether the chattel mortgage relied upon by claimant, Dack, was valid. The note, to secure the payment of which the chattel mortgage was given, was dated February 1, 1917; the mortgage itself was dated February 1. It was acknowledged, and the affidavit required by the statute of California was made, February 20, 1917. The mortgage was thereupon delivered by the mortgagee to the mortgagor for recordation in accordance with the requirements of the statute, but it was not offered for recordation by the mortgagor until March 13, 1917. Thus a month and 12 days elapsed between the execution of the mortgage and its recordation, and 21 days elapsed between the acknowledgment of its execution and its recordation. All the property was situate in or near, and the parties resided within, the city of Los Angeles.

It was held by the Supreme Court of California, in a well-considered and subsequently approved case (Ruggles v. Cannedy, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371), that section 2957 of the Civil Code of California required immediate recordation after execution, in order that a chattel mortgage might be valid as against creditors. The court (127 Cal. 298, 53 Pac. 914, 46 L. R. A. 371) said:

"We conclude upon this question that our law requires immediate recordation in lieu of immediate delivery, and that when such recordation is not effected the mortgage 'is void as against creditors of the mortgager.' The penalty for a failure to record promptly in the case of a mortgage is identical with the penalty under section 3440 for a failure to deliver promptly in the case of a sale. In either case the failure results in a legal fraud against those whom the statute enumerates and protects."

True it is that in that case the court expressly declined to determine whether or not the mortgage was invalid as to creditors who became such before the making of the mortgage, and true it is that in the case at bar all of the creditors apparently became such previous to the making of the mortgage. However, the precise matter has been passed upon by other courts, and the reasoning there indulged in is very persuasive with me. Karst v. Gane, which concerned this precise point,

was a case arising in New York, and given careful consideration by the different courts which heard it. Before the Supreme Court, as reported in 61 Hun, 533, 16 N. Y. Supp. 385, it was held:

"Upon this subject it has been provided that every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section of the act. 3 Rev. St. (6th Ed.) p. 143, § 9. But it was objected on behalf of the mortgagees that this section of the statute was designed only for the protection of persons who became creditors of the mortgagors after the execution of the mortgages and prior to the time when they were filed. But the statute clearly has proceeded upon no such distinction, for it has declared the mortgage withheld from the files to be absolutely void as against the creditors of the mortgagor. Not the creditors who should become such between the time of the execution and the filing of the mortgage, but the creditors generally, including all persons sustaining that relation to the mortgagor during the time the mortgage is withheld from the files. If it had been intended to restrict it to those persons who should become creditors after the execution, and before the filing of the mortgage, language to that effect might reasonably be expected to be found in the section. And its entire absence is a decisive circumstance against the construction which the objection taken requires to be given to the section. The Legislature was actuated by no such design as the intention appears in the law. But the design and intent was to render the mortgage, or mortgages, absolutely void as against all persons who should be creditors of the mortgagor during the time, whether their debts were created before the execution of the mortgage or afterwards; and that is the effect which has been given to the statute when this view of it has been brought before the courts for consideration."

Thereafter before the Court of Appeals (136 N. Y. 316, 321, 32 N. E. 1073, at page 1074) it was said:

"It is undoubtedly true that one, and perhaps the most important, purpose of the act, so far as it applies to creditors, was to protect persons giving credit to the mortgagor in ignorance of the existence of a mortgage upon his property. But the legislative policy was broader than this single purpose. It is impossible to say that only creditors who became such during the existence of a mortgage may be injured by keeping the mortgage secret. It certainly is not improbable that in many cases antecedent creditors may be fulled into security, and forbear the collection of their debts at maturity, by the apparent unincumbered possession and ownership by the debtor of property covered by an undisclosed mortgage. The statute prescribes a general rule which must be observed in order to entitle a mortgagee to assert his lien as against creditors."

136 N. Y. 323, 32 N. E. 1075:

"We therefore conclude, upon the language of the act and upon authority, that the plaintiff was a creditor, within the act, although his debt existed when the mortgage to the defendants was executed. A simple contract creditor is as much within the protection of the statute as a creditor whose debt has been merged in a judgment."

-136 N. Y. 325, 32 N. E. 1075:

"While the act does not, in terms, require an immediate filing of a mortgage, in order to make it valid against creditors or subsequent mortgagees or purchasers, the purpose of the act can only be satisfied by prompt and diligent action on the part of the mortgagee in filing his mortgage. The filing stands

as a substitute for immediate delivery, and an actual and continued change of possession, of the property, and avoids the conclusive presumption of fraud which would otherwise attach to the instrument under the act of 1833, in the absence of delivery and the change of possession of the mortgaged property. Some time will necessarily elapse between the execution and filing of the mortgage. Where it appears that due diligence was exercised in filing the mortgage, and there was no unnecessary delay, and no actual intervening lien has been acquired, there would seem to be no ground upon which subsequent lienholders could question the validity of the mortgage under the statute of 1833. The filing, under these circumstances, would be immediate, and make the mortgage valid as against liens subsequently acquired. a delay of six weeks in filing the mortgage is not a compliance with the act. There were no circumstances rendering so long a delay necessary. There can be no doubt that if, during the delay in filing, a lien had been acquired by a creditor, the mortgage, as to such lien, would be void. The mortgage was, however, filed before the plaintiff's judgments and executions were obtained. This did not restore the validity of the mortgage, as against creditors whose debts were in existence during the default in filing the mortgage, although judgments or executions were not obtained until after the mortgage was in fact filed."

Another case from New York (Tooker v. Siegel-Cooper Co., 55 Misc. Rep. 68, 106 N. Y. Supp. 277; Id., 194 N. Y. 442, 87 N. E. 773) concerned a state of facts very similar in their substantial import to the facts of the case at bar. The indebtedness existed prior to the making or execution of the chattel mortgage. There a delay of less than a month between the execution and recordation of the chattel mortgage ensued. Thereafter and after recordation of the chattel mortgage, it was foreclosed. Subsequently suit was brought upon the indebtedness owing to the creditor and a judgment rendered in favor of the plaintiff. The question then arose as to whether or not the mortgage was valid as against the judgment creditor. In holding that it was not, the court said (55 Misc. Rep. 69, 106 N. Y. Supp. 278):

"In November, 1905, and February, 1906, the plaintiff recovered judgments on two promissory notes for \$6,000 each, made by the defendant Hotel Regent Company on February 3, 1904, and maturing, respectively, one and two years from that date. Upon the return of unsatisfied executions, the plaintiff instituted this action in which she seeks to reach the proceeds realized from the sale of certain property under a chattel mortgage which she alleges was executed and delivered by the Hotel Regent Company to the defendant Siegel-Cooper Company on April 25, 1904, but which was not filed until May 23, 1904. An accounting by the Siegel-Cooper Company and a satisfaction of plaintiff's judgment is prayed; the right thereto arising under section 90 of the Lien Law, which declares: Every mortgage or conveyance intended to operate as a mortgage of goods and chattels * * * which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article.' The chattel mortgage in question, given to secure an indebtedness of \$56,080.97, the bona fides of which is conceded, was foreclosed in October, 1904, and the amount realized from the sale of the mortgaged property was \$56,000."

55 Misc. Rep. 71, 106 N. Y. Supp. 279:

"The statute has been construed in favor of creditors along the broadest lines and in accordance with the most liberal principles of statutory construction. Technicalities have given way to equities; limitations, to liberality. The statute contemplates protection to creditors against secret arrangements to withhold the filing of chattel mortgages. It commands publicity. The recognition of an agreement such as the one upon which the defendant relies would not only circumvent the statute, but would facilitate results which it was designed to prevent. The failure of the Siegel-Cooper Company to file the chattel mortgage in question within a reasonable time after its execution and delivery renders it void as against the plaintiff, and the relief prayed must be granted."

Thereafter the Court of Appeals (194 N. Y. 447, 87 N. E. 775) said:

"In order to make such an instrument effective against the creditors of the mortgagor, the lien law contemplates that it shall be placed upon file with reasonable expedition. Where it is put into the hands of a third party after execution upon no condition except that it shall not be delivered at all in the event of the payment of the debt before a specified date, and is subsequently delivered by him to the grantee, we think that such delivery must be deemed to relate back to the date when the third party received it, and that a delay of nearly a month in placing it upon file was properly held by the trial court to be so unreasonable as to invalidate the mortgage against creditors. Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073."

A similar ruling has been rendered in this circuit by the District Court of the Western District of Washington (In re Mission Fixture & Mantel Co. [D. C. Wash.] 24 Am. Bankr. R. 873, 180 Fed. 263), which has been approved by the Circuit Court of Appeals of this circuit in National Bank v. Moore (C. C. A. 9th Cir.) 41 Am. Bankr. R. 409, 247 Fed. 913, 918, 160 C. C. A. 103. See, also, 11 C. J. 513, 514.

[3] The construction of the California Code, made by the Supreme Court of California, is binding upon this court, of course, and the rulings from other jurisdictions having been approved apparently by the Circuit Court of Appeals of this circuit, it follows that this court can do naught else but confirm the report of the referee.

Such will be the order.

THE VERDI.

(District Court, S. D. New York. April 3, 1920.)

No. 565.

Payment \$\insert 12(5)\$—Costs of repairs to vessel repayable at current rate of exchange.

Where a collision between two British vessels occurred in New York Harbor, and suit therefor was brought in that district, but repairs were made in England and paid for in English pounds, and demurrage was also computed by agreement in that money, in reducing such sums to American money for the purposes of the decree, the rate of exchange applicable held to be the current rate at the time the damages became payable, as fixed by the decree.

In Admiralty. Suit by Thomas Wilson Sons & Co. against the steamship Verdi. Decree for libelant.

This suit was brought to recover damages for a collision off the quarantine anchorage, Staten Island, New York, on September 21, 1915, between claimant's steamship Verdi and libelant's steamship Barrano. The vessels were each British-owned. The temporary repairs and expenses in New York were \$1,509.

The permanent repairs and expenses were incurred in England, and were paid for there on or about January 1, 1916, in British currency, amounting to £1,791.2.6. The demurrage in New York and England occasioned by the collision amounted to £6,478.0.9. The commissioner converted these sums into American dollars at \$4.74 per pound sterling, the rate of exchange on January 1, 1916, the date upon which it is apparently assumed by the parties that all the damages were ascertainable. The correctness of his decision is challenged here by exceptions to his report.

Burlingham, Veeder, Masten & Fearey, of New York City (Charles Burlingham and Charles E. Wyth, both of New York City, of counsel), for libelant.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine,

of New York City, of counsel), for claimant.

AUGUSTUS N. HAND. District Judge (after stating the facts as above). The collision occurred and the libelant's right of action accrued in New York Harbor within the jurisdiction of this court. Consequently damages for loss were payable here, though both parties were British subjects. The mode which the parties have in effect adopted of calculating the damages as equivalent to the actual cost of repairs and incidental expenses, plus the amount which the ship would have earned when off time, is a mere method of arriving at the amount of damage suffered by the collision at New York, and then and there payable when ascertained. This is not, therefore, a case of pounds sterling due in England, suit to recover which is brought in New York. The damages were payable in dollars here, and while the parties have agreed upon the measure of damages in pounds sterling, a portion of which were expended in England, that is a mere method of computing the damages suffered in New York and finally ascertainable on January 1, 1916.

The libelant under this method of adjustment was entitled to the payment in New York on January 1, 1916, of the number of dollars represented by £8,269. We are not seeking the equivalent of £8,269 in dollars, in order to replace that number of pounds in England, but are ascertaining what was the damage on January 1, 1916, in dollars represented by £8,269. That can only be calculated at \$4.74 for each pound sterling, the then rate of exchange. Nothing less can indemnify the libelant for the damages suffered in New York, payment of which

was due here when ascertained.

It is contended that the damages cannot be determined until final decree, because the action sounds in tort, and that the rate of exchange then prevailing should therefore be adopted. This somewhat archaic argument, if pushed to an extreme, would bar interest prior to the date of the decree. The parties, however, have selected January 1, 1916, as the date to fix the amount of their damages in pounds sterling. The case is not one of transmitting these pounds sterling to New York, but of finding their equivalent in dollars on January 1, 1916. This can only be done by employing the rate of exchange prevalent at that date. The matter is quite different from one of a continuing obligation to pay pounds sterling in England, the failure to perform which would be compensated for by interest. Here the obligation was to

pay dollars in New York. Failure to pay them is similarly compensated for by interest, but as the initial damages were calculated in pounds they must be converted into dollars at the value the pounds had at the time and place of payment. That is measured by the rate

of exchange then prevailing.

The view I have taken is supported by The Weatherby (D. C.) 48 Fed. 734; The Cabot, 4 Fed. Cas. 961, No. 2,277; Forbes v. Murray, 9 Fed. Cas. 415, No. 4,928, and the unreported decision of Judge Learned Hand, in this court, on January 19, 1920, in the case of Constantinidi v. Benas. I think the rule enunciated in the interesting discussion by Mr. Justice Story in the case of Grant v. Healey, 10 Fed. Cas. 978, No. 5,696, where payment was due in loco fori litis, involves the conclusion I have reached, although there he allowed the par of exchange.

The report of the commissioner is correct, and is confirmed.

THE HURONA.

SOCIÉTÉ DE TRAVAUX & INDUSTRIES MARITIMES v. RUBY S. S. CORPORATION, Limited.

(District Court, S. D. New York. April 3, 1920.)

No. 566.

Payment \$\insigma 12(5)\$—Libelant's advances to vessel payable at prevailing rate of exchange.

Libelant made advances in France in francs to the master of respondent's vessel, and brought suit to recover for such advances in the United States. *Held* that, the amount being payable in France, in French money, libelant was entitled to a decree for such sum in dollars as would purchase the requisite number of france at the rate of exchange prevailing at the date of the decree.

In Admiralty. Suit by the Société de Travaux & Industries Maritimes against the steamship Hurona; the Ruby Steamship Corporation, Limited, claimant. Decree for libelant.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine, of New York City, of counsel), for libelant.

George B. Hayes, of New York City, for claimant.

AUGUSTUS N. HAND, District Judge. In this case advances were made at Marseilles, France, by the libelant to the master of the steamship Hurona, amounting to 119,007.65 francs, between June 3 and July 12, 1919. Thereafter this proceeding was instituted in rem in this court, after presentation of a bill for the advances to the agent of the steamship in New York and failure to pay them.

The rate of exchange of French francs on July 12, 1919, was 6.85 francs to the dollar; on September 5, 1919, when the bill was first presented in New York, was 8.60 francs to the dollar; and on January 29, when the parties filed a stipulation providing that interest was to be

figured from July 12, 1919, on all advances, the rate of exchange was 13.20 francs to the dollar.

I think there can be no doubt that the amount due from the vessel to the libelant was payable in France, where the advances were made and the services rendered. Consequently this case differs, in my opinion, from that of Thomas Wilson Sons & Co., Ltd., v. Steamship Verdi, 268 Fed. 908, in which I am this day handing down an opinion.

The only obligation of the vessel was to pay 119,007.65 francs in France; so long as this is performed, and that number of francs, plus interest, is paid to libelant, its claims are fully satisfied, and it is completely indemnified. This is, therefore, purely a case of transmitting funds from one country to another, and of rendering a decree which will enable the libelant to have the amount of money in francs which was due to it in France on the 12th day of July, 1919.

The dictum of Mr. Justice Story in Grant v. Healey, Fed. Cas. No. 5,696, and of Mr. Justice Washington in the case of Smith v. Shaw, Fed. Cas. No. 13,107, likewise the decision of the Supreme Court of Wisconsin in Hawes v. Woolcock, 26 Wis. 629, are in accord with my

conclusion.

I think the recent case of Kirsch & Co. et al. v. Allen Harding & Co., Ltd., decided in the King's Bench Division by Roche, J., and reported in 36 Times Law Reports 59 (November 21, 1919), is likewise in point. In that case the plaintiffs were merchants in New York, who had made a contract with the defendants in England, whereby the defendants had agreed to purchase certain quantities of condensed milk from the plaintiffs. The defendants were found guilty of a breach. It was held that the damages the plaintiffs had suffered in dollars should be converted into pounds sterling at the rate of exchange prevailing at the date of rendering judgment. That was a case where the money was apparently payable in New York. Plaintiffs were accordingly reimbursed, if they secured a judgment in the Court of King's Bench which would enable them to be paid the amount of money, with interest, represented in pounds sterling based on exchange at the date of the judgment.

The report of the commissioner is modified, so as to allow the libelant 119,007.65 francs converted at the rate of exchange prevailing at the date of entering the decree, with interest from July 12, 1919.

Ex parte HARRIS.

(District Court, E. D. New York. November 13, 1920.)

Army and navy 22—Bad-conduct discharge of enlisted man in navy terminates service.

A bad-conduct discharge, given to an enlisted man in the navy as punishment by a summary court-martial, terminates the service of the discharged man, and authority over him is not re-established by a disapproval of his sentence by the Secretary of the Navy, under Act Feb. 16, 1909, § 9 (Comp. St. § 3025).

Habeas Corpus. In the matter of the application of William Robert Harris for writ of habeas corpus. Writ granted.

Emery C. Weller, of New York City, for petitioner.

Charles J. Buchner, Asst. U. S. Atty., of Brooklyn, N. Y., for the United States.

GARVIN, District Judge. The relator was dismissed from the United States Navy March 25, 1920, pursuant to sentence of a summary court-martial, with what is known as a bad-conduct discharge. Thereafter he was directed to report to the recruiting officer at Scranton, Pa., upon the ground that the sentence of the summary court-martial was illegal and had been set aside. Accordingly he reported to said officer, surrendering his bad-conduct discharge, and under orders reported to the commanding officer of the United States ship Iowa, upon which ship he remained until July 26, 1920. At that time he returned to his home on leave, where he remained, refusing to return, claiming that the Navy Department had no jurisdiction over his person. The department declared him a deserter, whereupon he surrendered and is now in the custody of the naval authorities, who purpose to try him as such.

Although he reported for duty when directed, he did so under protest and did not re-enlist in the navy. It appears that by the Act of

February 16, 1909, 35 Stat. 621 (Comp. St. § 3025):

"The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps."

Acting under the authority attempted to be granted by this statute, the Secretary of the Navy, on April 22, 1920, disapproved the proceedings, finding, and sentence of the summary court-martial. There can be no control, however over the relator, except by reason of his being in the naval service of the United States. This service was terminated by his discharge, pursuant to which all parties had acted. The solemn act of the duly constituted representatives of the government in granting such discharge and terminating all relations between the relator and the government cannot be set aside by the act of Congress referred to.

There appears to be no provision for the Secretary of the Navy taking action upon the proceedings within any definite time. If the contention of the government is to be sustained, no man who has received such a discharge as is here involved would ever be able to ascertain whether he had been finally released from service, if there was no action by the Secretary of the Navy. Inasmuch as the relator returned to the service against his will, no de facto relationship is established.

The writ is sustained, and the relator discharged.

VULCAN TRADING CORPORATION v. KOKOMO STEEL & WIRE CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920. Rehearing Denied December 9, 1920.)

No. 2702.

1. Sales =174-Immaterial delay in furnishing installment of credit held

not to excuse installment delivery.

Under a contract for the sale of wire rods, which required the seller to deliver a third of the quantity sold in each of three stated months, and required the buyer to establish a credit for the seller on the 15th of the month for the quantity to be delivered the following month, a delay of 8 days in establishing the credit for the last month's deliveries, if it was immaterial, did not excuse the seller from making delivery for that month, where the seller was then in default in its deliveries for the two preceding months, even if the establishment of the credit on the date stated would have been a condition precedent to obligation to deliver, if the contract for that month's deliveries had been a separate contract.

2. Sales \$\isigma 62\$—Contract for delivery on installments is not separate con-

tract for each installment.

A contract for the sale of a stated quantity of wire rods to be delivered in three equal monthly installments, which provided for the establishment of credits to secure payment for each installment before delivery, is a single contract in its entirety, not a series of three separate contracts for each installment.

3. Sales = 194—Delay in payment ordinarily not material breach of installment contract.

In the case of installment contracts, though delay in delivery on the date specified is ordinarily a material breach, since it violates the fundamental purpose of the buyer in entering into the contract, delay in payment for the goods is ordinarily not material, but can be compensated by the allowance of interest.

4. Sales €=174—Delay in establishing credit held immaterial.

Where a contract for the sale of wire rods required delivery in three equal monthly installments, and required the buyer to establish credits for payment of each month's deliveries on the 15th of the preceding month, a delay of 8 days in establishing the credit for the last month's delivery, which still left 8 days between the establishment of the credit and the time for delivery, and when the seller had not completed delivery of the quantity required for the first two months, so that it had unexhausted credit for those deliveries, was immaterial, and did not excuse the seller from making delivery of the quantity required for the third month.

In Error to the District Court of the United States for the District of Indiana.

Action by the Vulcan Trading Corporation against the Kokomo Steel & Wire Company to recover damages for breach of contract. Judgment for defendant after a general demurrer to the complaint was sustained, and plaintiff brings error. Reversed, with directions to overrule demurrer.

William L. Taylor, of Indianapolis, Ind., for plaintiff in error. Conrad Wolf, of Kokomo, Ind., for defendant in error.

Before BAKER, EVANS, and PAGE, Circuit Judges.

BAKER, Circuit Judge. Vulcan Corporation, as buyer, and Ko-komo Company, as seller, entered into a contract whereby the seller sold 4,500 tons of wire rods to the buyer at \$58 a ton and agreed to deliver on cars at Kokomo, Ind., 1,500 tons in November, 1,500 tons in December, and 1,500 tons in January; and the buyer agreed to establish in the seller's name an irrevocable banker's credit, subject to sight drafts with bills of lading attached, the credit for the November shipments to be established on the preceding October 15th, for the December shipments on November 15th, and for the January shipments on December 15th.

In its complaint the buyer set forth the contract and averred that it had established the required credit of \$87,000 on October 15th and a like credit on November 15th; that the December credit was not established until December 23d: that the delay of 8 days was occasioned by the following circumstances, namely: That the seller was a manufacturer in Indiana; that the buyer was a jobber in New York; that when making the contract the seller knew that the buyer was purchasing the wire rods for the purpose of reselling them to the trade; that prior to December 15th the seller knew that the buyer had resold the 4,500 tons deliverable by the seller under the contract: that with such knowledge the seller delivered down to December 15th only 400 tons; that, if the seller had delivered prior to that date the tonnage then due, the buyer could have used the bills of lading as bases for credit, and would have established the December credit on the 15th; that, because it did not have such bills of lading, the buyer was required to spend the 8 days in procuring other means of credit; that on January 1st the seller was in default for 2,600 tons of the promised November and December shipments; that during January the seller continued to make deliveries, until the 2,600 tons for November and December had been delivered, and then refused to make any part of the 1,500 tons deliveries for January, although the sum of \$87,000 to pay therefor was then, and had been since December 23d, standing to the credit of the seller; and that thereby the buyer was damaged, etc. To this complaint the seller's general demurrer was sustained, and judgment for costs followed the buyer's refusal to plead further.

[1] Throughout the briefs and arguments for the seller runs the basic contention that the buyer's delay in establishing the December 15th credit for January shipments breached a condition precedent and thereby absolved the seller from ever making the shipments promised for January. If the contract had been for only the November deliveries and the October 15th credit, we will assume that on the buyer's failure to establish the credit on October 15th the seller could have successfully denied obligation to deliver. And if there had been successive separate contracts similarly covering December and January deliveries, the consequences of failure or delay in establishing prior credits would have been the same. So the seller is found to be contending for the very same right that would have accrued to it if there had been a separate contract for January deliveries. But three separate contracts were not executed. There is but one contract. It is an entirety, even though it calls for installments of deliveries and in-

stallments of credit. A contract for a single delivery and a single credit and a contract for installments of deliveries and installments of credit are alike in this respect: Performance of the buyer's promise to establish a prior credit stands as a condition precedent to the seller's obligation to deliver; it is a condition precedent, because it is the first promise to be fulfilled in order to set in motion the execution of the contract. The seller's promise is a secondary, subordinate, dependent condition; but if the buyer has fulfilled his promise, that promise has been converted into a completed act and no longer stands as any part of the executory contract, and the seller's promise thereupon acquires the primary rank in the executory contract. A single contract and an installment contract differ in this respect: In the single contract, if the buyer by fulfilling his promise to establish the single credit has promoted the seller's promise of a single delivery into the primary rank in the executory contract, there are no remaining promises on the part of the buyer to become secondary, subordinate, dependent conditions; while in the installment contract, if the buyer by fulfilling his promise respecting the first installment of credit has promoted the seller's promise of the first installment of deliveries into the primary rank in the executory contract, there remain the alternately succeeding promises of credits and deliveries. After the buyer has stricken from the executory parts of the installment contract his first promise by converting it into a completed act, may the seller ignore his own default in completing on time the first installment of deliveries—an obligation which now stands first among the executory parts of the contract—and insist that the buyer's promise of the succeeding installment of credit stands first and that performance thereof on the named day becomes a condition precedent to the seller's obligation to continue the performance of the contract beyond completing the first promised delivery?

[2] Is this buyer's delay of eight days in establishing the December 15th credit, while the seller was executing the contract without regard to its own promises of time, fatal to the maintenance of this action? Yes, if the establishment of the December 15th credit on that exact date was a condition precedent. Yes or no, dependent upon the materiality of the delay, if the condition was not a condition precedent, but merely a condition which had to be fulfilled reasonably in the circumstances in which the parties were mutually executing the contract. But in order to hold that the condition is a condition precedent it would be necessary to say that an installment contract is the same in law as separate and independent contracts which in times and amounts of credits and deliveries would correspond with the installments of the installment contract. Such is not the law. An installment contract is an entirety. The present contract was for one sale of 4,500 tons, not three contracts for three sales of 1,500 tons each. Norrington v. Wright, 115 U. S. 188; Simpson v. Crippen, L. R. 8 Q. B. 14; Freeth v. Burr, L. R. 9 C. P. 208; Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434; Cherry Valley Iron Works v. Florence Iron River Co., 64 Fed. 569, 12 C. C. A. 306; Cycle Co. v. Wheel Co., 105 Fed. 324, 44 C. C. A. 523; Construction Co. v. Guerini Stone Co.

¹6 Sup. Ct. 12, 29 L. Ed. 366.

241 Fed. 545, 154 C. C. A. 324; Williston on Sales, fifth line from bottom of page 821 to sixth line of page 824; \(\overline{13}\) Corpus Juris, 568, 569. [3, 4] So the inquiry becomes: Was the buyer's delay in establish-

[3, 4] So the inquiry becomes: Was the buyer's delay in establishing the December 15th credit until December 23d a material breach of a subordinate condition of the contract in the circumstances pleaded in the complaint? While in installment contracts stipulations of times of delivery are ordinarily material obligations, breaches of which go to the essence of the contract, stipulations of times of payment, in the absence of an express or necessarily implied condition that times of payment shall be of the essence, are not so vital that delay in payment would justify the seller's refusal to deliver the succeeding installments, unless the delay was of such importance as to work material injury to the seller or fairly expressed the buyer's intention no longer to be bound by his remaining executory agreements. Authorities, supra. Without an agreement to the contrary, delay in payment may ordinarily be compensated for with interest; but without an agreement to the contrary, delay of delivery of goods beyond the stipulated times violates the foundational purpose of the buyer in entering into the contract at all. And if a buver's delay in paying for goods already delivered would not necessarily absolve the seller from his remaining executory agreements to deliver, how much less material was this buyer's delay in establishing the December credit against the promised January shipments! On October 15th the seller company had available \$87,000 of the buyer's money with which to pay itself for the November shipments. On November 15th, though the seller had not shipped a pound, the buyer was required to and did put up \$87,000 more, because the seller could not be known to be in default for the November shipments until the last day of the month. On December 15th, the seller having shipped only 400 tons and having paid itself \$23,200 therefor, there remained in bank subject to the seller's drafts \$150,800 of the buyer's money. On December 23d this was increased to \$237,800, and the amount so remained with the oncoming of January. During January the seller completed the shipments due in November and December: and when the seller refused to do anything about the January shipments, \$87,000 of the buyer's money was still in bank for the seller's benefit. Now the plain purpose of requiring the buyer to establish credits in advance of deliveries was to give the seller unquestionable security, not security that subsequently might have to be pursued, but security yielding cash on delivery. The delay of 8 days was not a material, if any, impairment of that purpose, because for 8 days preceding January and for a month and 8 days preceding the seller's completion of the November and December shipments the credits for the entire 4.500 tons were available to the seller. And between December 15th and December 23d the pleaded circumstances of the seller's knowledge of the buyer's purpose in entering into the contract, the seller's knowledge prior to December 15th of the buyer's resales of the 4,500 tons, and the rapidly rising market, so far from fairly expressing the buyer's intention no longer to be bound, unmistakably demonstrate the buyer's desire that the contract should be fulfilled.

Though the foregoing considerations suffice, in our judgment, to determine this writ of error, two other propositions, based on the premise that the condition respecting the December 15th credit was a condition precedent, have been extensively argued and it may not be

inappropriate briefly to notice them.

One is that, though a defendant's act of prevention will excuse the plaintiff's nonperformance of a condition precedent, nothing short of an act which makes it "physically impossible" for the plaintiff to perform is a "legal prevention." Duress, undue influence, and other like oppressions, are not restricted to physical means. Why should "legal prevention" be so limited? In Lake Shore Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, the court, after reviewing numerous cases, denied such a limitation. See, also, United States v. Peck, 102 U. S. 64, 26 L. Ed. 46; Griffin v. American Gold Mining Co., 123 Fed. 283, 59 C. C. A. 301; Heidenheimer v. Cleveland, 11 Tex. Civ. App. 546, 32 S. W. 826.

The other is that, conceding the inability of the party who is first in default to count as plaintiff upon the defendant's following default (State v. McCauley & Tevis, 15 Cal. 430; Central Lumber Co. v. Arkansas Valley Co., 86 Kan. 131, 119 Pac. 321), if the party who is first in default is defendant, he may base a successful resistance upon the plaintiff's following default. But in Ankeny v. Richardson, 187 Fed. 550, 109 C. C. A. 316, the party who was first in default was defendant, and he was not permitted to speak of the plaintiff's act in

following his example.

But to neither of these two questions do we now find it necessary to formulate a definitive answer of our own.

The judgment is reversed, with direction to overrule the demurrer to the complaint.

KOKOMO STEEL & WIRE CO. v. REPUBLIC OF FRANCE.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920. Rehearing Denied December 9, 1920.)

No. 2735.

 Sales \$\infty\$ 79—Parties may agree to place of delivery different from that presumed.

Though the law presumes, in the absence of agreement, that the seller's place of business was mutually intended as the place of delivery, and that presumption is not overcome by a requirement that the seller place the goods on cars and prepay the freight, the parties to a contract of sale may nevertheless stipulate for a different place of delivery, and, if their intention so to stipulate is expressed in the contract, it will govern.

2. Sales 579—Contract held to require delivery alongside steamer.

Where a contract for the purchase of a quantity of barbed wire, known to be intended for export, not only stated the price as free alongside steamer, which would not be controlling as to place of delivery, but in a separate paragraph specified for delivery free alongside ocean steamer in New York, and required the seller to present shipping documents

showing delivery as aforesaid, the wire remained the property of the seller until delivery at the designated place, and the railroad and lighterage companies were the seller's agents, so that the seller could not require payment of the price on presenting railroad bills of lading with freight prepaid or to be deducted.

Where a contract of sale required delivery alongside steamer, a letter of instructions relating to billing, marking, and shipping, which directed consignment of the goods to the buyer's shipping agent, with rail bills of lading marked "for export," did not change the place of delivery, or at least did not change the requirement of the contract that the seller should present shipping papers before he was entitled to payment.

The fact that the fiscal agent of the buyer paid for certain quantities of wire intended for export on notice of its receipt at the rail terminus at the port does not waive the right of the buyer to insist on the provision of the contract that the seller present shipping documents before payment.

5. Sales \$\infty\$180(1)\to Waiver of delivery to steamer does not establish right to deliver at railroad.

Even if a buyer had waived his right to require delivery alongside steamer before payment by making payments on certain shipments on notice of the goods' arrival at the rail terminus at the port, that waiver would not entitle the seller to require payment on loaded goods on cars at its factory.

6. Trial €=304(5)—General finding incorporates special finding supported by evidence.

In an action for breach of a contract for the sale of barbed wire, to be delivered free alongside ship, where defendant claimed a waiver of the provision for delivery, a general finding for the buyer incorporated in legal effect a special finding, which was supported by evidence, that the payments by the buyer's agent were made on the understanding that the notices showed arrival of the goods alongside ship.

 Sales 418(7)—Buyer not required to accept delivery at another place to minimize damages.

The measure of the buyer's damages for breach of a contract for the sale of wire desired for immediate export, and which the seller was to deliver alongside steamer is the difference between the contract price and the market price of the wire at the port; the buyer not being required, in order to minimize the damages to accept the seller's offer for delivery on cars at its factory.

In Error to the District Court of the United States for the District of Indiana.

Action by the Republic of France against the Kokomo Steel & Wire Company for breach of contract for the sale of barbed wire. Judgment for the plaintiff, and defendant brings error. Affirmed.

Conrad Wolf, of Kokomo, Ind., for plaintiff in error. Ferdinand Winter, of Indianapolis, Ind., for defendant in error. Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. Judgment was rendered against Kokomo Company for damages resulting from its refusal to complete deliveries of barbed wire to the republic of France. It attempted to jus-

tify its stand on the ground that the buyer had first refused to pay for further deliveries, except on terms that violated the contract as signed, and especially violated the contract as practically construed by the acts of the parties during its partial execution.

Parts of the contract, material to the decision, are these:

"Price, \$2.98 per hundred pounds, f. a. s. New York City."

"Packing: Wire shall be wound on reels furnished by seller and to become property of buyer, and suitably packed by seller, without cost to buyer, for ocean carriage."

"Time and mode of delivery: Delivery shall be completed within 90 days from date (August 23, 1915) at the rate of 1,000 tons each 30 days. Time is of the essence. Delivery shall be made free alongside ocean steamer, New York City."

"Terms of payment: Payment shall be made by buyer for each lot delivered within 5 days after presentation to it at the office of its agents, Messrs. J. P. Morgan & Co., 22 Wall street, New York City, of proper invoices, shipping documents showing delivery as aforesaid, and inspection certificates."

Situation of parties when making the contract: Kokomo Company was a manufacturer of steel products in Indiana. France was at war, and barbed wire was an urgently needed material. France was represented in this country by an official commission. Under and through the commission J. P. Morgan & Co., of New York, were financial agents, and G. W. Sheldon & Co., of New York, were shipping

agents, looking after ocean transportation to France.

Four days after the date of the contract the buyer mailed to the seller a letter of "instructions as to billing, marking, and shipping." This stated that certain identifying marks should "appear plainly on each package"; that the invoices should "give full particulars as to package numbers, marks, gross and net weight of packages, and the quantity contained in each package"; that "shipment should be consigned to G. W. Sheldon & Co., 24 State street, New York City, with rail bills of lading marked 'For Export, Lighterage Free';" and that "original bills of lading should be mailed" to J. P. Morgan & Co.

Probably no controversy would have arisen if the seller had completed its deliveries (either on the cars at Kokomo or alongside ship in New York harbor) within the time specified in the contract. As the buyer was anxious to get the material, it waived the seller's delays; but those delays ran the shipments into the railroad congestion and embargo of 1916, and finally a situation developed in which cars leaving Kokomo would not arrive in New York until months later. From the first Sheldon & Co. (in charge of ocean transportation for the buyer) had been notifying Morgan & Co. of the arrival of each lot in New York, and Morgan & Co. had been paying the seller within five days thereafter. While shipments were going through promptly no dispute arose; but when months elapsed before shipments from Kokomo would arrive in New York, the seller took the position that it was entitled to payment within five days after Morgan & Co.'s receipt by mail of invoices, inspection certificates, and railroad bills of lading showing freight and lighterage charges prepaid, the contention being that the bills of lading constituted the "shipping documents" mentioned in the payment provision of the contract. Thereupon the buyer insisted that it was under no obligation to pay until five days after the seller's

presentation to Morgan & Co. of "documents showing delivery free alongside ocean steamer in New York Harbor." This was the parting of the ways; the seller declined to make further shipments except upon sight drafts attached to bills of lading; and the buyer went into the market in New York and purchased wire to cover the seller's shortage, and then sued for the difference between market and contract prices. A jury was waived and the court made a general finding in favor of the buyer.

[1] Parties may expressly agree in their writing upon the place of delivery. If a seller has his goods at his shop or produces them at his factory, and if nothing is stated in the writing with respect to place of delivery, the law operates upon a presumption of fact that the seller's place of business was mutually intended. If a seller assumes to put the goods aboard cars at his own expense, and further assumes to pay the freight to the buyer's station, and if these obligations are expressed only as affecting the seller's net price, the seller has fulfilled his obligation to deliver by placing the goods on the cars and title passes at once to the buyer. But the seller may additionally agree that he will deliver the goods, by his own carriers, to the buyer at a designated place; that pending delivery the title shall remain in the seller; or that prior to delivery the title, as between the parties, shall pass to the buyer; and that, irrespective of where the title is during transportation of the goods, payment shall be conditioned upon actual delivery: that is, that the seller shall be an insurer of safe transportation and actual delivery to the buyer. The problem is to ascertain the intent of the parties. United States v. Andrews, 207 U. S. 239, 240, 28 Sup. Ct. 100, 52 L. Ed. 185; Delaware, etc., Ry. Co. v. United States, 231 U. S. 363, 34 Sup. Ct. 65, 58 L. Ed. 269; Chandler Lumber Co. v. Radke, 136 Wis, 495, 118 N. W. 185, 22 L. R. A. (N. S.) 713; McCandlish v. Newman, 1 Phila. (Pa.) 268; 19 Cyc. 1082; 20 Cyc. 841, note; 35 Cyc. 171, note, 173, 174, 188.

[2] In the "price" provision of the contract in suit the seller agreed to prepay, or permit the buyer to deduct from the gross price, the freight and lighterage charges for transporting the goods from Kokomo to the side of an ocean steamer at New York. If this were the only place in the contract where the expression "f. a. s. New York" was used, the place of delivery would be aboard cars at Kokomo. But there is a separate paragraph devoted exclusively to delivery, and therein the seller engaged to deliver "free alongside ocean steamer, New York." And in the next paragraph, which concerns payment, the condition is that the seller shall present to Morgan & Co. "shipping documents showing delivery as aforesaid." The repetition of the word "free" in the delivery provision bringing forward the seller's previously made promise to pay transportation charges does not cancel "alongside ocean steamer, New York," as the place of delivery. And counsel's stressing of the adjective "shipping" in the payment paragraph is futile: the substantive things are the "documents showing delivery as aforesaid." Under this contract the goods remained the property of the seller until delivery at the designated place; and the railroad and lighterage companies, which the seller was free to select, were the seller's agents. And if the seller did not choose to have some other agent at New York to present the necessary documentary proofs to Morgan & Co., it should have required its transporting agents to procure the certificate of the master of the lighter and (or) the acknowledgment of the master of the ship.

[3] Is the legal effect of the contract altered by the buyer's letter of instructions? It said nothing about place of delivery or conditions of payment. It related only to "billing, marking, and shipping." Billing and marking could not bear upon the question. Counsel's contention is that the direction to consign the goods to Sheldon & Co. with rail bills of lading marked "For Export, Lighterage Free," altered the contract so that upon the seller's putting of the goods aboard cars at Kokomo with freight and lighterage charges prepaid the title passed to Sheldon & Co. for the buyer, and further that upon such passing of title all obligations of the seller were at an end. If the seller did not otherwise know, its obligation in the "packing" provision to prepare the goods "for ocean carriage" informed it of the ultimate destination of the goods. Like information was given by the direction how to mark the bills of lading. As the seller knew that somebody other than itself must arrange for the ocean carriage, the trial court was justified in finding that the direction respecting consignment to Sheldon & Co. was for the purpose of facilitating the securing of transportation to France by the buyer's shipping agents and not for the purpose of passing title at Kokomo. But, even assuming that title passed at Kokomo, the question here is not when title passed, but when the buyer's obligation to pay matured. And the letter of instructions about billing, marking, and shipping leaves untouched the very particular requirements of the contract in regard to payments. No payment was due until after the seller had delivered the goods to the buyer at the designated place. For the existence of such an obligation it was immaterial where the title was during the process of delivering the goods.

[4-6] Nor was the situation changed by what occurred between Sheldon & Co. and Morgan & Co. During the early part of the execution of the contract Sheldon & Co. mailed notices to Morgan & Co. of the arrival of goods and Morgan & Co. within five days remitted to the seller. These first notifications were given by Sheldon & Co. upon the arrival of goods at railroad freight terminals in New York. Sheldon & Co. were the buyer's agents for ocean carriage, but the seller, failing to have its own notification agent in New York or to require its rail and lighter transporting agents to give Morgan & Co. the necessary evidence of delivery alongside ocean steamer, either adopted the acts of Sheldon & Co. as acts of its own agents or failed entirely to notify Morgan & Co. of the arrival of goods. If payment by Morgan & Co. within five days after arrival of goods at rail terminals in New York should be considered a waiver of delivery alongside ocean steamer, such a conclusion would not establish the buyer's acquiescence in the seller's contention that delivery to a railroad at Kokomo was delivery to the buyer. But the trial court, in its general finding for the buyer, incorporated in legal effect a special finding (supported by the evidence) that Morgan & Co. paid on their understanding of the no-

tices given by Sheldon & Co. that the goods had arrived alongside ocean steamer. When by reason of the railroad companies' long delays in shipments between Kokomo and New York the French commission called the attention of its shipping and financial agents to the terms of the contract respecting delivery and payment, Sheldon & Co. thereafter gave no notices except on arrival of goods alongside ocean steamer and Morgan & Co. made no payments except after such arrival. If Sheldon & Co. were the seller's agents in giving the erroneous notices, they were likewise the seller's agents in changing to proper notices. But in any view there is no basis for waiver (or estoppel, see Ewart's Waiver Distributed, c. 2), for neither the government at Paris, nor the French commission in this country, nor Morgan & Co. ever knowingly permitted or made a payment until after the seller had

delivered the goods according to contract.

[7] There remains a question concerning the amount of the finding. which was based on the difference between the contract price and the market price in New York when the seller refused to complete deliveries according to contract. Counting on the general rule that, after the seller's breach, the buyer was obliged to use reasonable diligence to protect itself from loss and to keep the damages at the minimum, counsel insists that the buyer should have accepted the seller's continuing offer to furnish barbed wire at the contract price and to place the wire on board cars at Kokomo and to prepay rail and lighter transportation charges and to take in payment the buyer's acceptances of sight drafts attached to the rail bills of lading. But at that time the seller was more than a year in default on a 90-days contract in which time was expressly made of the essence. The urgent need, which induced the buyer to overlook the seller's delays, continued to make time of the essence of the situation created by the seller's refusal further to per-The seller had no wire in New York and offered to deliver none. What the buyer wanted and was entitled to have was wire in New York ready for ocean carriage, not a repudiating seller's offer of wire at Kokomo to be shipped to New York harbor at the buyer's risk. No duty required the buyer to yield to the wrongful demand and thus save the seller from the legal consequences of its repudiation of the contract.1

The judgment is affirmed.

1 On damages the seller cited: Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117; Lawrence v. Porter, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167; Mc-Knight v. Dunlap, 5 N. Y. 537, 55 Am. Dec. 370; Penn. Ry. Co. v. Washburn (D. C.) 50 Fed. 335; Deere v. Lewis, 51 Ill. 254.

And the buyer cited: 5 Birdseye's Consol. Laws of N. Y. p. 6292, § 148; Goldfarb v. Campe Corp., 99 Misc. Rep. 475, 164 N. Y. Supp. 583; Hirsch v. Georgia Iron Co., 169 Fed. 578, 95 C. C. A. 76; Campfield v. Sauer, 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N. S.) 837; Waldrip v. Hill, 70 Wash. 187, 126 Pac. 409; Chisholm v. Preferred Bankers' Life Assurance Co., 11 Mich. 50, 70 N. W. 415.

UNITED STATES v. ATKINS et al.

ATKINS et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1920.) Nos. 5420, 5425,

1. Indians @=13—Adjudication by Dawes Commission adversary in nature and conclusive against collateral attack.

Proceedings by the Dawes Commission to determine who should be enrolled as citizens of the Five Civilized Tribes and what land should be allotted to each held adversary in nature and conclusive against collateral attack.

2. Indians 13-Fraud alleged does not authorize review of Dawes Com-

mission adjudication.

Where the Dawes Commission had found that a named person was a citizen of the Five Civilized Tribes and allotted land to him, the adjudication cannot be set aside upon ground that defendant had fraudulently omitted to inform the commission that the named person did not exist.

3. Indians @13—Finding by Dawes Commission that a specified allottee existed is conclusive against collateral attack.

Where the Dawes Commission determined that an Indian allottee was alive on a specified date and entitled to enrollment, the decision is final and cannot be collaterally attacked on the ground that the allottee is a fictitious person.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Bill by the United States against Minnie Atkins and others. From an adverse decree, the United States appeals, and defendants Nancy Atkins and others also appeal. Affirmed.

In Case No. 5420:

Paul Pinson, Sp. Asst. U. S. Atty., of Tulsa, Okl., and D. H. Linebaugh, Sp. Asst. to the Atty. Gen., of Muskogee, Okl. (Archibald Bonds, U. S. Atty., and J. C. Davis, Creek National Atty., both of Muskogee, Okl., on the brief), for the United States.

C. B. Stuart, of Oklahoma City, Okl., and Lee Bond, of Leavenworth, Kan. (E. C. Hanford, of Seattle, Wash., and M. K. Cruce, of Oklahoma City, Okl., on the brief), for appellees Folk and others.

Joseph M. Hill, of Ft. Smith, Ark., and Malcolm E. Rosser, of Muskogee, Okl., for appellees Atkins and others.

In Case No. 5425:

Joseph M. Hill, of Ft. Smith, Ark., and Malcolm E. Rosser, of Muskogee, Okl. (Napoleon B. Maxey, of Muskogee, Okl., and Henry L. Fitzhugh, of Ft. Smith, Ark., on the brief), for appellants.

C. B. Stuart, of Oklahoma City, Okl., and Lee Bond, of Leavenworth, Kan. (E. C. Hanford, of Seattle, Wash., on the brief), for ap-

pellees Folk and others.

Paul Pinson, Sp. Asst. to the U. S. Atty., of Tulsa, Okl., and D. H. Linebaugh, Sp. Asst. Atty. Gen., of Muskogee, Okl. (Archibald Bonds, U. S. Atty., and J. C. Davis, Creek National Atty., both of Muskogee, Okl., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and VAN VALK-ENBURGH, District Judge.

VAN VALKENBURGH, District Judge. This case has been once before this court upon appeal from an order appointing a receiver. Some of the questions here presented were there discussed and ruled. The order appointing the receiver was reversed and set aside upon filing of bond in lieu thereof, and the case was remanded to the court below for further proceedings, not inconsistent with the views expressed in the opinion filed. Folk et al. v. United States of America et al., 233 Fed. 177, 147 C. C. A. 183. The main facts are

succinctly stated by Judge Sanborn in that opinion.

One Thomas Atkins was listed for enrollment as a member of the Creek Tribe of Indians by the Dawes Commission on May 23, 1901, was duly enrolled as such a citizen by that commission, was on March 1, 1902, reported to the Secretary of the Interior to have been regularly listed for enrollment and enrolled by it, to have been one of the Creek citizens "living on the 1st day of April, 1899, or born to citizens so entitled to enrollment up to and including the 1st day of July, 1900, and then living," to have been found upon the 1895 authenticated Creek tribal roll, and to have been enrolled by it as No. 7913 on its roll, and a copy of the part of that roll containing his enrollment and the enrollment of some others was submitted with the report, which the commission closed with this statement:

"The Commission, after having thoroughly examined the rolls of the Creek Nation and such evidence as has been submitted, touching the identification of the persons on roll herewith submitted, is of the opinion that all are entitled to enrollment as Creek citizens by blood, and should be so enrolled."

The part of the roll so certified to the Secretary was approved by him, the land in the defendants' possession was allotted to Thomas Atkins, a certificate of allotment thereof to him was issued on June 30, 1902, patents therefor, dated April 14, 1903, approved by the Secretary on May 8, 1903, were issued to him and were recorded in the office of the commission on May 16, 1903. It appears, however, that such patents were not actually delivered. Under leases, certain of the defendants were in exclusive possession of the land in controversy, drilling wells and producing oil, when, on February 15, 1915, the United States, on its own behalf and on behalf of the Creek Tribe of Indians, brought this suit to cancel and avoid the enrollment of Thomas Atkins as a Creek citizen, the certificate of allotment, and the patents of the land to him, to perpetually enjoin him and all claiming under him from asserting any interest therein, or in the proceeds thereof, and for the appointment of a receiver pendente lite.

On September 17, 1915, an amended bill was filed, and September 12, 1916, a bill of complaint supplemental thereto. The complainant alleges that the Dawes Commission was charged with the duty of determining who were entitled, under the acts of Congress, to be enrolled as citizens of the Creek Nation, and no one was entitled to be so enrolled who was not living on April 1, 1899, that Thomas Atkins was not living on that day, "that no evidence of any character was

produced before, or obtained or had by, said commission with respect to the right of the alleged Thomas Atkins under said act of Congress to be so enrolled," and that in causing his name to be placed on the roll of Creek citizens by blood the commission acted arbitrarily and summarily, and without any knowledge, information, or belief that he was in existence or living or dead on April 1, 1899; further that the said enrolled and allotted Thomas Atkins was, and is, a distinctly mythical person, and consequently that the Dawes Commission was without jurisdiction to enroll that name or allot lands to him, and the patents in question were and are utterly void; further, that the commission, as a basis for the enrollment of the name of Thomas Atkins, used, as necessarily material evidence upon the question of the citizenship of Thomas Atkins, the 1895 pay roll containing his name; that that pay roll was false and fraudulent in so far as it contained that name; that the defendant Minnie Atkins caused it to contain said name, well knowing that it had no rightful place thereon, and concealed the fact that it represented a mythical person; that the proceedings of the Dawes Commission, resulting in said enrollment, were ex parte and subject to attack in this proceeding in equity. The supplemental bill presented the fact that the patents, though issued, had never been delivered, and prayed that this cause be not set down for trial until the Secretary of the Interior might assume and exercise in the premises a jurisdiction claimed still to exist in him over the subject-matter of the controversy.

In order that the issues presented to this court for determination may be more clearly defined, it is necessary to review somewhat the proceedings in the court below after the case had been remanded for trial upon the merits as heretofore stated. The condition of the record is thus succinctly presented by Judge Campbell, and for precision and clearness we quote from his memorandum opinion of December 1,

1917:

"At an early stage in the taking of testimony in this case, after the plaintiff [United States] had produced the greater part of the evidence upon which it relied as to just what transpired before the Dawes Commission in May, 1901, at Okmulgee, when Thomas Atkins was listed for enrollment, and when it proposed to enter upon that branch of the case which involved the offering of proof in support of its contention that Thomas Atkins never had any existence, the objection was made by counsel for the defendants Atkins, Page, and allied interests that such evidence was inadmissible, as being immaterial to any proper issue in the case. It was then urged that the evidence already adduced by the plaintiff, so far from establishing the charge that the Dawes Commission had enrolled Thomas Atkins without having any evidence upon the question as to whether he was living April 1, 1899, on the contrary, established that it had heard testimony upon this point. It was further urged in support of the objection that the government's proof also showed that the hearing before the Dawes Commission as to the right of Thomas Atkins to be enrolled was not ex parte as contended by the Government, but that the commission had acted as a quasi judicial body in listing for enrollment and enrolling Thomas Atkins as a member of the Creek Tribe, had heard evidence upon the things conditioning his right to enrollment, to-wit: as to his being a citizen by blood of the tribe, his residence with the tribe, and his having been living on April 1, 1899, and that his enrollment by the commission and the issuance of patents pursuant thereto amounted to a judgment of that tribunal conclusively determining in his favor these several questions of fact as against

any future collateral attack and against any direct proceeding to vacate or set aside such enrollment and patents except upon the grounds upon which the final judgment of a judicial or quasi-judicial tribunal may be attacked, that is, for such fraud or such mistake of law or fact as when established renders such judgments voidable. That the fraud charged against Minnie Atkins in relation to the procurement of the placing of the name of Thomas Atkins on the 1895 Creek Roll was not the character of fraudulent act for which the judgment of the commission could be attacked, in that, if it was fraud, it involved a matter in issue before the commission, and not an extrinsic or collateral matter. It was urged therefore that the question of the existence or non-existence of Thomas Atkins was necessarily involved in the question of his being alive or dead on April 1, 1899, and that question having been conclusively determined by the commission could not be retried in this court. The matter was then orally argued quite fully and the court, largely on the authority of Iowa Land & Trust Co. v. United States, 217 Fed. 11, 133 C. C. A. 121, overruled the objection and permitted the plaintiff to offer proof as to whether Thomas Atkins ever existed, to which issue, as afterward developed, has been addressed the greater part of the testimony making up the colossal record in this case.

"Just before the close of the taking of the testimony in the case, which consumed more than a month, the opinion of the Supreme Court of the United States in United States v. Wildcat et al., 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024, commonly known as the "Barney Thlocco" Case, was rendered, involving the question of the finality of the action of the Dawes Commission in enrolling Creek Citizens and the issuance of patents to them or in their names. In the light of this decision, counsel renewed their objection above referred to, and the court decided to reopen this question of law and permit counsel to brief the same, and to further consider that question preliminary to the consideration of other features of the case. There was an effort on the part of the government to secure a rehearing of the Thlocco Case by the Supreme Court, but the court is now advised that this has been denied, so that the case stands as authority. Counsel for plaintiff in their brief say:

"'Even if we had proceeded with the trial of the case with the contention that the commission acted arbitrarily, and without evidence as to the right of Thomas Atkins to be enrolled, we would now be foreclosed with respect to that contention, by reason of the decision in the Barney Thlocco Case; but we were not unmindful of the view which this court took of the issue of fact raised in that case, and, in point of fact, we proceeded to try this case upon the following propositions, presented by our pleadings, namely:

"'First. That the enrolled and allotted Thomas Atkins was, and is, a distinctly mythical person; consequently, that the Dawes Commission was without jurisdiction to enroll that name or allot lands to him, and the patents were, and are, utterly void. This proposition is presented in the amended bill of complaint as the third ground for the relief prayed for, and calls for no impeachment of the judgment of the commission, save only in so far as proof of the utter nonexistence of the enrollee and patentee operates absolutely to impeach and destroy that judgment and the resultant patents. (See paragraph VII of the amended bill of complaint.)

"'Second. That the commission, as a basis for the enrollment of the name of Thomas Atkins, used, as absolutely necessary—hence, necessarily material—evidence upon the question of the citizenship of Thomas Atkins, the 1895 pay roll containing his name, and that that pay roll was false and fraudulent in so far as it contained that name; that the defendant Minnie Atkins caused it to contain said name, well knowing that it had no rightful place thereon, and concealed the fact that it represented a mythical person; that her concealment of that fact has continued from that day to this, and she is now attempting to reap the benefits growing out of the Dawes Commission enrollment, which resulted from the ex parte proceeding wherein said false tribal roll was used as aforesaid. (See paragraph V of the amended bill of complaint.)'

"In view of this admission and the evidence offered by the government itself, we start with the established proposition that the government has (268 F.)

failed to discharge the burden which rested upon it to establish by the evidence that the commission acted arbitrarily and without evidence as to the right of Thomas Atkins to be enrolled, which involved, as we have seen, the questions of his Creek blood, his residence in the tribe, and his having lived up to and including April 1, 1899. Therefore, unless the action of the commission may be attacked in this proceeding on the theory that notwithstanding its findings Thomas Atkins was in fact a myth and never existed, and that Minnie Atkins, in having him placed upon the 1895 Creek Roll as a person then in being, and permitting the commission to consider said roll as evidence of his existence and Creek citizenship, without apprising the commission of its falsity, practiced such fraud upon the commission as renders its judgment voidable in this proceeding; or on the theory alone that Thomas Atkins was in fact a myth, and that therefore, notwithstanding its attempted action, the commission was without jurisdiction to enroll his name or allot land in his name, and that hence its action is a nullity, the title to the land still remaining in the Creek Nation, and pretended patents being clouds thereon, the objection to the introduction of evidence was well taken, and as a matter of law the plaintiff must fail in this case. Its right to make this proof the plaintiff bases upon these three propositions as appears from the brief:

"I. "The proceedings before the commission were ex parte."

"II. 'The particular charge of fraud in this case, if sustained, entitles

the complainant to the relief prayed for.'

"III. 'A patent to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the title to no one, and the judgment on which it is based is a nullity, for want of jurisdiction in the Dawes Commission to render it.'"

It thus appears that, in view of the decision of the Supreme Court in United States v. Wildcat et al., supra, complainant abandoned its contention that the commission acted arbitrarily, and without evidence as to the right of Thomas Atkins to be enrolled, and proceeded to try its case thereafter upon the propositions numbered first and second, as quoted. The court below stated the three propositions upon which the plaintiff based its right to make proof in support of its contention that Thomas Atkins was a myth and never had any existence in fact. While the court sustained the objection of defendants upon these propositions, it must be remembered, however, that plaintiff had already tendered full proofs upon this issue, to which was addressed the greater part of the testimony making up this record of approximately 5,000 pages.

But still further, in their brief in this court, counsel for the government say:

"We do not now urge that Minnie Folk (née Atkins) committed any fraud upon the tribe, because we are unable to show that she caused the name Thomas to be placed upon the roll; nor do we believe she drew any money for the fictitious being represented by that name; nor can she be charged with any fraud upon the Dawes Commission, except the fraud of omission to inform that body of the nonexistence of Thomas. We shall not discuss the fraud allegations and proof, however, nor the character of the proceedings before the Dawes Commission resulting in this enrollment. We believe the question whether fraud was practiced in the enrollment proceedings is immaterial here."

[1] It will thus be seen that counsel for the government, both in brief and argument, in substance abandon all other contentions and rely upon the single proposition that—

"A patent to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the title to no one, and the judgment on which it is based is a nullity for want of jurisdiction in the Dawes Commission to render it."

And, as incident thereto, that Thomas Atkins was, in fact, a mythical person. We say this because there can no longer be reasonable insistence that the proceedings before the Dawes Commission were exparte. Those proceedings were adversary in their nature, and the adjudication of the commission of who should be enrolled as citizens and freedmen of the Five Civilized Tribes, what land should be allotted each, and in what way, and of every issue of law and fact necessary for it to determine, in order to decide such questions, is conclusive and impervious to collateral attack. Malone v. Alderdice, 212 Fed. 668, 129 C. C. A. 204; Folk v. United States, 233 Fed. 177, 147 C. C. A. 183; United States v. Wildcat et al., 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024.

[2] The allegation of fraud upon the tribe is abandoned, and it is conceded in brief and argument that Minnie Folk cannot be charged with any fraud upon the commission, "except the fraud of omission to inform that body of the nonexistence of Thomas." Such fraud, even though it existed, falls clearly within the rule announced in United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, and Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929. In the latter case it was said:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal."

It devolved upon the commission, in the proceeding to which the citizen claiming the right to enrollment and allotment on the one side and the Creek Nation on the other side were adverse parties in contemplation of law, to determine whether Thomas Atkins was "living on the 1st day of April, 1899, or born to citizens so entitled to enrollment up to and including the 1st day of July, 1900, and then living." This necessarily involved the question of whether he was a real or mythical person; since, of course, no mythical person could have been "living" on the dates mentioned. When the Dawes Commission determined that he was such a living person and entitled to enrollment, it decided the very crucial question involved in this proceeding—an issue of law and fact which was indispensable and necessary for it to determine in order to decide the matters exclusively confided to it and upon which its judgment is made final. As a result of the process of elimination, disclosed by the record as hereinabove stated, of some of the original propositions advanced by the government, and of the conclusive determination of others adversely to the government by the authoritative decisions of the Supreme Court of the United States and of this court, practically the only remaining question with which we have to deal is whether the court below erred in sustaining the contention of the defendant Minnie Folk, formerly Minnie Atkins, that the United States should not be permitted to retry the issue of whether her alleged son, Thomas Atkins, was living on April 1, 1899, on the ground that he was a fictitious or mythical person, and, as an incident thereto, whether, under the facts disclosed by this record, that error, if it be one, was substantially prejudicial.

The government, to sustain its proposition, relies almost entirely upon the decision of the Supreme Court of the United States in Sampeyreac v. United States, 7 Pet. 222, 8 L. Ed. 665. This case was brought under a special act of Congress passed May 8, 1830 (4 Stat. 399), for the express purpose of enabling the court in Arkansas having cognizance of claims under a former act—

"to proceed by bills of review, filed, or to be filed, in the said court, on the part of the United States, for the purpose of revising all or any of the decrees of the said court in cases wherein it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed, in any case, on any forged warrant, concession, grant, order of survey, or other evidence of title."

In the absence of this enabling act of 1830, and the authority thereby conferred, it was evidently believed that jurisdiction for the purpose stated was wanting. In such case, the scope of the act must necessarily be confined to the subject-matter recited and the grounds for relief stated therein.

In the Sampeyreac Case forgery was present and was the foundation of the action. Of course, closely interwoven with this was the further conceded fact, and not, as here, the contested fact, that Sampeyreac was a fictitious person, and, consequently, all deeds or other muniments of title purporting to emanate from him must, in the nature of things, have been forgeries. Conceding the express right to review and revise on the ground of forgery, the evidence thereof, including the evidence of the non-existence of a grantor and litigant, would be clearly admissible. And the act in question conferred not only the right to review decrees, but the right to relitigate issues involved in such decrees. But, if the general rules governing the jurisdiction of a court of equity, in the absence of such express legislation, forbid both the review of such decrees and the relitigation of such issues in a collateral proceeding, then, clearly, the evidence offered in support thereof must be denied.

In United States v. Flint, Case No. 15,121, 25 Fed. Cas. 1107, before Field, Circuit Justice, Sawyer, Circuit Judge, and Hoffman, District Judge, the Sampeyreac Case is thus distinguished from normal procedure under recognized equity rules:

"In the Case of Sampeyreac, 7 Pet. (32 U. S.) 222, which is the only reported case where a re-examination was made, it was done by virtue of a special act of Congress, which authorized the proceeding, not before the ordinary tribunals, but by bill of review in the special tribunal upon which the original jurisdiction over the cause had been conferred. Whether or not by virtue of that jurisdiction it might have entertained a bill of review to set aside its own decree, the Supreme Court does not decide. An act of Congress seems to have been deemed necessary to confer the authority. But it is nowhere intimated that any court of equity powers, but upon which no authority to pass upon the validity of claims of that description had been conferred, could have entertained such a bill, or in any other form have

re-examined the questions finally decided by the special tribunal. * * * It is not necessary to assert that, where a fraudulent title has been confirmed, the United States is entirely without remedy, nor that the political department of the government may not, if it sees fit, invest the courts with authority to re-examine the questions which, as the law now stands, remain finally decided in these cases. But, until Congress has so expressed its will and conferred the requisite authority, it may confidently be affirmed that the ordinary tribunals are without jurisdiction."

In the case at bar the existence of the allottee, Thomas Atkins, was a litigated question before the Dawes Commission, a quasi judicial tribunal established by act of Congress for the explicit purpose of quieting these questions of Indian title, whose decisions, by the express provisions of that act, were made final, conclusive and impervious to collateral attack either by the Creek Nation, the United States, or any other party in interest. The judgment of the commission established beyond peradventure that Atkins was not a fictitious person, but was alive April 1, 1899, and was therefore legally enrolled. It matters not that the proceedings of the commission were less formal than in the regular law courts of the country, nor that it necessarily must have made mistakes in the discharge of its duties. The principle involved remains unchanged. The rule applicable to the setting aside of decrees for fraud of the nature here presented has been well established by many pronouncements of the Supreme Court and of this court. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929; United States v. Wildcat et al., 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024; Malone v. Alderdice et al., 212 Fed. 668, 129 C. C. A. 204. It is a rule founded upon reason and substance. It is essential to a seemly end to litigation. It involves the very notion of repose and quietude that is embraced within the purpose of the act of Congress making the decision of the Dawes Commission final, conclusive, and impervious to collateral attack, except under the circumstances and conditions prescribed and recognized in the practice and procedure in equity. It follows that the action of the court below in sustaining the objection to the government's offer of proof in support of its contention that Thomas Atkins was a fictitious person was right, and must be sustained.

[3] But independently of this conclusion, it would seem that upon the merits the government can fare no better, and this involves Nancy Atkins, appellant in case No. 5425. This record of approximately 5,000 pages presents an "irrepressible conflict," and if any appellate court is ever concluded by the findings of a chancellor upon facts sufficiently substantial to support them, and such is and should be the uniform rule of decision, this case falls peculiarly within that rule. It may be that mistakes have been made. Taking into consideration the environment, subject-matter, and personnel of the witnesses and parties involved, it may be conceded that, in this class of cases, exact justice is difficult of attainment; but I apprehend Congress was fully aware of this situation, as affecting these Indian titles, when it conferred such complete authority upon the Dawes Commission and clothed its decisions with such presumption of verity. As has been stated, the government produced its evidence fully before the court. The de-

fendants introduced testimony without let or hindrance. The resident judge, admirably equipped, by training and experience, to discharge the onerous duty which devolved upon him, patiently and conscientiously heard and considered the evidence produced in the course of a hearing which consumed more than a month. He saw most of the witnesses upon the stand, and had opportunity to note their demeanor and to weigh their testimony. His findings are amply sustained by the record, and should not be set aside by this court. To attempt a comprehensive review of the evidence contained in this extended record would be impracticable, and would serve no useful purpose. It is sufficient that we have reached the same conclusions as did the trial judge upon the issues of fact.

It results that the decree should be sustained and affirmed. It is so

ordered.

MIDLAND BRIDGE CO. et al. v. HOUSTON & B. V. RY. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. November 24, 1920.)

No. 3480.

1. Navigable waters = 20(2)—Alterations in mere details of plan for bridge

need not be approved by Secretary of War.

Where the plans for a bridge over a navigable river have been approved by the Secretary of War as required by Act March 3, 1899, § 9 (Comp. St. § 9971), mere alterations in details which in no way contemplate any change in the size, nature, or relation to the stream of the completed bridge do not require approval by the Secretary as a condition to the continuing in force between the parties of a contract for construction of the bridge.

2. Navigable waters ≈ 20(2)—Subsequent contract for removal of collapsed

bridge not invalidated by failure to obtain approval.

A subsequent contract for the removal of a collapsed bridge, which obstructed a navigable stream, where the compensation for such removal was to be measured by the determination of which party was in fact responsible for such collapse, would not be invalidated by a failure to secure the approval of the Secretary of War to alterations in the original contract for construction of such bridge, even if such approval was necessary to authorize such alterations.

3. Bridges \$\iff 20(6)\$—Contractor's fault shown to be cause of pier's fall.

Evidence held to sustain the finding of a master, sustained by the District Court, that the falling of a bridge pier during construction of the bridge was due to the fault and negligence of the contractor in employing improper methous of construction and using defective concrete, and not to defects in the plans furnished by the owner.

4. Appeal and error €=1022(2)—Findings by master and trial court conclu-

sive, if supported by evidence.

Where a master and the trial court agree on findings of fact, they are conclusive on the appellate court, if there is any substantial evidence to support them.

Appeal from the District Court of the United States for the Southern District of Texas; Joseph C. Hutcheson, Jr., Judge.

The Midland Bridge Company and others appeal from the decree on

a petition of intervention in suits against the Houston & Brazos Valley Railway Company and others. Affirmed.

For opinion below, see 257 Fed. 213.

W. S. Hunt, of Houston, Tex., and William C. Scarritt and Edward L. Scarritt, both of Kansas City, Mo., for appellants.

O. L. Stribling, of Waco, Tex., and John A. Mobley, of Houston, Tex., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The Midland Bridge Company, a partnership consisting of Henry Freygang and Albert A. Trocon, on July 1, 1914, made a contract with the Houston & Brazos Valley Railway Company and the county of Brazoria, Tex., as owners, to build a bridge across the Brazos river between Freeport and Velasco, Tex., about four miles from the Gulf of Mexico, according to certain plans and specifications prepared by the owners through their engineers, attached to and made a part of said contract, known and hereinafter referred to as the "construction contract."

The construction of said bridge proceeded to the completion of three piers on the Velasco side, pier 3 being a pivot pier located about one-third of the way across the river, and carrying a revolving steel span 290 feet long. So much of this steel span was completed as connected pier 2, which was at the shore line, with pier 3, and two members of the span beyond pier 3 were also completed, when, on May 7, 1915, pier 3 toppled over and fell into the river, throwing the steel span attached to it more than 50 feet downstream from the pier site.

A dispute arose between the bridge company and the owners as to whether the pier fell by reason of improper construction by the bridge company or defective plans furnished by the owners. The dispute being unsettled, in order to provide, meanwhile, for the removal of said steel from the river, a contract was entered into, on June 21, 1915, between said bridge company, the contractors, and said railway company and said county of Brazoria, the owners, for the removal of said steel by the contractors. The contractors were to keep an accurate account of the cost of all (1) labor employed; (2) material used; and (3) the rental, or use value, of all boats, equipment, machinery, and appliances, other than what they then owned and had at or near the bridge site. Fifteen per cent. of these sums was to be added, for the personal services of the contractors and for the rental of the boats, equipment, machinery, and appliances then owned by them, and the sum of the items 1, 2, and 3, and said 15 per cent. thereon should be the contract value, as that term was used in said second contract. If the contract value did not exceed \$4,000, the owners should pay one-half thereof in full discharge of their obligations under this contract; if it exceeded \$4,000, the owners should pay to the contractors one-half of \$4,000 and all of the contract value exceeding said sum, said payments to be made biweekly on receipt of statements from said contractors.

Said contract recited the existence of said dispute as to the responsibility for said fall, and provided that it should not estop either party in respect to said contention, and that if it should be thereafter established or agreed by the parties interested, or be judicially determined that the contractors were right in their claim and assertion, then the portion of said contract value, which by the terms of this contract they agreed to bear, should be allowed and paid to them by the owners; on the other hand, if it should be established, agreed, or judicially determined that the contractors were liable for the loss or damage caused by the fall of said part of said bridge, the portion of the contract price that the owners had paid under this contract should be repaid to them by the contractors. The contract value for removing said steel was reported as required, and aggregated \$9,226.48; but no biweekly or other payments of any part thereof were made by the owners.

On October 27, 1915, the defendant railway company was put in the hands of a receiver on a creditors' bill, filed in the United States District Court for the Southern District of Texas. Subsequently a bill to foreclose a first mortgage on the property of said railway company was filed in said court by the Mercantile Trust Company, a corporation of Missouri, against said railway company. The two cases were con-

solidated, and the receivership extended under this second bill.

On June 26, 1916, an intervening petition was filed in said consolidated cause by said Midland Bridge Company, seeking to recover said sum of \$9,226.48, the contract value under said second contract, and also the further sum of \$625.32 for items of material and labor furnished on other accounts. It was claimed in said petition that said contractors were not liable or responsible for the collapse of said pier 3, and that therefore the owners were liable for said entire contract value; that all the labor and material sued for was furnished within six months of the date of the appointment of the receiver, and that under the terms of the order of appointment such items were entitled to be adjudged preferential claims, superior to the mortgage.

The answer of the railway company and the receiver set up that the interveners were liable and responsible for the loss or damage that had occurred, because a part of the bridge constructed by them did not stand up, and denied all liability under said contract for removing said steel. While admitting most of the items composing said \$625.32, the defendant pleaded a counterclaim, which by stipulation was admitted to be \$2,018.67, arising out of matters disconnected with the contract sued on. Interveners' right to a preference was also denied. The intervention and defenses thereto were referred to a master, to take testimony and report his findings, judgments, and recommendations to the court.

The master heard voluminous testimony as to the original contract and the building of said collapsed pier 3 thereunder. He found that the contractors were responsible and liable for the collapse of said pier 3, and that they were not entitled to recover any part of said contract value for removing said steel. On the other items he found a balance in favor of the defendant railway company on said admitted counterclaim of \$1,692.08.

On exceptions to the master's report, which challenged the correctness of his finding that interveners were liable for the collapse of said pier 3, the District Judge, after a careful review of the evidence, held that on the findings of fact by the master, in which he concurred, the

interveners were responsible for the collapse of said pier, and overruled the exceptions to the master's report. A decree in accordance therewith was entered.

The errors assigned, insisted on in appellant's brief, attack the correctness of the decision that the interveners are not entitled to recover on the contract for removing said steel, because liable and responsible for the collapse of pier 3.

Three causes were assigned for the fall of the pier: First, that the original plan called for an excavation of 35 feet below mean low tide, in which the pier should be erected, and that this was stopped at 32 feet; that only 21 piles were driven when the excavation was carried to this depth, at intervals greater than $3\frac{1}{2}$ feet between centers, when the construction contract made this the maximum distance, and when proper piling required many more piles; second, that the concrete at the base of said pier was defective, and had become disintegrated, causing the pier to topple; third, that the interveners (contractors) had negligently dredged an excavation near the lower side of pier 3, which occasioned the river to scour, thus weakening the foundations under the pier.

[1, 2] The master found as to the change of the depth of the excavation that it was not authorized by the engineers of the owners in charge, and was therefore done at the contractors' risk; that the change was not authorized by the War Department, as required by the Act of Congress of March 3, 1899, c. 425 (6 Fed. Stat. Ann. 805), and therefore was not authorized to be made by the contractors. He also held that each of the other causes existed and operated in causing the collapse. The District Judge disagreed with the master as to the effect of no approval of the Secretary of War having been obtained to the change of depth of the excavation,

We do not think a mere alteration in detail, which in no way contemplated any change in the size, nature, or relation to the stream of the completed bridge would have to be approved by the Secretary of War as a condition to an existing contract for construction continuing of force between the parties thereto. We also think that, even if such approval was necessary to legalize such change, the failure to obtain it would not affect the rights of the parties in this present suit.

This is a suit brought to recover, on a contract made for the removal of the steel out of the river where it had fallen, the contract price agreed to be paid for such removal. This contract needed no approval of the Secretary of War or any other government official. It was stipulated that if the fall of this pier 3 was due to the conduct of the contractors they should not recover for the contract value of such removal. If they were not liable and responsible for such fall, then they were entitled to so recover. It was agreed by this second contract that the question of responsibility for the fall of the pier should fix the payment to be made under this contract for removing the steel. We can see no reason why this was not a valid agreement.

The District Judge also disagreed with the master in his finding that the change in depth of said excavation was without the owners' assent. He held that under the decision of this court in Penn Bridge Co. v. City of New Orleans, 222 Fed. 737, 138 C. C. A. 191, and like cases, the contractors could recover if the collapse of the pier 3 was due solely to defective plans furnished by the owners, if they did not know and had no reason to know the plans were defective.

Complaint is made that the court below held interveners, in order to sustain their intervention, had the burden of proving that the pier fell solely because of improper plans prepared by the owners, whereas the contractors insist the burden of proving that the collapse was due to other causes, for which the contractors were responsible, rested on the defendant owners.

The court below, while expressing the opinion that the burden rested on the interveners, first, to show that the collapse was due solely to defective plans of the owner; second, that they complied strictly with said plans; and, third, that they did not know and were not charged, in the course and progress of said work, with knowledge of said defects and that such a result was likely to occur because of them, nevertheless found that the evidence clearly showed the failure of the contractors to discharge their duty under the contract, and that had they done so the pier would not have fallen, and he, and the master find affirmatively a want of proper skill and a failure to comply with the contract in these particulars.

[3] Upon these several points, the District Judge found as follows:

"The evidence overwhelmingly established that the change in the plan was not at the suggestion of the owner, but of the contractor himself; that the engineer, Tolman, who for the county agreed to the change, rested his agreement not on his personal observation of the conditions, but upon the recommendation of the bridgemen, having the reputation of being skillful and accurate bridge builders of long experience; and the railway company, through Banks, gave the same assent, under the same influence. Therefore the change must be treated as a change made by the contractor and not the owner. It must be held that the contractor did not comply strictly and exactly with the plan of the owner, and that therefore, having failed on the first essential of the case, he cannot recover. Should, however, I be mistaken in this view of the law, and should the changed plan be treated, because of the owner's assent, as the owner's plan, still the intervener cannot recover, because the second obligation imposed upon him to prove that the structure fell because, and only because, of the strict compliance with the plan, has not been established. The master finds, and his findings are sustained by the evidence, that a large part of the cement in the pier which gave way was of a bad and worthless character, not in accordance with the plans, and wholly without sufficient tensile supporting strength. That the construction of the pier and cofferdam was done in a dangerous and improper manner, calculated to produce the very result that followed, through excessive dredging and lowering of the subsoil at and adjacent to the pier, and that these defective and improper conditions proximately contributed to and caused the fall of the pier."

The contention of the appellants, therefore, as to the burden of proof, is without merit in its application to the facts found by the court below. The court below also found on the facts as follows:

"While the master has made no finding on the third element of defendant's burden, it is as clear as the rest that it has failed to show that it did not know and was not charged with knowledge that such a result was likely to occur through the plans and methods adopted and employed. On the contrary, I find that under all the conditions, the danger from the use of the changed plan was or should have been known to the contractor, and that it could have

easily provided against it by placing the proper number of piles in the stream, and that knowing or being charged with knowledge of this fact, it wholly failed to take the elemental and necessary precautions; all the testimony agreeing that a sufficient number of piles would have kept the pier up forever. The testimony is affirmatively that the contractor knew the conditions surrounding the work as it progressed, especially the conditions caused by the excavation in the stream to obtain material to stop the leak in the cofferdam, and it was his duty to protect against the conditions caused by his own conduct by providing an adequate number of piles. Finding, then, as I do, not only that the contractor has wholly failed to show, with the clearness and certainty which the law requires when he seeks to evade a responsibility for the failure to fully complete the contract, that the fall was caused by defective plans of the owner, but that the evidence, on the contrary, affirmatively establishes that the plan, if it was a cause of the fall, was only one of the contributing causes, and that had the cement in the pier been in the proper condition, and the excavation in the stream not been made in the way and manner it was the pier would have stood indefinitely I sustain the master's findings and recommendations and order judgment accordingly.'

The evidence shows that the change was agreed to at the suggestion of the contractors on the understanding that pilings were to be driven to furnish a foundation for said pier. The contract required that piles should not be further apart than $3\frac{1}{2}$ feet between centers. The evidence disclosed the pilings driven were only 21 in number and were placed at a greater distance than $3\frac{1}{2}$ feet between centers, and that this number of piles was selected by the contractors.

The evidence was practically without contradiction that the contractors should have known that the changed plan could not be safely used without a much larger number of piles, and that with such number of piles pier 3, if constructed of good concrete, would have stood for all time. This pier was being built in a cofferdam, which was to protect this excavation from invasion of water.

The contract required that the concrete should be deposited in dry hole. "No water to be permitted in caisson, cofferdam, or forms where concrete is deposited." There was undisputed evidence that there was a continual fight to keep the water out of this cofferdam; that a deep excavation was made in the riverbed a short distance outside of the cofferdam in order to get material to place between the timbering outside of the cofferdam, and its interior steel walls in an effort to stop the leaks; that two pumps were kept at work during the day, and one day and night, and although there was evidence that while this pier was being built in this excavation the water was kept from the freshly laid concrete, the evidence was very conflicting, and preponderated in favor of the view that the water was only kept down from covering the fresh concrete as laid, but that it was in water much of the time before it was dry.

There was abundant testimony that concrete so laid would be deficient in tensile strength. There was evidence supporting the finding that the lower part of this pier was composed of such defective concrete. There was testimony to the effect that when the pier toppled it drew off of some of the piles, leaving them standing, which was impossible if the concrete had possessed the proper tensile strength; also that after it fell a portion of the base was gone, and that disintegrated concrete material was found near the site of the pier. The evidence

preponderates heavily to the effect that the making of the excavation in the bed of the stream a short distance outside of the base of said pier 3 was unskillful engineering and likely to weaken the foundation of said pier, and caused a scour in the river bed that contributed to undermining said pier.

While the evidence is conflicting on some matters, there is abundant evidence to support every finding of fact made by the master and the District Court, and to support the decree of the court overruling all exceptions to these findings of fact. The decree in favor of the defendants and against said interveners follows as a necessary result

from such findings of fact.

[4] Where the master and trial court agree on the findings of fact, they are conclusive on the appellate court, where there is any substantial evidence to support them. Last Chance Min. Co. et al. v. Bunker Hill & S. Mining & Concentrating Co., 131 Fed. 579, 66 C. C. A. 299; Mercantile Trust Co. v. Chicago, P. & St. L. Ry. Co., 147 Fed. 699, 78 C. C. A. 87; Moffatt v. Blake, 145 Fed. 40, 75 C. C. A. 265.

The decree of the District Court is therefore affirmed.

MEYER et al. v. RITTER.*

(Circuit Court of Appeals, Eighth Circuit. November 6, 1920.)

No. 5601.

 Appeal and error €=1022(1)—Findings of master, confirmed by court, entitled to great weight.

The findings of the unster, confirmed by the court, regarding the rights of a holder of mortgage notes, are entitled to great weight; but the appellate court must examine the record and reach its own conclusion, after giving findings the weight to which they are entitled.

 Mortgages = 235, 249(3) — Security of deed of trust passes to indorsee of notes; release by mortgagee after assignment held ineffectual.

Where the holder of notes secured by deed of trust sold the notes, the security also passed to the buyers as an incident of the debt, and seller's attempted release thereafter of the deed of trust was unavailing, even in favor of a purchaser for value, and although there was no record evidence showing the transfer of the notes.

3. Mortgages 235—First indorsed of duplicate notes carries the security.

In case of duplicate notes secured by the same deed of trust, the note first negotiated carries the security.

4. Mortgages \$\iff 249(3)\$—Indorsee of mortgaged notes not precluded from asserting rights against release by mortgagee.

Where the holder of notes secured by a deed of trust indorsed them to plaintiff, but did not record an assignment of trust deed, and later fraudulently released it, held, that plaintiff indorsee was not estopped from asserting her lien against a bona fide purchaser from mortgagor.

 Mortgages \$\iff 249(3)\$—Indorsee of mortgaged notes not guilty of laches in asserting lien.

Where the holder of notes secured by a deed of trust indorsed them to plaintiff, and later fraudulently released the trust deed, thus permitting an innocent party to purchase from the mortgagor without knowledge of the outstanding lien, held, that plaintiff, who instituted suit some six months after learning of the purported release, was not guilty of laches.

6. Vendor and purchaser & 242—Defense of innocent purchaser is affirmative.

The defense of innocent purchaser is an affirmative one, and the burden of proof is on the party asserting it.

 Mortgages 249 (3)—Unauthorized release not binding on holder of trust deed.

A purchaser of notes secured by a deed of trust is charged with knowledge of what the record showed when she purchased the notes, but is not bound to watch the record from day to day to see that no unauthorized person attempts to release her deed of trust.

8. Equity \$\infty 72(1)\$—Mere lapse of time does not constitute laches.

Mere lapse of time does not constitute laches, unless something has occurred to make it inequitable to grant relief.

9. Mortgages 249(3)—Indorsee of notes secured by trust deed has right

superior to bona fide purchaser from mortgagor.

Where notes secured by a trust deed were purchased from the original holder, who purported to record an assignment of trust deed, but did not actually do so, and later fraudulently released trust deed of record, permitting the mortgagor to sell apparently unincumbered property to an innocent purchaser, held, that the rights of indorsee of mortgaged note were superior to those of bona fide purchaser.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit by Anna L. Ritter against Emma J. Meyer and others. Decree for plaintiff, and defendants appeal. Affirmed.

Henry D. Ashley, of Kansas City, Mo. (William S. Gilbert and Spencer F. Harris, both of Kansas City, Mo., on the brief), for appellants.

Edwin A. Krauthoff, of Washington, D. C. (William S. McClintock and Arthur L. Quant, both of Topeka, Kan., and Aaron Myers, of Salt Lake City, Utah, on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and MUNG-ER, District Judge.

CARLAND, Circuit Judge. The question for decision in this case is as to whether appellants Anna S. and W. C. Howe are the owners of lot 12, block 1, Aberdeen addition to Kansas City, Mo., free and clear from the lien of a trust deed executed by and between Laura S. Eddy, party of the first part, and J. W. McCurdy, trustee, on May 21, 1912, and recorded in the office of the recorder of deeds for Jackson county, Mo., July 20, 1912, or whether said trust deed is a valid lien on said property for the amount secured thereby in favor of Anna L. Ritter, the appellee herein. The master, to whom the case was referred, made a report in favor of appellee, and, this report being confirmed by the District Court, a decree was entered accordingly. Emma J. Myer, one of the appellants, is a party to the proceedings by reason of having agreed on December 27, 1915, to protect the Howes against the claim of any person adjudged to be the owner of notes secured by the trust deed. The appellants have appealed from the decree so entered.

[1-3] The findings of the master, confirmed by the court, are entitled to great weight, and will be followed, if there has been no serious mistake made in the consideration of the evidence, or in the applica-

tion of the law to the facts found. This rule is elementary, but in order that we may determine whether there has been a serious mistake made in the consideration of the evidence, or in the application of the law, we must examine the record and reach a conclusion of our own, giving to the findings of the master and court the weight to which they are justly entitled. An examination of the evidence satisfies us that no serious mistake was committed by the master in finding the facts. The question at issue must be determined as one of law upon the facts found. The following are the material facts appear-

ing in the record:

On and prior to May 21, 1912, one Thurmond was the owner of the property hereinbefore described: the legal title being in Laura S. Eddy, who held said title for Thurmond. Some time in February, 1912, Thurmond applied to Theodor Peltzer, a real estate agent at Kansas City, Mo., for a loan of \$8,000 on said property, to be used in the erection of a six-apartment flat thereon. Laura S. Eddy was an employee of Peltzer, and executed notes and deeds of trust at his dictation, having no personal interest in the same. Some time before May 21, 1912, Peltzer told Charles J. Ritter and Anna L., his wife, that he intended to loan some money on the property in question, and asked them if they would take the loan from him. The Ritters thereupon examined the property. On May 21, 1912, Peltzer told the Ritters that he had made the loan on the property, and requested them to buy the loan from him, whereupon Charles J. Ritter gave Peltzer a check for \$7,000, payable to Peltzer's order; Peltzer at the same time giving Ritter a receipt stating:

"For Laura S. Eddy loan of \$7,000 on the northwest corner 39th St. and Olive St. (6 Apt. flat), dated May 21, 1912."

The property thus referred to in the receipt is the same as the property now in controversy. Peltzer at this time told the Ritters that the loan was to be \$7,000. Some time before June 15, 1912, Peltzer told the Ritters that it would require \$1,000 more to complete the flat then being erected on the property. The Ritters looked at the property again and said they would take the additional \$1,000. On June 15, 1912, Charles J. Ritter gave his check, payable to Peltzer's order, for \$2,915.64. This check included the \$1,000 additional on the Eddy loan and payment for what was known as the Brinkman loan. These checks were paid in due course. When Ritter gave this check to Peltzer, the latter gave Ritter two negotiable notes, dated May 21, 1912, payable to the order of Peltzer, one for \$1,000, payable two years from date, the other for \$7,000, payable five years from date; also interest notes payable to Peltzer's order for the semiannual interest upon the two principal notes, both principal and interest notes being signed by Laura S. Eddy and indorsed by Peltzer without recourse. The notes were at once placed by the Ritters in a tin box, for which each had a key, and which most of the time was left in a vault in Peltzer's office. Peltzer had no access to the contents of the box, and the notes remained in the exclusive possession of the Ritters until the death of Charles J. Ritter November 15, 1913, and since that time have been in the manual

possession of Anna L. Ritter as the executrix of the last will of her husband.

In addition to these notes, on May 21, 1912, Laura S. Eddy executed three other series of notes, each series consisting of one note for \$7,000 and one for \$1,000, and all exactly like the ones now held by Anna L. Ritter. She also on the same date executed two deeds of trust, whereby she conveyed the property in question to J. W. McCurdy, as trustee, to secure the payment of a \$7,000 and \$1,000 note, such as the ones now held by Anna L. Ritter. The deed of trust was executed for the benefit of Peltzer or his indorsees, but the title of the land in question was conveyed to McCurdy, who executed the deeds of trust on his part and covenanted faithfully to perform the trust thereby created. These two deeds of trust were alike in every particular. One of them was duly recorded on July 20, 1912, as hereinbefore stated. When the Ritters paid for and received the notes, June 15, 1912, they received no trust deed. It was understood that the deed of trust would be recorded by Peltzer. Some time in August of the same year the Ritters received from Peltzer one of the trust deeds which had been executed by Laura S. Eddy, and it has remained in the possession of one or both ever since. This trust deed purported to have been filed in the recorder's office, and bore what appeared to be the certificate of the recorder as to its filing. This certificate, however, was a forgery. This paticular trust deed had never been recorded.

August 26, 1913, an exchange of property was agreed upon between Thurmond and Emma J. Meyer. The property in question was to be conveyed free of incumbrance by Laura S. Eddy, who still held the legal title, to said Emma J. Meyer, who on her part was to convey to Laura S. Eddy, lots in Santa Fé Place, Kansas City, Mo. This exchange was consummated on August 29, 1913. On this date Peltzer, Thurmond, and the attorney for Emma J. Meyer met at the office of the recorder of deeds. Peltzer had with him one of the series of notes which had been executed by Laura S. Eddy. He also had with him the trust deed which had actually been filed for record July 20, 1912, and the matured interest coupons. The notes bore the indorsement of Peltzer without recourse. Peltzer acknowledged satisfaction of the trust deed upon the margin of its record. The notes were produced and stamped by the recorder "Canceled," as also was the trust deed. Peltzer died September 29, 1915. Immediately thereafter rumors of the frauds committed by Peltzer in his lifetime became current. Anna L. Ritter employed an attorney to look after her securities, and learned that the trust deed purporting to secure the notes held by her had been released of record August 29, 1913. Until after Peltzer's death, neither Thurmond, the Ritters, nor Emma J. Meyer had any intimation that Laura S. Eddy had executed duplicate notes, or more than one trust deed. In December, 1915, Emma J. Meyer sold the property in question to Anna L. and W. C. Howe.

These being the facts, who is to suffer the loss caused by the fraudulent and unlawful act of Peltzer in satisfying of record the trust deed on August 29, 1913, Anna L. Ritter or Emma J. Meyer; the latter having agreed to save the Howes harmless. Manifestly this is not a con-

test between different holders of the notes executed by Laura S. Eddy. No person other than Anna L. Ritter is now before the court claiming to be the owner of any of the notes so executed. There was but one loan to Thurmond upon the property in question, and that was sold to the Ritters. Peltzer did not own the loan, and had no right whatever to satisfy the lien of the trust deed. It is not material that two trust deeds were executed, as no one is claiming a lien but Mrs. They both secured the same debt, and one of them was duly recorded. The trust deed was valid as between Peltzer and the Ritters, though unrecorded. The act of recording was simply to give notice. The fact that the trust deed which was delivered to the Ritters some time in August, 1912, before Mrs. Meyer purchased the property, had a forged recordation certificate, did not affect its validity, as between the parties to the transfer. As the Ritters were the owners of the debt secured by the trust deed, the record of the trust deed that was recorded was notice to all the world of the lien created thereby, although the trust deed that was recorded was not delivered to the Ritters. The commercial world contains many bonds and notes held by persons who never saw the trust deed which secures their payment.

Under the facts as they appear in the record, the law seems to be clear that, when Peltzer sold the notes to the Ritters, the security of the deed of trust as an incident of the debt passed to the Ritters, and the attempted release thereafter by Peltzer was unavailing, even in favor of a purchaser for value; and this is true, even though there is no evidence of record showing a transfer of the notes. Carpenter v. Longan, 16 Wall. 271, 275, 21 L. Ed. 313; Batesville Inst. v. Kauffman, 18 Wall. 151, 154, 21 L. Ed. 775; New Orleans, etc., v. Montgomery, 95 U. S. 16, 18, 24 L. Ed. 346; Leahy v. Haworth, 141 Fed. 850, 73 C. C. A. 84, 4 L. R. A. (N. S.) 657; Weldon v. Tollman, 67 Fed. 986, 15 C. C. A. 138; Black v. Reno (C. C.) 59 Fed. 917, 919; Cudahy Packing Co. v. State National Bank, 134 Fed. 538, 67 C. C. A. 662; Laberge v. Chauvin, 2 Mo. 179; Potter v. Stevens, 40 Mo. 229, 233; Anderson v. Baumgartner, 27 Mo. 80, 86; Hagerman v. Sutton, 91 Mo. 519, 531, 533, 4 S. W. 73; Boatmen's Sav. Bank v. Grewe, 84 Mo. 477, 478; Mitchell v. Ladew, 36 Mo. 527, 533, 88 Am. Dec. 156; Lee v. Clark, 89 Mo. 553, 1 S. W. 142; Bank v. Carondelet R. E. Co. 150 Mo. 570, 576, 51 S. W. 691; Cooper v. Newell, 263 Mo. 190, 199, 172 S. W. 326; Wilkins v. Fehrenbach (Mo. App.) 180 S. W. 22, 24; Baxter v. Donnell, 69 Mo. App. 588, 590; Kelly v. Staed, 136 Mo. 430, 439, 37 S. W. 1110, 58 Am. St. Rep. 648; Cummings v. Hurd, 49 Mo. App. 139, 145; Bell v. Simpson, 75 Mo. 485, 490; Logan v. Smith, 62 Mo. 455, 459; Chappell v. Allen, 38 Mo. 213; Borgess Inv. Co. v. Vette, 142 Mo. 560, 574, 44 S. W. 754, 64 Am. St. Rep. 567; Lipscomb v. Talbott, 243 Mo. 1, 32, 147 S. W. 798; Potter v. Mc-Dowell, 43 Mo. 93, 98; Joerdens v. Schrimpf, 77 Mo. 383; Morrison v. Roehl, 215 Mo. 545, 553, 114 S. W. 981; Hower v. Erwin, 221 Mo. 93, 100, 119 S. W. 951; Landau v. Cottrill, 159 Mo. 308, 60 S. W. 64; Lanier v. McIntosh, 117 Mo. 508, 518, 23 S. W. 787, 38 Am. St. Rep. 676; George v. Somerville, 153 Mo. 7, 54 S. W. 491.

The case of Foege v. Woestendiek, 201 Mo. App. 382, 212 S. W. 411,

was a case of duplicate notes and duplicate trust deeds. The plaintiff in that case purchased one of the duplicate notes and left the deed of trust with the land agent to be recorded. This deed in fact was never recorded. The plaintiff, however, was given a deed of trust upon which the recorder's certificate as to its recordation was forged. Another note was later sold to the defendant, and the deed of trust, which had been properly recorded, was delivered to him. Plaintiff was held entitled to the security of the recorded instrument. In the case of duplicate notes the note first negotiated carries the security. Kirkpatrick v. Reed (Mo. App.) 204 S. W. 1135; Ricketts v. Finkelston (Mo. App.) 211 S. W. 391, 397; Saving Bank v. Slattery, 166 Mo. 620, 66 S. W. 1066; Quinn v. McCallum, 178 Mo. App. 241, 165 S. W. 1115; Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73; Casner v. Schwartz, 198 Mo. App. 236, 201 S. W. 592.

[4-6] The important question in the case, however, is not altogether one of notice. Whatever notice the trust deed which was recorded gave, Mrs. Meyer had, and as Mrs. Ritter was the owner of the debt the trust deed was notice that it had not been paid. The real question for decision is as to whether, under the evidence, the production of the series of notes and the trust deed and the acknowledgment of satisfaction on the record by Peltzer bound Mrs. Ritter, or in other words was a lawful satisfaction of the lien of the trust deed. Counsel for appellants, assuming that what has been said is the law, maintain that Mrs. Ritter so conducted herself as to create in Peltzer indicia of ownership of the notes and trust deed, and is therefore estopped from asserting the same as a valid lien on the property in question. A careful reading of the record discloses no incident where, by word or deed, Mrs. Ritter ever acted inconsistent with her present position with reference to the notes and deed of trust. Moreover, there is no evidence that appellants, or either of them, ever acted on any act or declaration of Mrs. Ritter. The fraudulent and unlawful act of Peltzer in satisfying the lien of the trust deed was wholly unauthorized by Mrs. Ritter, and any presumptions that may be indulged in must be against the granting of authority to Peltzer to commit a fraud, or to act against her interest.

It is further claimed that Mrs. Ritter has been guilty of laches. It was found by the master that she did not know of the attempted satisfaction of the trust deed until after Peltzer's death in September, 1915, and this proceeding was commenced in March, 1916. The Howes purchased in December, 1915, and took an agreement from Mrs. Meyer to protect them against claims of the very kind that Mrs. Ritter is now asserting. So far as they are concerned, they must be held to have had notice of facts which, if investigated, would have led to a discovery of the fraud committed by Peltzer. The defense of innocent purchaser is an affirmative defense. The burden of proof is upon the party setting up the defense. Boon v. Chiles, 10 Pet. 177, 9 L. Ed. 388; Wright Blodgett Co. v. U. S., 236 U. S. 397, 405, 35 Sup. Ct. 339, 59 L. Ed. 637; Stonebraker-Zea Cattle Co. v. U. S., 220 Fed. 99, 135 C. C. A. 96; U. S. v. Krueger, 228 Fed. 97, 142 C. C. A. 503.

[7-9] We cannot agree to the proposition that Mrs. Ritter had con-

structive notice of the fraudulent discharge of the lien of trust deed from the time it was made. The discharge being unlawful and unauthorized, there was no law requiring it to be placed of record. Mrs. Ritter was charged with knowledge of what the record showed when she purchased the notes; but she was not bound in law or morals to watch the record from day to day, that she might learn what some orbitless captain of high finance outside of her chain of title might do. Moreover, mere lapse of time does not constitute laches, but in addition thereto something must have occurred to make it inequitable to grant the relief prayed for. In our opinion there is no laches shown by the evidence.

Counsel for appellants contend, further, that this is a case for the application of the rule that, when one of two innocent persons must suffer from the acts of fraud of a third person, the one of the two persons whose acts or conduct has been such as to put it within the power of the third person to commit such a fraud is the one of the two persons who must suffer from the result of such acts. We recognize the rule as stated, and have no fault to find with the cases cited illustrating that rule. If we could find that it was through the negligence of Mrs. Ritter or the Ritters that the record of the recorder of deeds was permitted to give notice to the world that the lien of the trust deed was satisfied, we would hesitate to allow her, in face of her own carelessness, to enforce the lien of the trust deed against a bona fide purchaser taking his title on the faith of the record. But this is not such a case.

On the whole record, we are satisfied that the decree below was right, and must be affirmed.

It is so ordered.

GRAMMER v. FENTON, Warden.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1920.)

No. 5586.

 Courts \$\infty\$ 405(7)—Federal Supreme Court has exclusive jurisdiction of anneal in habeas corpus, where Constitution is involved.

appeal in habeas corpus, where Constitution is involved.

Judicial Code, §§ 128, 238 (Comp. St. §§ 1120, 1215), governing appeals to the Supreme Court and Circuit Court of Appeals, applies to habeas corpus appeals, and where the only basis of jurisdiction of habeas corpus to determine legality of incarceration under state laws is violation of national Constitution, the Supreme Court has exclusive jurisdiction of appeal.

2. Pardon \$\infty\$=12\top Reprieve from death sentence pending litigation in federal court not governed by Rev. St. Neb. 1913, §\$ 9222\top 9224.

Rev. St. Neb. 1913, §\$ 9222\top 9224, requiring reprieves by the Governor

Rev. St. Neb. 1913, §§ 9222-9224, requiring reprieves by the Governor to be accepted and signed by the prisoner, etc., are inapplicable to death sentence reprieves, granted to enable a prisoner to litigate his conviction in the federal courts.

 Constitutional law 42—Validity of statute questioned only by person affected thereby.

No one can question the validity of a statute or official action, unless he has been harmed, or is liable to be harmed, thereby.

4. Habeas corpus \$\infty 45(2)\$—Governor's reprieve from death sentence not

basis for jurisdiction of federal court.

In habeas corpus proceedings, petitioner's claim that he was reprieved from a death sentence contrary to Rev. St. Neb. 1913, §§ 9222-9224, requiring reprieves to be accepted by the prisoner, etc., confers no jurisdiction on federal court, since the cited sections are inapplicable to reprieves granted to permit litigation of the conviction, especially as the only substantial result had been to keep the prisoner alive while testing his conviction.

5. Courts \$\iff 405(7)\$—Circuit Court of Appeals without jurisdiction of appeal in habeas corpus, though no certificate of probable cause was issued.

Where under Judicial Code, \$\\$ 128, 238 (Comp. St. \$\\$ 1120, 1215), the Supreme Court would have exclusive jurisdiction of appeal in habeas corpus proceeding to determine legality of incarceration under state laws, as involving violation of national Constitution that jurisdiction would not be affected by absence of certificate of probable cause, under Act March 10, 1908 (Comp. St. \\$ 1293), requiring such a certificate in habeas corpus appeals to Supreme Court.

Appeal from the District Court of the United States for the District

of Nebraska; Thomas C. Munger, Judge.

Habeas corpus proceeding by Allen Vincent Grammer against William T. Fenton, Warden. From a denial of the writ, the applicant appeals. Appeal dismissed.

Sterling F. Mutz, of Lincoln, Neb. (C. J. Campbell, of Lincoln, Neb.,

on the brief), for appellant.

Mason Wheeler, Asst. Atty. Gen., of Nebraska (Clarence A. Davis, Atty. Gen., of Nebraska, on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and JOHNSON, District Judge.

STONE, Circuit Judge. Appeal from denial of writ of habeas corpus. Grammer is in the custody of Fenton, warden of the Nebraska state penitentiary, under death sentence, by the state court, as accessary before the fact to murder. A demurrer to the application, based upon lack of jurisdiction in a federal court and insufficient facts, was sustained generally. Appellant elected to stand upon the application, which was then dismissed at his costs. From the application and from adjudications by the Nebraska state courts, of which we take notice, we find the setting of this case to be as follows: Appellant and one Cole were jointly tried and convicted of murdering the mother-in-law of appellant. Cole pleaded guilty. Execution was fixed for July 12, 1918. Appellant appealed to the state Supreme Court, where the judgment was affirmed. Grammer v. State, 103 Neb. 325, 172 N. W. 41. Reargument in the state Supreme Court was denied. 103 Neb. 325. 174 N. W. 507. Appellant then applied, in the state court, for a writ of habeas corpus, which was denied. His appeal to the Supreme Court from this dismissal was unsuccessful. Grammer v. Fenton (No. 21384) unreported. He then filed this application the day before the date finally set for his execution. During a portion of this time and up to the present, the Governor has granted reprieves, with the object of preventing execution while appellant has litigation pending concern-

ing his conviction.

The application alleges that the reprieves are unlawful and void, because not granted in the form and manner required by section 9222 of the Nebraska Revised Statutes of 1913. It then attacks the judgment of conviction, because procured by fraud, rendered by incompetent jurors, procured by intimidation, and because the question of punishment was submitted to the jury. It further says there was no presentment or indictment of a grand jury. It also alleges that the laws of Nebraska provide no method of opening, vacating, or modifying judgments of the state courts in criminal cases upon the ground of newly discovered evidence, which could not, with reasonable diligence, have been discovered before the trial or during the term at which the trial was had; that evidence of this character has been discovered. The application alleges, generally, that detention under order of the Governor is null and void, and as to each of the other grounds, as above outlined, the allegation is that a specific right under the national Constitution has been violated.

[1] At the threshold of the case we meet a challenge, by appellee, of the jurisdiction of this court. The contention is that the appeal should have been taken direct to the Supreme Court. The basis of this contention is that the sole questions presented in the case below and upon this appeal are such as involve the construction and application of the national Constitution. The jurisdiction of the Circuit Courts of Appeals is purely appellate and statutory. This is defined to be "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section 238, unless otherwise provided by law. * * * " Code, § 128, 36 Stat. 1133 (Comp. St. § 1120). Section 238 (Comp. St. § 1215), referred to, provides that "appeals and writs of error may be taken from the District Courts * * * direct to the Supreme Court in the following cases: In any case that involves the construction or application of the Constitution of the United States, * * * and in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." Code, § 238, 36 Stat. 1157. The quoted provisions of the above sections apply to appeals in habeas corpus cases. Raton Waterworks Co. v. Raton, 249 U.S. 552, 39 Sup. Ct. 384, 63 L. Ed. 768; Horn v. Mitchell, 243 U. S. 247, 37 Sup. Ĉt. 293, 61 L. Ed. 700; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113; In re Lennon, 150 U. S. 393, 14 Sup. Ct. 123. 37 L. Ed. 1120. The cases just cited establish the rule that where the jurisdiction of the trial court rests upon the sole basis that the suit is one arising under the Constitution of the United States, the Supreme Court has exclusive appellate jurisdiction. No diversity of citizenship is suggested in the petition. Federal jurisdiction is based upon a detention alleged to be in violation of the rights of the petitioner under the national Constitution. Under the facts as outlined in the petition, and under section 753 of the Revised Statutes (Comp. St. § 1281), the only possible ground for federal jurisdiction would be that the detention was, as provided in section 753, "in violation of the Constitution * * * of the United States." Appellant's arguments on this jurisdictional point are as follows:

First he says:

"Section 893 of Barnes' Federal Code [Judicial Code, § 128] provides that 'the Circuit Court of Appeals shall exercise appellate jurisdiction * * * in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section 238, unless other-

wise provided by law.'

"Section 1092 of Barnes' Federal Code [Act Mar. 10, 1908, 35 Stat. 40 (Comp. St. § 1293)] provides: 'Appeal to Supreme Court Where Detention under State Process.—From a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a state court, no appeal to the Supreme Court shall be allowed unless the United States court, by which the final decision was rendered, or a justice of the Supreme Court, shall be of the opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.'

"The detention complained of in the plaintiff's application herein is by virtue of a warrant of commitment and an order directing the execution issued by the Governor of the state of Nebraska, and not issued out of a state court. The contention of the applicant that the process is issued by the Governor, instead of by the court, takes the case out from under the provisions of section 1092 of Barnes' Federal Code, and places it directly under section 893 thereof. The Circuit Court of Appeals, therefore, has jurisdiction at least to determine the question of unlawful detention by the order of the Governor of the state."

His further argument is thus expressed:

"It would require a strained construction of these sections to hold that an appeal in a habeas corpus case of this character is denied, unless the judge who tries the case certifies that he has probably committed error. In the light of the present decisions of the United States Supreme Court, District Judges would seldom, if ever, issue a certificate that there was probable cause for the appeal. On the other hand, in order to convince a Justice of the Supreme Court that there is probable cause for an allowance of the appeal, the appeal must be practically perfected, to present all the questions raised, and be briefed and argued to the Justice of the Supreme Court. It is our contention that the Congress did not intend to thus delay and impede the process of the courts in determining this class of important cases. We believe that while appeals may be taken in habcas corpus cases, either to the Circuit Court of Appeals, or to the United States Supreme Court, that the Supreme Court will not assume jurisdiction, except in cases of such great importance that the Supreme Court should pass upon them. And this importance must be certified by either the trial judge or one of the Justices of the Supreme Court."

[2-4] The facts, as shown by the petition, are, that this appellant was condemned to death by a state court; that he has prosecuted a writ of error in that case to the Supreme Court, resulting in affirmance, and a direction by that court to appellee to execute appellant on September 19, 1919; that the Governor granted two stays, finally directing sentence to be executed on February 7, 1920; that this petition was filed February 6, 1920. The claim is then made that these stays or reprieves are illegal, because not "in due and legal form as provided by section 9222 of the Revised Statutes of Nebraska for 1913," because not accepted and signed by appellant, not subscribed by two witnesses who attested the same, no such witnesses went before the clerk of the

court where such sentence was recorded and proved the same, no journal entry thereof in the records of the state courts—all as required by section 9222. A bare perusal of this section and the two related sections, 9223 and 9224, shows the utter lack of application of those sections to the situation here involved, and reveals the entirely frivolous character of this suggestion that the Governor acted without authority. The Constitution of Nebraska empowers the Governor to grant reprieves (article 5, § 13), and there is no contention that the state statutes make the date of execution a part of the sentence (Holden v. Minn., 137 U. S. 483, 495, 11 Sup. Ct. 143, 34 L. Ed. 734).

Again, it is basic law that no one can question the validity of a statute or of an official action unless he has been harmed or is threatened harm thereby. The only substantial result of the actions of the Governor has been to keep appellant alive for months while he was testing his conviction in every manner and court possible. This entire contention of appellant concerning the orders of the Governor is wholly without foundation upon its mere statement (Storti v. Mass., 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120), and cannot be a basis for jurisdiction of this court (Berkman v. U. S., 250 U. S. 114, 39 Sup. Ct. 411, 63 L. Ed. 877; Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544). Also see Lambert v. Barrett, 157 U. S. 697, 15 Sup. Ct. 722, 39 L. Ed. 865.

[5] The further argument is that a fair consideration of sections 128 and 238 of the Judicial Code, in connection with the above Act of March 10, 1908 (35 Stat. 40), leads to the construction that appeals will lie to this court from habeas corpus cases where the confinement is by virtue of process issued out of a state court and the trial judge will not certify the existence of probable cause for appeal, as required by that act. There is no merit in this view. The sole effect of the act of 1908 upon appellate jurisdiction in habeas corpus cases is to further restrict appeals direct to the Supreme Court by requiring a certificate of probable merit by the trial court in cases where custody under state judicial process was challenged.

All other grounds urged for the writ rest entirely upon the construction and application of the Constitution of the United States. The Supreme Court has exclusive jurisdiction of the appeal and the appeal

to this court is dismissed for lack of jurisdiction.

Dismissed.

DIRECTOR GENERAL OF RAILROADS v. REYNOLDS.

(Circuit Court of Appeals, Sixth Circuit. November 3, 1920.)

No. 3399.

1. Negligence = 136(8)—Question for jury, though evidentiary facts are undisputed.

Though the evidentiary facts are not in dispute, a directed verdict cannot be required, unless the court can say that all reasonable minds must agree that there was no negligence by defendant, or that there was contributory negligence by plaintiff.

2. Railroads \$\infty\$275(3)—No lookout duty owing to trespassers.

If employees of an adjacent factory, loading matter on cars on a switch track, were trespassers on or dangerously near the main track, the railroad company owed them no duty to keep a lookout.

3. Railroads = 282(9) - Negligent lookout for licensee a jury question.

If persons loading building sections on cars on a switch track in such manner that they extended over or dangerously close to the main track were licensees, it was a question for the jury whether reasonable prudence required the keeping of a lookout.

4. Railroads €=275(1)—License dependent on customary use.

Whether employees of an adjacent factory, loading building sections on cars on a switch track in such manner that they extended over or dangerously close to the main track, were trespassers or licensees, depended on whether there was such customary or permissive use of the main track or its danger zone as charged the railroad with knowledge of the danger and necessity for precautions.

5. Railroads \$\infty 282(9)\$—License to use of tracks by factory employees held a jury question.

Evidence of the customary manner of loading and unloading cars on a switch track adjoining a factory held to make a question for the jury as to whether the loading of building sections in such manner that they extended over or dangerously close to the main track was under an implied license.

6. Railroads \$\infty\$275(1)—Space opposite factory's loading platform cannot be divided, in passing on question of license.

Where a switch track adjoining a factory's loading platform was 8 feet from the main track, with a safety zone of about 4 feet, the whole space opposite the platform must be treated as a unit in determining the question of license, and a distinction cannot be drawn as a matter of law between the loading and unloading space, or between the safety zone and the space beyond, into which employees might inadvertently go.

7. Appeal and error \$\infty\$999 (3)—Finding of negligence not disturbed.

If the jury found an implied license to persons loading building sections on cars on the switch track, and found that it was the railroad company's duty to keep a lookout, its finding of negligence in failing to do so cannot be disturbed.

8. Railroads = 282(9) - Negligence as to persons loading cars held jury ques-

Where plaintiff was assisting in loading building sections on cars on a switch track in such manner that a section projected beyond the car. and was struck by a car on the main track, it was a question for the jury whether the railroad company should have anticipated that an injury might occur in that way.

9. Railroads €=275(3)—Licensees entitled to warning.

If persons loading cars on a switch track in such manner that materials being loaded extended over or dangerously near the main track were licensees, they could depend upon the license as entitling them to a degree of warning which trespassers could not have required.

10. Railroads €==282(9)—Contributory negligence of persons loading car on switch track a jury question.

Whether persons loading building sections on a car on a switch track, which projected over or dangerously near the main track, were guitty of contributory negligence, held a question for the jury.

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by Leslie Reynolds against the Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

In connection with its factory, the Huntington Lumber & Supply Company maintained a loading and unloading platform 400 feet long alongside of the Norfolk & Western Railroad. Opposite half of this platform there were placed more or less constantly about eight box cars, from which lumber was being unloaded, and opposite the other half there were commonly standing about the same number of box cars, into which the finished product was being loaded. The main track of this portion of the railroad was parallel to the switch track, and 8 feet distant therefrom, from rail to rail. The overhang of the cars occupied about 2 feet on each side, and it follows that there was a safety zone of about 4 feet between passing cars upon the main track and the switch track. Part of the product of the lumber company consisted of sections for building into portable houses. These sections were 12 feet long, 4 feet high, and several inches thick, making a heavy and awkward article, for the loading of which four men were required. Along the front of the loading platform, close to the cars, stood a row of posts. In getting these long sections into an ordinary box car, it was necessary to swing one end as nearly parallel to the car as might be. Unless the car was in the precisely accurate position, these posts interfered with such swinging. It was therefore not uncommon for the loaders first to put a section through the car at right angles, so that, at the extreme, it temporarily projected 4 or 5 feet, reaching across the safety zone, if not beyond. Reynolds was an employee of the lumber company. He and another of the loading crew were inside of the car while the section was in the position just described; the other two of the crew were on the platform. As they were engaged in getting it placed and swung, the outer end was struck by a freight car on the main track, the inner end was swung back, catching Reynolds between it and the side of the car, and he received the injuries for which he brought this suit against the Director General. The issues of negligence and contributory negligence were submitted to the jury, which found for the plaintiff. The Director General now insists that a verdict should have been directed for him, because there was no evidence tending to show negligence by the railroad employees, and because Reynolds' contributory negligence appeared beyond dispute.

Just before the accident the freight car had been standing on the main track, perhaps 50 feet east of the car on which Reynolds was working. The greater part, if not the whole, of the switch track was occupied by cars being loaded and unloaded, and from time to time the switch engine was placing cars thereon and removing cars therefrom. At this moment the switch engine approached from the east on the main track, backing, intending to couple to the standing car. At the first impact, the coupler did not work, but the car was kicked along until it came within a few feet of the car Reynolds was loading. The engine came up again for the coupling, which was successfully accomplished; but before the engine and car had come to a stop the projecting section had been hit and the injury was done. It is to be taken as the fact from this record that the engine bell was ringing, but the jury was at liberty to conclude that, for a couple of minutes before the accident, there had been no lookout, either by any brakeman situated where he could see, or by any one on the engine looking back along the safety zone.

Homer E. Holt, of Huntington, W. Va. (Holt, Duncan & Holt, of

Huntington, W. Va., on the brief), for plaintiff in error.

Arthur T. Bryson and John W. Woods, both of Ashland, Ky. (Woods & Bryson, of Ashland, Ky., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] The principles which in this court govern such contentions have been stated too often to need elaboration. Even though the evidentiary facts may not be in dispute, it often happens that different minds draw different inferences therefrom, and whatever the conclusion of the judges might be, if they were triers of fact, it is only when they are able to say that all reasonable minds must agree that there was no negligence by defendant, or that there was contributory negligence by plaintiff, that they can require a verdict to be directed upon either of these grounds. Richards v. Mulford (C. C. A. 6) 236 Fed. 677, and cases cited on page 679, 150 C. C. A. 9, on page 11.

[2-4] If Reynolds were to be treated as a trespasser upon, or in dangerous proximity to, this main track, the railroad company would owe him, under these circumstances, no duty of lookout, and there would be nothing to show negligence. Cronopolous v. Pennsylvania Co. (C. C. A. 6) 259 Fed. 210, 170 C. C. A. 278. On the other hand, if he were to be treated as a licensee, doing his work in this way with the permission of the railroad, it would be equally clear that whether reasonable prudence by the railroad required a lookout would be a question for the jury. Whether he should be treated as a trespasser or licensee depends upon whether there was such a customary and permissive use by the lumber company employees of the main track or its danger zone as would charge the railroad with knowledge that they were likely to be in danger, and that precautions should be taken for their safety. Hodges v. Erie Co. (C. C. A. 6) 257 Fed. 494, 168 C. C. A. 498.

[5-8] If the claim that there was an implied license depended upon proof that these sections were customarily projected into the striking zone, and that the railroad employees knew it, or should have known it, there would be at least grave doubts whether the evidence should be thought sufficient, and we do not rest any conclusion upon this evidence alone. It appeared without question that the regular methods of unloading lumber and loading material which were in use on this day had been in use for a long time; that there were, customarily, 50 or more lumber company employees constantly engaged in this loading and unloading; that these sections were quite commonly extended. though only for a minute or two, out close to, if not into, the striking zone; that every car loaded was closed and marked by men working between the two tracks; that about half of the box cars which came in loaded with lumber (and most of the lumber came in box cars) were so loaded that the unloading work had to commence from the outside. or main track side, until enough of the load was removed to get at the other door from the inside of the car. This railroad crew had been

employed in this work for a considerable time, passing along many times a day, and they necessarily knew that the loading and unloading were done in the manner described. Knowledge of the unloading and the closing and marking of the cars is not disputed, and one or more of the train crew expressly admit knowledge of the method of loading these cars by projecting sections from the main track side, though they deny knowledge that any section ever extended far enough to get hit.

It is quite evident that men, in unloading lumber from the side of a box car, must commonly use more than four feet of space, and thus have commonly been upon the main track or within the striking zone. It is also evident that men, closing and marking cars, while they probably could always keep within the four-foot safety zone, would be very likely to overstep into danger; also, the danger that a section might be put out one or two feet more than was intended or strictly necessary must have been obvious to any railroad employee who saw this method of loading or handling that material. In other words, the railroad company is chargeable with knowledge that 50 or more lumber company employees were constantly working along this stretch of track, and that many of them were frequently along the safety zone where they were very close to danger, and that some of them were frequently actually upon the main track or in the danger zone. For the purposes of this question, we cannot draw, as matter of law, any nice distinction between that space where cars were being unloaded and the adjacent space where they were being loaded, nor between the four feet of supposed safety which the lumber company employees had the clear right to use and the few additional inches that they might inadvertently take.

We think the whole distance opposite the lumber company platform must be treated as a unit, and we cannot say, as matter of law, from this evidence, that the jury had no right to draw the inference that the lumber company employees were customarily in this position of danger or near danger by consent and with knowledge of the railroad company. If the jury, as trier of the fact, found such implied license, and, as another conclusion of fact, found that the railroad company's duty to take reasonable precautions for their safety was not satisfied without a lookout, there was lawful ground for the jury's finding of negligence and we cannot disturb it. The fact that, if there had been a lookout, he would have seen only the extended section, and would not have known whether it came too far, is not controlling; it would be for the jury to say whether there should have been an apprehension that an injury might occur of the type that did occur.

[9, 10] The question of contributory negligence must be considered from the same standpoint. If the jury found this implied license, it would follow that the lumber company employees could depend upon it to entitle them to a degree of warning which trespassers could not have required. Of course, it would have been more prudent for one of the loading crew to have been watching for trouble on the main track. Many might think that reasonable prudence so required; but the jury had a right to conclude that the projection of the section was intended to be only momentary, and that its extreme extent outwardly was inadvertent; that the ringing of the bell a little way up the track

was natural to the switching constantly going on, and would not necessarily indicate that a car was going to be kicked or pushed backward, without lookout, past this door at that very instant; and that, if Reynolds had looked out just before that, he would have seen only a stationary freight car a car length away, not coupled to an engine and with no engine near. Putting these things together, we think contributory negligence does not follow as matter of law, even if rather persuasively indicated as a conclusion of fact.

The judgment must be affirmed.

DE FRIES v. SCOTT.

(Circuit Court of Appeals, Ninth Circuit. October 11, 1920. Motion to Vacate Judgment and Dismiss Writ of Error and Petition for Rehearing Denied, January 3, 1921.)

No. 3361.

1. Appeal and error \$\iff 84(4)\$—Judgment for sum certain is final judgment.

The judgment of an appellate court, directing entry by the trial court of a judgment for a specific sum of money, with a proviso that, if certain judgments should be released by a party, the amount thereof should not be included in the judgment, held a final judgment, reviewable on writ of error.

2. Associations 5-15(1)—Shareholder in Hawaii land "hui" holds subject to regulations adopted by by

ject to regulations adopted by hui.

Under the law of Hawaii, while the members of a Hawaiian land hui (an association of persons in the ownership of land) hold the property as tenants in common, the adoption of regulations concerning the management of the hui and the use of the land constitutes them a voluntary association, and persons entering into the membership through the acquisition of shares in the hui, and those claiming under them, take their interest subject to such valid regulations as may have been adopted by the hui with reference to the holding of the land in severalty.

3. Landlord and tenant 23 (5)—Tenant, after long occupancy, not entitled to recover rent paid, on ground of breach of quiet enjoyment.

A lessee of an undivided interest in land for a term of 30 years held

A lessee of an undivided interest in land for a term of 30 years held not entitled, after more than 20 years, to abandon the lease and recover the rent paid thereunder, on the ground of a breach of covenant for quiet enjoyment, where the evidence showed that she had possession and use of all the land claimed by her under the lease, with the exception of certain small and comparatively unimportant pieces held by others of the tenants in common.

4. Words and phrases—"Mauka."

The Hawaiian word "mauka" means toward the mountain, or away from the sea.

5. Words and phrases-"Makai."

The Hawaiian word "makai" means toward the sea.

6. Words and phrases-"Kuleana."

The Hawaiian term "kuleana" means a small area of land, such as were awarded in fee by the Hawaiian monarch, about the year 1850, to all Hawaiians who made application therefor.

For other cases see same topic & KEY-NUMBE, in all Key-Numbered Digests & Indexes

In Error to the Supreme Court of the Territory of Hawaii.

Action at law by Nettie E. Scott against Elizabeth K. De Fries, née

Pilipo. Judgment for defendant was reversed by the Supreme Court of the Territory of Hawaii, and defendant brings error. Reversed.

See 23 Hawaii, 739.

Noa W. Aluli, of Honolulu, T. H., for plaintiff in error. John W. Cathcart, of Honolulu, T. H., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This case was three times before the Supreme Court of the territory of Hawaii, to review the judgment (rendered June 27, 1918) in the last one of which the present writ of error was sued out.

- [1] The motion filed by the defendant in error since the submission of the case, that the writ of error be dismissed, based on the contention that the judgment was not final, is denied. The judgment brought up for review reversed that of the circuit court, with directions to render one for specific sums of money, and was final in the strictest sense of that term. The fact that two of these sums were represented by specifically described unsatisfied judgments, with a provision in the decree of the Supreme Court of the territory to the effect that in the event the defendants to the action should file in the lower court "a full release of the plaintiff upon the two last-named unsatisfied judgments," the respective amounts thereof should not be included in the judgment directed, in no respect affected the finality of the latter—the provision regarding the filing of the release calling for and admitting of the exercise of no judgment, or even discretion, and manifestly for no exercise of any judicial function. The case is wholly different from that of Rumsey v. New York Life Insurance Co. et al., 267 Fed. 554, recently decided by this court, and from the decisions of the Supreme Court therein referred to.
- [3] The action was for the alleged breach of the covenant for quiet enjoyment contained in a certain lease made August 21, 1894, by the plaintiff in error and her mother, Esther N. Pilipo, to the present defendant in error, her executors, administrators, and assigns, of—"fifty-three (53) shares out of their fifty-six (56) shares undivided of the lands of Holualoa, in North Kona, Hawaii, * * * but excepting and reserving therefrom to the lessors in the portion of the land 'makai' of the upper government road three (3) undivided shares of their fifty-six (56) shares, which said shares shall contain a house lot near the sea adjoining the kuleana of H. N. Kahulu, deceased; also the houses, pineapple and coffee planted by the lessors adjoining the new road running from Kailua mauka on both the upper and lower sides of said road; also other plants or trees planted by them; also the koa and ohia forest trees in the forest, excepting such as may of necessity be cut for the purposes of agriculture of the lessee."
- [4-6] The meaning of the Hawaiian words appearing in the lease are thus stated by one of the counsel in the case, which we take to be correct and here insert, there being no dispute in regard to that:
- "(1) The word 'mauka' meaning toward the mountain, or away from the sea; (2) the word 'makai' meaning toward the sea; (3) the word 'hui' meaning in this record a number of persons combined together as partners

or tenants in common in ownership of a common property; and (4) the word 'kuleana' meaning in this record a small area of land, such as were awarded in fee, by the Hawaiian monarch, about the year 1850, to all Hawaiians who made application therefor."

The lease was for 30 years from and after September 1, 1894—

"subject to the payment of a rent of six dollars (\$6.00) for each of said shares per annum and until the expiration of the lease now outstanding of the upper portion of the land (being the lease made by the hui of Gouveia), and for each year thereafter until the expiration of thirty (30) years of this lease fifteen dollars (\$15.00) for each share. Said rent shall be paid as follows: The first year to be paid in advance, and after it shall be payable half yearly in advance on the first day of the half year, subject to the conditions hereinafter mentioned."

One of the covenants on the part of the lessors was that, if the rent should be duly paid and the covenants and conditions thereof duly observed, the lessee should—

"hold and possess the demised premises without hindrance of any person whomsoever, but it being understood that this demise is of undivided interests."

Among the covenants on the part of the lessee was this:

"In entering upon the land 'makai' of the upper government road not to enter or interfere with the parcels of the said land now occupied by members of the hui (Hoa-Aina) either as house lots or agricultural purposes in places heretofore planted by them."

The complaint in the present case was twice amended—a demurrer to the first amended one having been sustained. Scott v. Pilipo, 23 Hawaii, 349. The second amended complaint, being the one upon which the present action was tried, was held by the same court (23) Hawaii, 739) to state a cause of action in favor of the plaintiff and against the defendants thereto. It alleged, among other things, that upon the execution of the lease on the 21st day of August, 1894, the lessee paid one year's rent of the premises in advance, and on the 1st of the following September undertook to enter upon the demised premises, but was, by tenants by sufferance and at will of the lessors, prevented from obtaining such possession, and was not authorized by the terms of the lease to interfere with such tenants, and that the lessors have at all times neglected and refused to terminate such tenancies by sufferance and at will, so that at all times since the execution of the lease the lessee has been hindered and prevented by such tenants of the lessors from any possession, use, or enjoyment of the leased premises, or of any part thereof, notwithstanding the lessee has at all times been ready and willing to enter upon the premises, and to comply with all the terms and conditions incumbent upon her; that notwithstanding she was unable to secure any possession of the demised premises the lessee continued to pay the rents reserved in said lease for a period of five years, aggregating \$1,500, and that thereafter the lessors, as plaintiffs in an action for rent under the said lease, secured a judgment in the circuit court of the First circuit against the lessee as defendant, in the sum of \$2,201.65, which judgment the lessee, on or about January 2, 1914, was compelled to pay, together with costs of defending the said action in the sum of \$350. making a total sum of \$2,551.65; that on or about June 25, 1915, in another action for rent under the said lease, the lessors as plaintiffs secured in the same court another judgment against the said lessee in the sum of \$1,992.73, and on or about November 4 of the same year, in another action for rent under the said lease the lessors secured in the circuit court of the Third circuit a judgment against the lessee in the sum of \$761, both of which last two judgments, although unpaid, are incontestable and must be paid by the said lessee; and because of the failure and neglect of the lessors to make available the demised premises for entry by the lessee, the latter elects to rely no longer on performance by the lessors, but to treat the lease as terminated, and under and by virtue of the obligation of indemnity assumed by the lessors under express covenant of quiet enjoyment of the leased premises, to demand the damages to which the plaintiff is entitled, aggregating \$6,895.38, for which judgment was prayed, with interest.

It appears from the record, and from the various decisions referred to in the cause, that at the time of the execution of the lease the plaintiff, Elizabeth K. Pilipo, owned, subject to the dower interest therein of her mother, Esther N. Pilipo, 56 of the 353 shares of the lands known as "Holualoa No. 1 and 2," situate in the district of North Kona, island of Hawaii, acquired many years previously by a Hawaiian hui, extending from the sea up into the mountain forests, comprising a total area of 7,330 acres, of which 6,189 are situated above the upper government road.

In the present case the defendants, in addition to their denial of certain allegations, pleaded as an estoppel against the cause of action alleged in the second amended complaint of the plaintiff that, in an action brought by the defendants against her in the year 1906 to recover rent under the lease, the latter set up in defense the eviction by the lessors of the lessee from the leased premises. That case, between the same parties, came before the court below, where it was held that there was no such eviction for the reason that the plaintiff had not been in possession. Pilipo v. Scott, 21 Hawaii, 609. In deciding that case the court said, at page 612 et seq.:

"The members of the hui were tenants in common of the lands of Holualoa in proportion to their respective ownerships of shares, so called, each share representing a 1/353 interest in the land. Upon the execution of the lease, and by virtue of it, the lessee became a tenant in common of the lands of Holualoa with the members of the hui, including Miss Pilipo, in the proportion that the interest demised to her bore to the whole. We do not accept the view of counsel for the plaintiff in error that the lease demised to the lessee an undivided 58/353 interest in the land clear, and that all the exceptions mentioned in the lease were intended to be included in the 3 shares or interests which were not demised. We hold the proper construction of the language of the lease to be that the lessors demised $^{53}/_{50}$ of their interest in the common land, but reserved and excepted therefrom the houses, pineapples, and coffee planted by the lessors adjoining the Kailua road, meaning the land upon which the houses stood and upon which the pineapples and coffee trees were growing; also the other plants or trees mentioned, including the forest trees. The language purporting to except and reserve 3 shares in the land makai of the upper road, which should include the house lot near the sea, was used loosely and inaccurately, for the 3 shares referred to were un-

divided interests in the whole land, and were not included in the general description. An exception in a deed or lease withholds from its operation some part or parcel of the premises, which, but for the exception, would pass by the general description. A reservation is the creation of some new right issuing out of the thing granted, and which did not exist before as an independent right in behalf of the grantor or lessor. The 3 shares were not included in the demise, and no statement that they were excepted or reserved was necessary or appropriate. The language of the purported exception above referred to had no more effect than to designate the house lot near the sea as being a portion of the premises which the lessors intended to occupy us against the lessee as a portion of their remaining interest in the premises. Neither party could rightfully claim, as against the other, the right to the exclusive possession of any part of the land (except the pieces expressly excepted in the lease the right to the possession of which as against the lessee the lessors retained), unless by virtue of some regulation or custom of the hui. The members of huis, such as the hui of Holualoa, usually agree upon by-laws or regulations to govern the use and occupancy of the common prop-The rules of this hui, if it has any, were not in evidence, though there was testimony tending to show that there was at least a custom among the members to recognize and respect individual occupancy in that part of the land which was adapted to agricultural use. What terms or conditions, if any, were imposed on such occupancy did not appear.

"Soon after obtaining the Pilipo lease, the defendant secured leases of individual interests from other members of the hui, who had been cultivating portions of the agricultural belt, and acquired altogether 85 shares. The defendant then undertook to take possession of a portion of that belt containing an area of about 71 acres lying between the upper government road and the Kailua road, bounded on the north side by the J. C. Munn land (L. C. A. 3660) and on the south by the Scott trail, by erecting fences on such portions of the boundary of the tract as were not already fenced, and by posting a notice at each of the four corners of the tract. This area contained coffee trees in bearing and was valuable on that account. The defendant proceeded to clear off the guava and other wild growth. An allotment of the agricultural belt, separate from the rest of the common land lying above and below it, would give to each hui share a little less than one acre. There was evidence tending to show that there were other portions of the common land, both agricultural and nonagricultural, which were available for use; but the husband of the defendant, who acted as her business agent, testified at the trial that 'what we were working for at that time was coffee land.'

"In order to constitute an eviction, it is not necessary that there should be an actual physical expulsion of the tenant from the premises. Any act of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises may be treated as an eviction; that is, it must be something more than a mere trespass. Holt v. Waialua Agl. Co., 18 Hawaii, 360. But, strictly speaking, there can be no eviction from premises of which the tenant never acquired the possession, 24 Cyc. 1130. 'An eviction consists in taking from the tenant some part of the demised premises of which he was in possession; not in refusing to put him in possession of something which, by the agreement, he ought to have enjoyed. A tenant cannot be evicted from that which he never possessed.' Etheridge v. Osborn, 12 Wend. 529, 532.

"The evidence showed that Miss Pilipo owned a kuleana (L. C. A. 7746, 1) containing 4.7 acres situated within and near the center of the tract which the defendant intended to take up, and Mr. Scott testified that Miss Pilipo expressly requested the defendant to occupy the land about the kuleana, because she wished that upon the making of the contemplated partition of the lands her proportion of the agricultural land should be located adjoining her kuleana, and that the defendant acceded to her request. Miss Pilipo admitted that she had entertained the desire attributed to her, but she denied having made such request of the defendant. The circuit court found the fact against the defendant's contention."

The court then proceeded to consider the four specific instances, each of which it was contended by the plaintiff in error there constituted an eviction of the defendant to the action, and held that the evidence in each instance failed to show eviction, for the reason that it did not show that the lessee had ever been in possession of the premises, and accordingly affirmed the judgment. The claim upon which that action was based was for \$1,113 for unpaid rent under the lease, accruing during the period from March 1, 1902, to September 1, 1905, and that decision of the Supreme Court of the Territory was

rendered June 19, 1913.

Subsequently the lessee commenced a suit in equity for an injunction to restrain the lessors from enforcing the judgment last mentioned, and from collecting any other sums as rent under the lease, and to secure a judgment declaring the lease void. The trial court having granted the lessee the temporary injunction applied for, that case was taken to the court below and was decided December 11, 1913, and is reported in 21 Hawaii, 766, where the case was remanded to the circuit judge, with instructions to dissolve the temporary injunction, to sustain the demurrer to the complaint, and for such further proceedings not inconsistent with the opinion of the Supreme Court. In the opinion of the latter court, after referring to the law action commenced in April, 1906, by the lessors to recover the rent which had accrued under the lease for the period from March 1, 1902, to September 1, 1905, the court said:

"The facts above recited are disclosed by the bill, in which in addition to its direct allegations, the complainant refers to the records in the action for rent, declares that they are 'by reference incorporated herein,' and prays 'that the same be judicially noticed as if set out in full in the complaint.' The records in the equity suit (1901) for cancellation of the lease had been received in evidence in the action for rent, and are therefore to the same extent made a part of the bill. The same treatment is in the bill ac-

corded to the records in the partition suit.

"The allegations of the bill are somewhat detailed and lengthy, but their substance may be briefly stated. While the complainant (lessee) confesses that she paid rent for a period of years, adding that she did so, 'relying on the expectation that she would secure possession by the partition proceedings,' and further confesses, indirectly by the showing of the records in the lessors' suit to cancel the lease, that as late as 1901 she was unwilling to have the lease canceled, and desired the tenancy continued, and says that upon the execution of the lease she 'essayed to enter, by completing the boundary fences (walls), clearing away the guavas, and otherwise exercising rights of possession' on the 71-acre tract referred to in our opinion in the action for rent [21 Hawaii, 609], she alleges that she 'was completely defeated in her attempt to enter or to secure possession of any part of the lands represented by the demised 53 shares, and ever since has been kept from possession of all and every part of the land so attempted to be entered upon' (meaning evidently the 71-acre tract), and that 'there was no other part of the hui lands upon which complainant could then have entered under the terms of said lease, without interfering with the proscribed rights, set out in the terms of said lease, of other members of the hui.' In other words, her complaint is that at no time since the execution of the lease has she been able to obtain possession of any of the demised property.

"It is clear that ordinarily a lessee's failure to obtain possession, or a lessor's failure to deliver possession, in so far as it is a violation of the lessor's duty under the lease, absolves the lessee from his obligation to pay rent, and is available as a defense at law in an action for the recovery of the

rent. Kaale v. Petero, 7 Hawaii, 180; 18 A. & E. Ency. Law, 325; 24 Cyc. 1145-1147; 1 Taylor, Landlord and Tenant, § 378. This rule is recognized by the complainant. To avoid its effect she claims in the bill and in argument, and no other excuse is advanced, that the defense was not available to her in the action at law, 'for the reason that defendant' (now complainant) 'in good faith claimed to have been evicted and the defense of not having entered would have been inconsistent therewith,' that the trial court found that there had been no eviction, and that this court 'held the finding of the trial court to mean that, when defendant essayed to enter upon said block of 71 acres, her effort had failed, and that defendant had never been in possession of any part of said 71 acres,' and refused to disturb the finding on the ground that there was evidence to sustain it.

"Concerning this contention we have no hesitation in saying that the trial court did not find that lessee had never been in possession of the 71-acre tract, or of any part of the ahupuaa other than the three comparatively small pieces above referred to, and that this court did not hold that the trial court did so find. The opinion filed by the lower court shows that the only defense there offered and considered was that the lessors 'by taking possession of portions of the designated land' (meaning portions of the 71acre piece) 'and by sub-leasing other portions to a Japanese tenant' had been guilty of an eviction and that the only finding was that 'there has been no eviction.' The opinion leaves no room for the inference that the court found an utter lack of possession of any part of the demised property. This court, likewise, confined itself to a consideration of the sufficiency of the evidence, under the law, to support the finding that there had been no eviction with reference to the three small pieces of land within the 71-acre tract, and of the soundness of the contention that an eviction occurred by reason of certain acts of the lessors in the course of the suit for partition. We held that there was evidence sufficient to support a finding that the lessee had not had possession of the three pieces specifically mentioned, but we did not consider the state of the evidence relating to any supposed absence of possession by the lessee of any other parts of the land. The judgment was affirmed, because 'the only defense relied upon' had failed of es-

tablishment. Ante, 618.

"In saying that 'the circuit court presumably took the view that the defendant had never obtained possession of the area in question' (ante, 615), and that there was evidence to support the finding, reference was being made to the piece of land which was the only subject of discussion in that paragraph, to wit, the 'land of the hui between the makai end of the kuleana and the Kailua road' (11, 4 and 5, p. 615). Almost immediately following the sentence in which the words 'the area in question' occur are the statements that 'possibly the area here involved was covered by the exceptions made in the lease of "the houses, pineapples, and coffee planted by the lessors, adjoining the new road," and that 'the area seems not to have extended all the way down to the road.' These quotations show unmistakably that 'the area' was simply a piece within the 71 acres, and not, as the complainant contends, the whole tract, and, of course, not the whole ahupuaa. In the defense at law there was no claim of an eviction from all of the demised property."

The evidence and records in all of the actions between the parties respecting the lease in question, as well as the suit for the partition of the hui lands, were made a part of the record in the present action. The trial court, a jury having been waived, filed its decision in favor of the defendants to the action, upon which judgment was entered, and, the case having been taken by appeal to the court below, the judgment was reversed, and the cause remanded to the circuit court, with instructions to render judgment—

"in favor of the plaintiff and against the defendants, and to assess plaintiff's damages (she having waived her claim to damages for the value of the unexpired term of the lease) as per items following: (1) The amount of

that certain judgment in favor of defendants and against plaintiff for the sum of \$2,201.65, rendered in the circuit court of the First circuit of the territory of Hawaii, on or about January 2, 1914, and which plaintiff was compelled to pay, together with accrued costs thereon and accrued interest thereon from date of judgment; (2) the amount of that certain judgment rendered in the circuit court of the First circuit of the territory of Hawaii, on or about June 25, 1915, in favor of the defendants and against the plaintiff, for the sum of \$1,992.73, and which is now unsatisfied, together with the accrued interest and costs thereon; and (3) the amount of that certain judgment rendered on or about November 4, 1915, in the circuit court of the Third circuit of the territory of Hawaii, in favor of the defendants and against the plaintiff for the sum of \$761, and which is unsatisfied, together with all accrued interest and costs thereon. But if the defendants herein shall file in the trial court a full release of the plaintiff upon the two lastnamed unsatisfied judgments the respective amounts thereof, with accrued interest and costs, shall not be included in the amount of damages awarded to the plaintiff; otherwise, the same to be included in the damages awarded to plaintiff."

[2] We are unable to sustain this judgment, in view of the evidence in the cause and of the previous decisions of the court, to which reference has been made. By them we understand that it is not only the law of the present case, but the well-settled law of Hawaii, that while members of a Hawaiian land hui hold the property as tenants in common, the adoption of regulations concerning the management of the hui and the use of the land constitutes them a voluntary association, and that persons entering into membership through the acquisition of shares, so called, in the land, and those claiming under them, take their interest therein subject to such valid regulations as may have been adopted by the hui with reference to the holding of the land in severalty.

The court below in its opinion in the present case says that in the action commenced by the lessors in April, 1906, to recover rent due under the lease, it was decided that—

"The acts of the defendants here relied on to establish eviction were not sufficient, for the reason that plaintiff had not been in possession, and therefore had not been evicted. This decision was in an action between the parties to this action, and adjudicated the question of possession by plaintiff up to the time of the commencement of that action. Pilipo v. Scott, 21 Hawaii, 609, 766. We have been unable to find any evidence in the record showing that since April, 1906, the plaintiff has been placed in possession of the demised premises or any thereof. In the former action, commenced in 1906, which was finally tried in the circuit court in 1912 and affirmed by this court in 1913 (21 Hawaii, 609), the only defense against the claim of the lessors for rent made by the lessee (plaintiff here) was that of eviction, and it was decided that the lessee had not been in possession and therefore had not been evicted, for which reason the defense failed. The court below in its decision correctly said: 'I do not think that the plaintiff's contention that it was agreed that she was to have the use and occupancy of said definite area was seriously disputed upon the trial of the case. On the authority of Scott v. Pilipo, 23 Hawaii, 352, I think such an agreement could be legally made. We will therefore consider this case as though the lease by its terms was for a specific area."

As will be seen from the decision of the case between these parties, reported in 21 Hawaii, 609, it was held in effect that—

"A lease of an undivided portion of the interest of a member of a Hawaiian land hui in a tract of land owned by the hui constitutes the lessee a tenant in common with the members of the hui of the whole tract. But the lessee is not relieved from the payment of rent, on the ground of eviction by the lessor, because of the lessee's inability to obtain possession of certain specific portions of the common land which prior to and at the time of the execution of the lease were in the exclusive occupation of the lessor or other members of the hui pursuant to a custom of the hui."

And while it is entirely true that the court also held in that case that the eviction set up by the lessee as a defense to that action was not sustained, for the reason that the evidence there given failed to show that the lessee was in possession of the leased property, the same court, in the subsequent equity suit between the same parties (21 Hawaii, 766), brought by the lessee to restrain the lessors from enforcing the judgment for rent entered by direction of the Supreme Court in the action for rent, explained and very materially limited the language of its previous opinion. This very plainly appears from the following excerpts from the quotation hereinbefore made from that opinion:

"Her [lessee's] complaint [in the equity suit] is that at no time since the execution of the lease has she been able to obtain possession of any of the demised property. * * * She claims in the bill and in argument, and no other excuse is advanced, that the defense was not available to her in the action at law, 'for the reason that defendant [now complainant] in good faith claimed to have been evicted and the defense of not having entered would have been inconsistent therewith,' that the trial court found that there had been no eviction, and that this court held the finding of the trial court to mean that when defendant essayed to enter upon said block of 71 acres her effort had failed, and that defendant had never been in possession of any part of said 71 acres,' and refused to disturb the finding on the ground that there was evidence to sustain it. Concerning this contention we have no hesitation in saying that the trial court did not find that lessee had never been in possession of the 71-acre tract, or of any part of the ahupuas other than the three comparatively small pieces above referred to, and that this court did not hold that the trial court did so find. The opinion filed by the lower court shows that the only defense there offered and considered was that the lessors, 'by taking possession of portions of the designated land' (meaning portions of the 71-acre piece) 'and by subleasing other portions to a Japanese tenant,' had been guilty of an eviction, and that the only finding was that 'there has been no eviction.' The opinion leaves no room for the inference that the court found an utter lack of possession of any part of the demised property. This court, likewise, confined itself to a consideration of the sufficiency of the evidence, under the law, to support the finding that there had been no eviction with reference to the three small pieces of land within the 71-acre tract and of the soundness of the contention that an eviction occurred by reason of certain acts of the lessors in the course of the suit for partition. We held that there was evidence sufficient to support a finding that the lessee had not had possession of the three pieces specifically mentioned, but we did not consider the state of the evidence relating to any supposed absence of possession by the lessee of any other parts of the land. The judgment was affirmed because 'the only defense relied upon' had failed of establishment. * * * In saying that, 'the circuit court presumably took the view that the defendant had never obtained possession of the area in question,' * * * and that there was evidence to support the finding, reference was being made to the piece of land which was the only subject of discussion in that paragraph, to wit, the land of the hui between the makai end of the kuleana and the Kailua rond.' * * * Almost immediately following the sentence in which the words 'the area in

question' occur are the statements that 'possibly the area here involved was covered by the exceptions made in the lease of 'the houses, pineapples, and coffee planted by the lessors adjoining the new road,' and that 'the area seems not to have extended all the way down to the road.' These quotations show unmistakably that 'the area' was simply a piece within the 71 acres, and not, as the complainant contends, the whole tract, and, of course, not the whole ahupuaa. In the defense at law there was no claim of an eviction from all of the demised property." Scott v. Pilipo, 21 Hawaii, 769, 770, 771.

[3] Moreover, we are of the opinion that the evidence itself shows that the lessee entered into the possession of the leased property, with the exception of the few small and comparatively unimportant pieces held by or under other members of the hui, and that this fact appears from the testimony of the husband and agent of the lessee. Having enjoyed the fruits of the leased premises, to permit the lessee, near the end of the long life of the lease, as is done by the judgment here in question, to recover from the lessors rent money theretofore paid by her under and by virtue of the lease, as well as the amount of the unpaid judgments against her for rent, with interest and costs, is, in our opinion, unsupported in principle or by authority, and is fundamentally wrong.

The judgment of the Supreme Court of the Territory is reversed and that of the circuit court affirmed, with costs to the plaintiff in

error.

BANKERS' TRUST CO. et al. v. WABASH-PITTSBURGH TERMINAL RY. CO.

Appeal of DUNCAN.

(Circuit Court of Appeals, Third Circuit. September 28, 1920. Rehearing Denied December 17, 1920.)

No. 2570.

Receivers == 157-Related company held not entitled to priority on claim for

The relations between an insolvent railroad company, now under receivership, and another company, held to have been such that the latter was not entitled to priority of payment for supplies furnished and advances made from earnings of the receivership or from the corpus of the property as against pre-existing mortgage creditors.

Appeal from the District Court of the United States for the Western

District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Bankers' Trust Company and others against the Wabash-Pittsburgh Terminal Railway Company. William M. Duncan, receiver of the Wheeling & Lake Erie Railroad Company, appeals from the order of distribution. Affirmed.

Arthur O. Fording, of Pittsburgh, Pa., and Squire, Sanders & Dempsey, of Cleveland, Ohio, for appellant.

John S. Wendt, of Pittsburgh, Pa. (John Quinn, of New York City, of counsel), for appellees.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes 268 F.—61

Before BUFFINGTON and WOOLLEY, Circuit Judges, and WIT-MER, District Judge.

PER CURIAM. This is an appeal from the order of the court distributing the several funds in hand on final accounting by the receiver of the defendant, the Wabash-Pittsburgh Terminal Railway Company; the balance appearing from the one account, \$133,374.46, being the proceeds of sale by the receiver of the unencumbered real estate of the defendant, and that of the other account, \$76,995.77, is represented as income accruing during the receivership. The first was awarded to the general creditors, and the last to the first mortgage bondholders. To this the Wheeling & Lake Erie Railroad Company, through its receiver, William M. Duncan, took exception and brought this appeal.

The contentions of the parties have been well stated by the special master, William H. McClung, Esq., where in his report he says in

paragraph X:

"The Wheeling & Lake Erie, through William M. Duncan, receiver, claims that the indebtedness of \$81,221.81 owing to it by the Wabash-Pittsburgh Terminal Railway Company, described in the last preceding finding of fact, is of a preferential character, and as such entitled to priority in payment out of the net earnings of the Wabash-Pittsburgh Terminal Railway Company accruing during the receivership; that the balance of \$76,995.77 in the hands of H. F. Baker, receiver on operating account, consists of net earnings, and as such is wholly applicable to the Wheeling & Lake Erie's claim, to the exclusion of the claims of all other creditors; that, in addition to the earnings so shown to be in the hands of the receiver, the Wabash-Pittsburgh Terminal, a short time prior to the appointment of receivers, paid interest on its first mortgage bonds and expended other moneys for betterments and improvements upon its railroad out of earnings which should have been applied to the payment of its (the Wheeling & Lake Eric Railroad Company's) claim; that it is entitled to recover from the first mortgage bondholders the earnings so improperly paid to them or expended for their benefit, and in prejudice of the Wheeling & Lake Erie's claim, and that such recovery may be enforced in the present proceeding, by subrogating the Wheeling & Lake Erie Railroad Company to the rights of the first mortgage bondholders, who, through the trustee in the mortgage securing their bonds, are insisting upon participating as general creditors in the fund of \$133,374.46, representing the proceeds of sale of property of the Wabash-Pittsburgh Terminal Railway Company not used for railroad purposes and not bound by the lien of the first mortgage: The first mortgage bondholders, through the Bankers' Trust Company, successor to the Mercantile Trust Company, as trustee in the first mortgage, deny that there was any diversion of earnings to the payment of interest on their bonds in regard to which the Wheeling & Lake Erie Railroad Company has the right to complain, and further maintains that the fund of \$76,995.77 in the hands of H. F. Baker, receiver on operating account, is not earnings, but represents corpus of the railroad property, bound by the lien of the tirst mortgage to which they are entitled, to the exclusion of all other creditors."

The special master has denied the claim for priority made by the Wheeling Company upon the ground that the relation of that company to the defendant was such as to deprive it of the equity of priority in the distribution of either income or the proceeds of sale of the corpus of the debtor railroad company's property as against the rights of pre-existing mortgage creditors, on the ground that the Wheeling Company had full and complete knowledge of the financial condition of the defendant company, and having presumably furnished the supplies and

made the advances of money out of which the indebtedness arises upon the general credit and responsibility of the company, and not with
the expectation of being paid out of any particular fund. There was
no error in affirming this conclusion. However, we have reached the
conclusion from a careful examination of the evidence in the case, on
the urgent and very able and persistent presentation of the appellant's
claim, that the road, as found by the master, was operated during the
receivership at a net loss of a sum exceeding the reported balance, and
that such balance represents money realized from the sale of receiver's
certificates, afterwards paid out of the proceeds of the sale of the mortgaged property, which otherwise would have been allowed in payment
on account, which furnishes a further reason favorable to the conclusion reached.

Being satisfied, furthermore, that there was no diversion, since the claim of the appellant accrued, to the benefit and advantage of the first mortgage bondholders that was not wholly by them restored, all of the facts relied upon by the appellant give way to the conclusion reached by the special master, whose report is so full and satisfactory that a review of legal authorities is not deemed necessary.

The order of the District Court, sustaining the report of the mas-

ter, is affirmed.

COVERDALE v. SIOUX CITY SERVICE CO.

(Circuit Court of Appeals, Eighth Circuit. October 25, 1920. Rehearing Denied January 15, 1921.)

No. 5172.

1. Street railroads 99(10)—Automobile driver guilty of contributory negligence.

An automobile driver, approaching a street railroad track crossing a familiar highway at an obtuse angle, bringing the street car coming toward him in the line of his forward unobstructed vision, when he is in a place of safety, who drives on without stopping in time to prevent a head-on collision, is guilty of contributory negligence as a matter of law.

2. Street railroads \$\iiint 103(3)\$—Last clear chance doctrine held inapplicable. An automobile driver, injured in a collision with a street car at a highway crossing, cannot recover under the last clear chance doctrine, where the motorman did not apprehend danger until the front end of his car was up to line of the paved strip, about 8 feet from its center, when the automobile was 25 or 30 feet away, and he did everything he could to stop the car, which went 8 or 10 feet further, when the automobile crashed into him.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by J. L. Coverdale against the Sioux City Service Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Paul M. Hatfield, of Sioux City, Iowa (Henderson, Fribourg & Hatfield, of Sioux City, Iowa, on the brief), for plaintiff in error.

. J. W. Kindig, of Sioux City, Iowa (Kindig, McGill, Stewart & Hatfield, of Sioux City, Iowa, on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and TRIEBER, District Judge.

HOOK, Circuit Judge. This was an action by Coverdale against the Sioux City Service Company for personal injuries caused by a collision between his automobile and its street car. At the conclusion of the evidence the trial court directed a verdict for the defendant. Coverdale, the plaintiff, prosecuted this writ of error to review the

judgment that followed.

[1] It is fairly inferable from the record that the trial court found plaintiff guilty of contributory negligence. We think it plain beyond reasonable question that he was. He was driving his automobile westward on the paved strip or roadway 16 feet in width in the center of a highway, known as the Military Road, leading out of Sioux City, Iowa. He was not unfamiliar with the highway, and knew that the street railroad crossed it and the paved strip on which he was traveling. The angle of the railroad track and the line of plaintiff's movement toward the crossing was obtuse. In other words, the street car did not approach the plaintiff from behind, or at right angles to his course, but came toward him in the line of his forward vision as he traveled westward. The evidence showed, and so clearly that there was no question for the jury, that for considerable distances of both automobile and street car from the crossing there were no temporary or permanent obstructions to a plain view of each by the driver of the other, and that, had plaintiff used ordinary care for his safety, he would have seen the street car in ample time to have stopped, and so prevented the accident. As it was, there was almost a head-on collision, and the front ends of both vehicles were materially damaged. It is true the motorman testified that when he first saw the automobile approaching the crossing it was about a block away, and that he then looked westward to see if anything was coming from that direction. But in looking the other way the motorman was prudent, not negligent, and he had no reason to believe the plaintiff would continue to a point of danger. It is common practice for pedestrians and drivers of vehicles to stop near dangerous crossings, but in a place of safety, and in the absence of exceptional circumstances, not present here, a motorman or engineer may reasonably assume that those approaching on the highway will not venture on the tracks to their peril. Illinois Central R. Co. v. Ackerman, 144 Fed. 959, 76 C. C. A. 13; Denver City Tramway Co. v. Cobb, 164 Fed. 41, 90 C. C. A. 459. See, also, Little Rock, etc., Co. v. Billings, 187 Fed. 960, 110 C. C. A. 80.

[2] Upon his construction of the testimony of the motorman as to the distance of the approaching automobile when he first apprehended danger and as to the distance within which he could stop the street car, counsel invokes the "last clear chance" doctrine. This contention might be answered by the Cobb Case, supra. See, also, Illinois Central R. Co. v. Nelson, 173 Fed. 915, 97 C. C. A. 331. Furthermore, the testimony is misconstrued. Taking his testimony upon this subject in its entirety, and not by disconnected sentences, the motorman said, not that he was 35 feet away from the point of collision when he

first feared danger, but that the front end of the street car was up to the line of the paved strip, about 8 feet from its center, that the automobile was 25 or 30 feet away, that he did everything he could to stop the car, and that it went 8 to 10 feet further, when the automobile crashed into him. In any view of the last clear chance rule, there was no support for it in the testimony of the motorman.

The judgment is affirmed.

W. L. SLAYTON & CO. v. CITY OF JOURDANTON et al.

(Circuit Court of Appeals, Fifth Circuit. November 19, 1920.)
No. 3531.

Courts \$\infty\$=405 (5) \(\to \) Circuit Court of Appeals has no jurisdiction of appeal from dismissal of cause as without jurisdiction of District Court.

dismissal of cause as without jurisdiction of District Court.

A Circuit Court of Appeals is without jurisdiction of an appeal from a decree of a District Court, dismissing a bill on the sole ground that it does not state a cause of action within the jurisdiction of that court, under Judicial Code, §§ 128, 238 (Comp. St. §§ 1120, 1215).

Appeal from the District Court of the United States for the Western District of Texas; Duval West, Judge.

Suit in equity by W. L. Slayton & Co. against the City of Jourdanton and others. Decree for defendants, and complainant appeals. Appeal dismissed.

W. M. Harris, W. H. Graham, and John D. McCall, all of Dallas,

Tex., for appellant.

Marshall Eskridge, of San Antonio, Tex. (Eskridge & Williams, of San Antonio, Tex., and F. H. Burmeister, of Jourdanton, Tex., on the brief), for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. This is an appeal from an order of the court sustaining a motion of appellees, defendants below, to dismiss the amended bill of complaint filed by the appellant, plaintiff below, in so far as said bill asserted claims based on two issues of city warrants, one for \$4,000 and the other for \$20,000, on the ground that the court was without jurisdiction to hear and determine the issues so tendered. The plaintiff declined to amend, and appealed to this court from that order. As the jurisdiction of the court was put in issue, and the case was disposed of by a decision of that issue in favor of the defendants, the action of the court which is complained of is not subject to be reviewed by this court on appeal. United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Knisely v. Burt, 248 Fed. 493, 160 C. C. A. 503.

The appeal is dismissed.

YOUNG v. GRAND RAPIDS REFRIGERATOR CO. GRAND RAPIDS REFRIGERATOR CO. v. YOUNG.

(Circuit Court of Appeals, Sixth Circuit. November 3, 1920.)

Nos. 3316-3318.

Patents \$\iff 328 - 928,030\$, claims 1 and 3, for refrigerator latch, held not infringed.

The Crampton patent, No. 928,030, claims 1 and 3, for refrigerator latch, an essential part of which was a pair of toggle arms, held not infringed by defendant's latch in which the only equivalent for the toggle arms was similar to the construction in the prior art.

2. Words and phrases-"Toggle."

The characteristic of a "toggle" is that it should comprise two arms with their ends pivoted together, permitting lateral motion at the pivotal point and longitudinal motion at one or both ends of the arms, and its usual office is to translate lateral into longitudinal motion.

Patents 328-988,313, claim 5, for refrigerator latch, held not infringed.

The Crampton patent, No. 988,313, claim 5, covering an easily assembled joint of toggle arms in a refrigerator latch, *held* not infringed by a latch which did not use the characteristic feature of the claim.

4. Patents 328—Reissue No. 14,205 for refrigerator latch, held invalid, as

not invention of patentee.

The claims of the Young reissue patent, No. 14,205, the characteristic feature of which is a thumb lever on a refrigerator latch, adjusted to open the toggle and throw the striker pin out of engagement, held invalid, because that feature was the invention of another than the patentee.

 Patents 328—Design patent No. 48,958, for refrigerator latch casings, held valid.

The Young design patent, No. 48,958 for refrigerator latch casings, held valid as the invention of the patentee, who suggested the design in its final form, and supervised the execution thereof with his employés, and not the invention of customers of the patentee, who earlier suggested to the same employé of patentee a design embracing some feature of the patented design.

 Patents 320—Statutory penalties for infringement of design held sufficient.

Where a design for refrigerator latch casing was infringed only by sale of such casings as a part of defendant's refrigerators, so that the profits from the use of the patented design cannot be ascertained, a decree awarding \$250 damages was all that could be allowed, under Act Feb. 4, 1887, § 1 (Comp. St. § 9476), authorizing an award of \$250, and in addition thereto the total profits from the sale of the article or articles to which the design has been applied.

 Patents \$\infty\$ 320—Statutory penalty for design infringement does not apply to each sale.

The statutory penalty for infringement of design can be allowed only for the whole infringement, not as to separate sales, unless there is some measure of the infringing sales by subordinate units.

(268 F.)

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suits by Leonard A. Young against the Grand Rapids Refrigerator Company for infringement of two original and one reissue patents for refrigerator door latch and two design patents for latch casings. There was a decree finding infringement as to the two original latch patents and one design patent, finding the reissue of the patent invalid, and the other design patent not infringed, and the defendant appeals from the findings of validity and infringement and damages, and complainant appeals from the award of damages as insufficient. Decree as to reissued patent affirmed, and other decree reversed for modification. In Nos. 3316, 3318:

C. R. Stickney, of Detroit, Mich., for appellant Young. Frank E. Liverance, Jr., of Grand Rapids, Mich. (Luther V. Moul-

ton, of Grand Rapids, Mich., on the brief), for appellee.

In No. 3317:

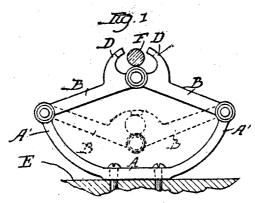
Frank E. Liverance, Jr., of Grand Rapids, Mich. (Luther V. Moulton, of Grand Rapids, Mich., on the brief), for appellant.

C. R. Stickney, of Detroit, Mich., for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. Young brought infringement suits against the Refrigerator Company (hereafter called the defendant), based upon patents for a door latch, numbered 928,030, issued July 13, 1909, to Crampton; patent No. 988,313, issued April 4, 1911, to Crampton; reissue patent No. 14,205, issued October 17, 1916, to Young; and design patents, No. 46,305, of August 18, 1914, and No. 48,958, of April 25, 1916, issued to Young, for latch casings. The District Court sustained, and found infringed, claims 1 and 3 of No. 928,030, claim 5 of 988,313, and the single claim of the design patent No. 48,958; assessed plaintiff's damages upon the theory of a reasonable royalty on the mechanical patents and at \$250 on the design patent: found the reissued patent invalid, and design patent No. 46,305 not infringed; and entered a final decree for injunction and damages on the three patents. The refrigerator company appeals from the findings of validity and infringements and damages; Young appeals against the award of damages, because insufficient, and against the decree as to the reissued patent.

The defendant manufactures refrigerators, and needed, for the doors thereof, a latch which would hold the doors tightly shut; Young was in control of a company which manufactured such articles under the Crampton patents, and, for a period, defendant bought and paid for latches which were manufactured by the company in alleged compliance with the inventions and design of Crampton and Young. Later defendant made changes in the form of the latch, and made or bought the changed form; these suits challenge its right to do so.



[1] The three mechanical patents all relate to a device by which spring pressure is utilized to hold the door tightly shut when latched. and thus to cause and maintain a fairly air-tight joint between door and casing. The first Crampton patent makes the chief disclosure; the other two being in the nature of improvements. The dominant feature of the device is a spring-operated toggle joint. Its substance

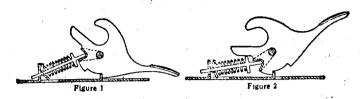
is shown by Fig. 1 and claim 1 of No. 928,030, here reproduced.¹ In this drawing, F represents a pin parallel with and projecting horizontally beyond the edge of the door. A' A' represent curved spring arms rising from a base and fixed vertically to the casing. Jointed in the extremities of these spring arms is a centrally pivoted pair of levers, forming a toggle, and near the central point each of these levers carries a concave jaw. When the door swings shut, the pin on the door —the striker—comes in contact with this pair of jaws, which is in the position shown by the solid lines in the drawing. Further inward progress of the door causes the pin to act upon the toggle, forcing it inward and expanding the spring arms enough to permit the knee to pass the center. It then snaps in further and assumes the position shown by the dotted lines, and the tension of the spring arm extremities toward each other holds the jaws and the inclosed pin, and therefore the door, firmly in this position, which is the position of the tightly closed door. Then an outward pull of the door and striker pin will pull the toggle knee outwardly, and expand the spring arms enough for it to pass the center. The pin will then be released.

[2] According to all definitions, it is characteristic of a toggle that it should comprise two arms with their ends pivoted together, permitting lateral motion at the pivotal point and longitudinal motion at one or both ends of the arms. Its usual office is to translate lateral into longitudinal motion. Its ordinary useful function is to increase the power resulting in a longitudinal direction correlatively to the loss in distance—e. g., inward motion at the joint or knee might continue for three inches until the center was reached, thereby producing a longitudinal extension of (say) only one-half inch at the ends of the arms, but a corresponding gain in power. It is manifest that when the device is built in the form and proportions shown in the drawings, and when it is at work holding the latch shut or open, the springs exert, for this purpose, the least power that they can do at any time,

¹Claim 1: "A latch having a keeper, said keeper having, in combination, a pair of jaws, a pair of toggle arms carrying said jaws, and means for yieldingly resisting the movement of the toggle arms towards their center of movement."

and the working effect is to get an increase of motion with a loss of power. However, the more characteristic action is found during the first half of each opening or shutting; the specification calls these arms toggle arms, and the joint a toggle joint, and the name may be accepted as appropriate enough.

The defendant uses a device shown by the following sketches; Fig. 1 showing the unlatched and Fig. 2 the latched position. It embodies



a more or less disc-shaped piece stamped out of sheet metal and intended to be pivoted near its center to ears projecting from a base attached to the casing. The upper portion is cut away, so as to form an irregular recess, the lower side of which is produced into an arm. The lower part is extended to one side to form a thumb piece. It is, characteristically, a simple lever extending from the thumb piece to the end of the opposite arm, and carrying on its upper side just above its pivot or fulcrum a hook or jaw. In the edge of the disc, on the side opposite the thumb piece, is a notch or recess, and inserted into this recess is one end of a small bar, the other end of which is held loosely in a guide on the base plate, so that it may have both longitudinal and swinging motion therein. A cylindrical coiled spring surrounds this bar and is held between stops, at one end on the bar and at the other end on the plate. This coiled spring is normally under compression, and, accordingly, the rod has a spring-actuated longitudinal thrust toward the disc. As the striker pin is moved down and comes in contact with the disc arm, it causes the disc to rotate on its pivot, the disc notch swings and thrusts the end of the bar, and this exerts compression on the spring, and the rod yields longitudinally until it passes the dead center or direct line to the disc pivot. It will then snap further into the position shown in Fig. 2.

It is not easy to find in defendant's structure the "pair of toggle arms" called for by the claim. The first impression is that one of these extends from thumb piece to pivot, and the other from the pivot to the lower end of the spring; but this is erroneous, since the fixed pivot is not and cannot be the toggle joint. If a toggle joint exists, it must be at the point of contact between the disc edge and the spring-pressed rod, because this is the only point the lateral motion of which tends to cause longitudinal motion at the ends of its arms; and it thus becomes apparent that the only toggle arm which can be found in the disc is that portion thereof extending in a straight line from the pivot to the notch. If we conceive the adjacent portions of the disc to be cut away, we will have here an arm (indicated by the dotted lines which we have inserted in the two figures) which might be considered a toggle arm exerting its longitudinal end thrust against the

fixed pivot, and therefore transferring the entire longitudinal motion to

the other arm which is slidingly attached.

It seems natural to classify the defendant's device with the type of spring-snap catches, of which there are several instances in the record, where a simple lever is pressed by a spring which will throw and hold the lever into either one of its alternate positions, according as the lever passes the center line or line of direct spring pressure in one way or the other; but if the defendant's latch is reconstructed with the mind's eye sufficiently to lay bare the pair of toggle arms and the characteristic toggle joint action which perhaps lurk therein, and it is thus brought within the patented monopoly, it becomes necessary to ascertain whether, from this broad viewpoint, Crampton invented any-

thing.

There are several earlier patents upon latches which disclose a spring-pressed toggle joint yielding laterally against the blow of the striker pin, and then holding the striker pin after the center has been passed, in nearly, if not quite, as great degree as this conception can be found in defendant's device. Of these, it is sufficient to refer to the patent to Conklin, No. 58,914, dated September 8, 1897. He had a plate lever quite similar to defendant's, except that the outer end was developed into a weight instead of into a thumb piece. The toggle arm, merged in the plate and resting at one end on the fixed pivot, is to be found in Conklin in the identical form and position in which it is found in defendant (if, indeed, it is truly present in either). The other supposed toggle arm, in the form of a spring-pressed thrust rod, is essentially the same as in defendant's device, excepting that its lower end is attached nearly underneath the fixed pivot, and the two toggle arms therefore make at their joint practically a right angle, instead of an obtuse angle, as in defendant's form. In Conklin, as in defendant, the blow of the striker pin is not delivered directly upon the toggle joint in a line at right angles to the line connecting the other ends of the toggle arms, as it is in Crampton; but in both Conklin and defendant this necessary thrust at this right angle is brought about indirectly. The contact of the striker pin with one side of the open jaw rotates the disc or plate. This rotation swings the toggle joint in the arc of a circle, and this arc very soon sufficiently approximates the necessary right-angled thrust.

The only difference in this respect, between defendant and Conklin, is that, because Conklin's toggle joint angle is more acute, a little further swing is necessary before the desired sufficiently right-angled thrust is achieved; but this is a matter of slight degree. Neither in the purpose to be accomplished nor in the means employed can we find any substantial distinction between Conklin and defendant, of a character which would allow Conklin (if later) to escape the charge of infringement, if the defendant is guilty. In other words, if the defendant has the "pair of toggle arms" called for by the claim of the patent in suit, so has Conklin; and it necessarily follows that the claim cannot be valid, if its scope is extended far enough to reach the supposititious toggle arms which, with a sufficient liberality of construction,

might be found in defendant.

There is abundant room to find in Crampton patentable novelty over Conklin, even after giving to the terms of the claim a very natural and fairly liberal interpretation. There is, therefore, no reason why the Patent Office should have cited Conklin (as it did not), and the lack of such citation and the issue of the patent in the form which the application was originally presented furnish no argument that the claims should be expanded to cover something of the Conklin type. The more natural implication is to the contrary, and is to the effect that the patentee avoided any danger of a citation to Conklin by putting his claim in a form that did not reach so far.

This conclusion as to the absence from defendant's device of the "pair of toggle arms" makes it unnecessary to consider whether the single hook which the defendant uses should be considered the equiv-

alent of the pair of jaws specified in the claim.

What has been said as to claim 1 applies with at least equal force to claim 3 of the same patent. It calls, in addition, for the striker pin, which, in some form, must be understood as impliedly appurtenant to claim 1, and is also more specific in its requirement for two jaws.

[3] Claim 5 of No. 988,313 is given in the margin.² The patentable advance, which is thought to be here indicated, over Crampton's former patent, consists in the means for uniting the two toggle arms at the inner ends to constitute the toggle joint. As this feature is the characteristic one of this patent, and the toggle arms are only the field in which the invention works, we may, without any inconsistency with what has been said as to the other patent, accept plaintiff's theory that defendant's device contains these toggle arms, and, for the purposes of this opinion, we do so, leaving the vital question of infringement to be whether the defendant's structure contains "recesses" in the meeting ends of the toggle arms, and "buttons consisting of heads joined by a shank," or the equivalents of these parts.

Plainly, the defendant does not have these in the form specified, and the question is one of equivalency. In the patented device, the two toggle arms, after assembling, are stopped from outward motion in either direction, so that they cannot open far enough to permit the inserted shank to fall out, while the heads or buttons, at each end of the shank, prevent it from coming out endways. On the theory that defendant's device contains the two toggle arms of the patent, it may be said that one of them—the one which is constructively found embodied in the disc between fixed pivot and notch—has a recess in its end; the notch constituting that recess. The other arm, the spring-thrust bar, has no recess, but has a pointed end, which enters the notch, bears therein, and is thereby held from motion in the plane of the disc. To prevent excessive wear upon this bearing, and (perhaps) to prevent the bar from slipping laterally out of the notch, defendant interposes,

² Claim 5: "A latch consisting of a bolt and a handle attached thereto in combination with levers provided with recesses at their meeting ends, a button consisting of heads joined by a shank, said shank positioned in said recesses, means to yieldingly hold the levers in position to form toggle arms and to resist the movement of said toggle arms into the same plane, and means to limit the outward movement of said toggle arms, one of said levers provided with a finger engageable with said bolt."

between bar and notch, a thin metal plate, bent across at an angle to fit the end of the bar and the notch, and turns down this plate at the sides of this bar end into ears. This is said to be made of a hardened metal, which will not easily wear.

We cannot find, in this form, and within any reasonable latitude of construction, the equivalent of the patented form. The latter was devised to be substituted for the pivot between the two toggle arms in the earlier patent. The office of the shank and the engaging recesses is to hold the two arms in proper relation to each other. It is, in substance, the pivot bolt of the older patent, but in a specific form suitable for easy assembling. Defendant never had any pivot bolt, and had no occasion to use a substitute. The interposed bearing plate has nothing to do with holding the two arms in contact in the plane of the disc, as the bolt does. They are held in position in this plane just the same, whether the interposed plate is present or not. It cannot be considered as the recess in the end of the bar. It faces the wrong way. Notch and plate together constitute only one recess. The advance made by Crampton in respect to pivoting the two arms was, at best, slight, and defendant has not adopted its characteristic feature.

- [4] Upon the reissue patent, No. 14,205, infringement is alleged of the five claims which, upon reissue, were added to the original claims, and of which added claims the characteristic feature is the presence of a thumb lever secured to one of the toggle arms and so adjusted with reference to the striker pin that the thumb lever will open the toggle and throw the striker pin out of engagement. Here, also, there is opportunity to give much broader construction to the call for toggle arms than we could do in the first patent, where they constituted the dominant feature, and with such a construction infringement is not denied. Validity is therefore the controlling issue. The court below concluded from the evidence that Young was not the inventor of this thumb lever improvement, but that Crampton was. We agree. Young's failure to claim this invention in his original was not because of inadvertence, but because he did not then consider it his. His claim thereto was first made after defendant had been for months using its present form, and after Young had found that his original patent would not reach it. If his present claim was not belated as matter of law, the delay at least is persuasive on the issue of fact.
- [5] As to the design patent No. 48,958, our conclusion is that it is valid. The controversy is one of originality as between the Leonards, on the one side, and Young, on the other. After the patent issued to Young, the Leonards filed an application and went into interference. The Examiner of Interferences awarded priority to them; the interference record was stipulated into the present case in the court below as the record on this subject; the District Judge found in favor of Young; the higher Patent Office tribunals and the Court of Appeals of the District of Columbia reached the same conclusion as the District Judge, but rested this result so largely upon his opinion that we have thought the question should be examined on this appeal in substantially the same light as if the later decisions at Washington had not been made. We have grave doubt, to say the least, whether the

testimony or the applicable rules of presumption justify a finding that Young made the invention before the Leonards gave their instructions. Indeed, most of Young's testimony does not distinguish between this particular invention and his earlier design patent looking in the same direction.

This patent involves a very narrow margin of invention; except that both parties are so thoroughly committed to the theory that it does show invention, that conclusion would be doubtful; but whatever invention there is consists in the relatively small and precise changes in configuration and appearance as compared with Young's earlier patent. We think the most satisfactory conclusion is that this precise invention was not made until about the middle of June. It was actually developed in detail by the superintendent and draftsman in the Crampton factory. Standing over them with general directions and instructions were Crampton and Young. Young was furnishing the capital, was actually engaged in working out improvements on the different articles that were to be made, and had large experience in this general class of manufacture. He had already perfected a design for these shells which was midway between the old form and the ultimate form—the patent in suit. Crampton had just received from the Leonards their description of the shape and form of the shell they wanted made for them; but their statements and descriptions were general, and it is not clear that they reached those details of configuration which alone are involved in the controversy.

Under familiar principles, they would be entitled to the invention which they had generally described, and which mechanics and draftsmen working for them had developed in detail; but, under the facts in this case, the factory superintendent and the draftsman must be considered employés of Young rather than of the Leonards. The Leonards were the customers and vendees of the Crampton factory, giving instructions as to what they wanted made for them under their purchase contract. Young was, in practical effect, the head of the Crampton factory, and he was already engaged in this precise line of development. We cannot say that he was not entitled to the benefit of whatever invention there was in the details as finally matured. Our only hesitation arises from a letter, written at the time by Crampton, giving credit to the Leonards for the "new design." This letter does not bind Young, but, under the circumstances, it is forceful evidence. The explanation consistent with our general conclusion is that Crampton did not know or appreciate the fact that the Leonards' suggestions were merely along the general line on which Young had been working, that he had no idea that any patentable invention had been made, and that he desired to please and flatter the customers upon whom he was relying for a successful business.

[6] Young complains that, instead of the statutory penalty for the infringement of a design patent, he should have been awarded either profits or a reasonable royalty. The statute (section 9476, U. S. C. S. 1916; Act Feb. 4, 1887) contemplates an award of profits in addition to the penalty when "the total profits * * * from the * * * sale * * * of the article or articles to which the design * * *

has been applied" exceed \$250; but, in a case like this, the difficulty is to determine what profits have been made by a sale of the article. The patent was upon a sheet metal shell or casing which surrounds the mechanism of the latch, and was attached to the refrigerator as a part of the latch structure, and was sold by defendant (with negligible exceptions) as a part of the refrigerator. The ornamental design of the shell added something to the attractiveness of the unitary article sold; but it is not seriously contended that all the profits from the refrigerator belonged to Young. It would be less fanciful to treat the latch and casing together as a unit; but defendant did not sell them in this form, unless for occasional replacement. Any segregation of the profits due to the use of this particular design of latch casing is obviously impossible. The statute was passed, we think, to provide for cases of this character, and to prevent the otherwise inevitable result of a recovery of merely nominal damages. Nor does the case seem to us appropriate for applying the rule of reasonable royalty. The absence of any other measure of recovery is one of the reasons for resorting to a reasonable royalty, and the considerations supporting that measure of damages apply with much lessened force, if at all, to a design patent of this character.

[7] The statutory penalty is imposed for selling an article to which such design has been applied. The defendant here has sold about 100,-000. There seems to be no way in which the defendant's infringement can be divided into more than one unit, unless each article stands by itself. Even if the record indicated a number of separate sales, or separate orders taken and filled, it would be true in a typical case, though it might not be in this, that there were likely to be as many sales as there were articles; and we think it could not have been the intention of Congress, without more explicit language, to impose this penalty for each article; indeed, the statute refers to profits of more than \$250 from the sale of the "article or articles," as though it was immaterial whether singular or plural. The somewhat analogous copyright statute (section 9546, U. S. C. S.) provides for a measure graduated by the number of copies sold, and Congress might have adapted this statute to design patents, if it had intended such a measure. The discussion of that statute in an opinion of this court (Westermann v. Dispatch Co., 233 Fed. 609, 615, 147 C. C. A. 417) and in the opinion of the Supreme Court reversing in part (Westermann v. Dispatch Co., 249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499), and what is said on the subject in other cases under this statute (Gimbel v. Hogg [C. C. A. 3] 97 Fed. 791, 38 C. C. A. 419; Frank v. Geiger [C. C.] 121 Fed. 126), are consistent with the conclusion that only one penalty should be awarded, unless there is some measuring of the infringing

The decree as to the reissued patent is affirmed; the other decree is reversed for modification, and the case is remanded for proceedings in accordance with this opinion. No costs are awarded in this court.

sales by subordinate units not herein shown.

STATE OF OREGON v. WOOD et al.

(District Court, D. Oregon. November 22, 1920.)

No. 9031.

1. Removal of causes \$3\%, New, vol. 9A Key-No. Series-Petition signed by United States attorney for revenue officers held petition of defendants. A petition, signed by the United States attorney and stating that it was presented as the petition of certain revenue officers indicted in the state court, held the petition of the defendants, within Judicial Code, \$ 33 (Comp. St. § 1015), authorizing suits against revenue officers to be removed to the federal courts upon defendants' petition.

one of several petitioners sufficient.

Under Judicial Code, § 33 (Comp. St. § 1015), providing that suits against revenue officers may be removed to the federal courts on a petition verified by affidavit, it is sufficient that the affidavit be executed by one of the several petitioners.

3. Removal of causes \$\iins\$85\%, New, vol. 9A Key-No. Series—Writ proper in proceedings removed to federal court when defendants are out on bail.

Under Judicial Code, § 33 (Comp. St. § 1015), providing that suits against revenue officers in state courts may be removed to the federal courts by issuing a writ of certiorari when the suit was commenced by any process except capias, and by habeas corpus when commenced by capias or a similar proceeding, the issuing of a habeas corpus writ is the correct procedure where defendants had been released on bail by the state court.

4. Removal of causes €=22-Officers enforcing federal prohibition law entitled to remove prosecutions against them in state courts.

Federal revenue officers indicted, in the state court for killing a man while enforcing the National Prohibition Act, may remove the proceedings to a federal court under Judicial Code, § 33 (Comp. St. § 1015), authorizing removal of proceedings against revenue officers, etc.

5. Removal of causes \$\iint\$85\%, New, vol. 9A Key-No. Series—Petition by revenue officers held sufficient.

Under Judicial Code, § 33 (Comp. St. § 1015), providing that proceedings in state court against revenue officers may be removed to a federal court on a petition setting forth the nature of the suit or prosecution. a petition alleging that the indicted persons are revenue officers, and were acting as such at the times mentioned in the indictment, that the case was pending in the state court, and no trial had been had thereon, etc., held sufficient.

Motion by the State of Oregon against W. R. Wood, E. M. Jackson, William D. Morris, James J. Biggins, and Delazon C. Smith, to set aside an order directing a writ of habeas corpus cum causa to issue, and to guash the writ. Motion to guash denied.

Walter H. Evans, Dist. Atty., of Portland, Or. (Barnett H. Goldstein, of Portland, Or., of counsel), for the State of Oregon.

Lester W. Humphreys, U. S. Atty., and John C. Veatch, Asst. U. S. Atty., both of Portland, Or., for defendants.

WOLVERTON, District Judge. This is a motion on the part of the state of Oregon to set aside an order of this court, heretofore made. directing a writ of habeas corpus cum causa to issue, and to quash

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the writ. The motion is resisted by the United States attorney. It is based mainly upon the supposed insufficiency of the petition for the

writ, but questions also that the proper writ has been adopted.

The defendants were indicted in the state court, by the grand jury of Multnomah county, upon the charge of involuntary manslaughter, for having killed one Robert W. Hedderly while they were in the performance of a lawful act. The removal to this court is sought upon the ground that the defendants are officers appointed, under the revenue laws of the United States, by the Commissioner of Internal Revenue, and were acting by authority of the revenue laws of the United States at the time Hedderly was killed. Section 33, Judicial Code (Comp. St. § 1015).

[1] It is insisted that the petition is not the petition of the defend-

ants, as required by the removal statute. The petition reads:

"Now comes Lester W. Humphreys, United States attorney for the district of Oregon, acting under instructions from the Attorney General of the United States, and, as such United States attorney, presents the petition of W. R. Wood, James J. Biggins, and Delazon C. Smith, who show to the court." etc. "[Signed] Lester W. Humphreys, United States Attorney."

I am of the opinion that this must be held to be the petition of defendants. It is the constant practice for complaints and petitions to be signed by the attorneys for complainants and petitioners. Such was the case in Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648, where the petition was signed by James A. Warder, attorney. It purported to be the petition of James M. Davis, however. It is the province of the United States attorney to act for the petitioner, although at the same time he is concerned, by virtue of his office, in seeing that the revenue officers are not deterred in the performance of their duties. Hughes, Fed. Procedure (2d Ed.) 349, 350.

In language, the United States Attorney "presents the petition" of petitioners, naming them. This is tantamount to presenting the petition for and in behalf of the petitioners, and thereupon he signs as United States attorney. I see no reason why the United States attorney, appearing both for petitioners and for the government, as the petition itself shows, may not sign in that way, and why such a petition so signed may not be considered to be the petition of Wood, Biggins, and Smith. It is obvious that the petitioners are the moving parties, and that the United States attorney is acting for them. The signing, therefore, is quite as authoritative as the signature of the attorney in the Davis Case, supra. Viewed in this light, the petition meets the requirement of the statute.

[2] The petition is verified by Wood alone. The statute merely requires that it be verified by affidavit. Presumably this means that it shall be verified by the petitioner. Where there are several petitioners, verification is usually made, in common practice, by one of them. Such a verification, I have no doubt, is within the purview of the statute, and is sufficient. While a valid petition, duly verified, is necessary to give jurisdiction to the Federal court on removal, the statute has prescribed no technical form of petition and verification to be observed, and common usage, in legal practice, is probably all that was intended.

of the writ adopted is regular and sufficient for the purpose of procuring the removal. The federal court acquires jurisdiction, on removal from the state court, only after service upon it, or its clerk of the appropriate process, whether certiorari or habeas corpus cum causa, by which the clerk is notified of the filing of the petition in the federal court. After such notice, all proceedings are stayed in the state court. Virginia v. Paul, 148 U. S. 107, 115, 13 Sup. Ct. 536, 37 L. Ed. 386. It is essential, therefore, that the appropriate writ be adopted for acquirement of federal jurisdiction. The statute seems to be clear as to what writ should be issued. It reads:

"When the suit is commenced in the state court by summons, subpœna, petition, or any other process except capias, the clerk of the District Court shall issue a writ of certiorari. * * * When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa."

It is further provided by the same section that:

"If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the District Court."

It is elsewhere provided that:

"All bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court."

The defendants in the present case were out on bail, when their petition for removal was filed in this court and the writ was sought, so there was no occasion for the marshal to take them into custody. Their bail answers for their appearance here.

Should the writ have been certiorari or habeas corpus cum causa? Capias denotes:

"A writ directing the sheriff to take the person of the defendant into custody. * * * Being the first word of distinctive significance in the writ when writs were framed in Latin, it came to denote the whole class of writs by which a defendant's person was to be arrested." 1 Bouvier's Law Dictionary, 418.

The statute comprises capias or other similar form of proceeding by which a personal arrest is ordered. It is obvious that there are two classes of proceedings which dominate the form of the writ. One is when the suit is commenced by summons or like process, except capias, and the other is when commenced by capias or other similar form of proceeding. Certiorari is appropriate in one class, and habeas corpus cum causa in the other; this whether the petitioner is in custody or out on bail. If in custody, then the marshal must take him in his custody, and produce him here; but, if out on bail, the bail answers for his personal appearance in this court. Obviously, however, the writ should be the same in either event. While, by a technical consideration of the two writs, certiorari would be the more appropriate when the defendant is out on bail, it is sufficient that the statute has

not so regarded it, but has prescribed the writ of habeas corpus cum causa. State of Virginia v. Felts (C. C.) 133 Fed. 85.

State v. Sullivan et al. (C. C.) 50 Fed. 593, seems to hold that the writ of certiorari would be sufficient; but I doubt it. However that may be, I am of the opinion that the writ of habeas corpus cum

causa was properly issued in the present case.

[4] It is another contention that the proceeding under which the removal was had can be invoked only when a revenue law affecting the revenue of the United States is involved. It may be conceded for the purposes of this case that the defendants, when attempting the arrest of Hedderly, were acting under and for the enforcement of the National Prohibition Act. 41 Stat. 305. Section 2, title 1, of that act, charges the Commissioner of Internal Revenue, his assistants, agents, and inspectors, with the duty of investigating and reporting violations thereof to the Attorney General. These officers may also, subject to the control of the United States attorney, conduct the prosecution at the committing trial for the purpose of having offenders held to the action of a grand jury. By section 28, title 2, these and all officers whose duty it is to enforce criminal laws, are accorded all power and protection in the enforcement of the act, or any provisions thereof, that are conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States.

It can hardly be disputed that the then existing laws relating to the manufacture and sale of intoxicating liquors were revenue laws, one of the functions of which was to produce revenue for the general government. Like protection to that extended to the revenue officers acting under the revenue laws is expressly extended to the same officers acting under the prohibition act. This in itself is sufficient to answer the contention. But, beyond this, it is manifest that this is a revenue act, as well as a prohibition act, as witness sections 35 and 37 of title 2, and other provisions of the act. While, therefore, the defendants may not have been engaged in enforcing a clause relating to the collection of revenue, it is obvious that it was intended, nevertheless, that they should receive the same protection as though they were so acting. The contention, as applicable here, is therefore not well taken.

[5] The next contention relates to the sufficiency of the petition. The proposition that the petitioner must state facts sufficient to enable the court to decide whether the case is one within the provisions of the act is sound. Nor is it enough that the petitioner alleges in general terms that he intends to rely in his defense to the prosecution upon the revenue laws of the United States. Salem & L. R. Co. v. Boston & L. R. Co., 21 Fed. Cas. 229, No. 12,249. See, also, Exparte Smith, 94 U. S. 455, 24 L. Ed. 165.

The statute requires that the petition shall set forth the nature of the suit or prosecution. The petition shows that petitioners are officers appointed, under the revenue laws of the United States, by the Commissioner of Internal Revenue. This is the allegation of a fact, and not a conclusion. Then it is alleged that, on a date named, a criminal

prosecution was commenced in the state court, specifying the court, against the petitioners and others, wherein the grand jurors of such court indicted petitioners for involuntary manslaughter, and charged that petitioners, while in the performance of a lawful act, killed one Hedderly by shooting him, which indictment is still pending, no trial having been had. Then it is further shown that petitioners did not kill Hedderly; that at the time of the occurrence of the act for which petitioners were indicted they "were and still are officers of the United States as aforesaid," and were acting as such officers and under color of their office, to wit, attempting to effect the arrest of Hedderly; that petitioners believed Hedderly was in the act of violating the revenue and prohibition laws of the United States, and for that reason the arrest was attempted; that such attempted arrest was the same act as referred to in the indictment as the performance by petitioners of a lawful act.

It appears from the petition that petitioners were indicted in the state court, and the charge made against them is specified, and, further, that the indictment is still pending, and that no trial has been had. These also comprise statements of fact, and not conclusions. So do the subsequent statements. It was not essential that the officers state more fully the capacity in which they were acting. The court can readily deduce from these allegations that they were acting for the enforcement of the revenue and prohibition laws. Nor was it essential that the petition state more fully the reason why petitioners attempted to make the arrest, or, that it state more precisely, what revenue laws they were acting under, or that such laws were still in force, or what particular acts Hedderly was engaged in at the time.

I think it quite sufficient, under the statute, that it appear that the petitioners have been indicted in the state court, and with what they are charged; that they are revenue officers, and that, at the time the act occurred of which complaint is made against them in the indictment, they were acting in the capacity of such revenue officers, and were attempting to enforce the revenue and prohibition statutes of the United States; that the indictment is pending in the state court, and that no trial has been had thereon. These are the essentials material to the removal. The petition states pertinent facts covering these essentials, and it is clear that it comports with the intendment of the statute. Tennessee v. Davis, supra; State v. Peak (D. C.) 252 Fed. 306.

Further criticism of the petition consists in the argument that, as it is represented that petitioners did not kill Hedderly, the representation is tantamount to a denial of doing the very act for which they now claim protection, and therefore it was incumbent upon petitioners to show a justification of their act; that is, that it was done under color of their office as revenue officers of the United States. There is a fallacy in the reasoning in two particulars: First, the petition does show that the act was done under color of their office as revenue officers; and, second, it may well be that petitioners did not kill Hedderly, but nevertheless they are indicted for killing him, and the essential allega-

tion for the purposes of this inquiry is that the act charged against, them was done under color of their office. Their real defense will come later. State v. Peak, supra.

The motion to quash will be denied.

CARPENTER STEEL CO. v. METROPOLITAN-EDISON CO.

(District Court, E. D. Pennsylvania. December 10, 1920.)

No. 2113.

1. Corporations \$\iii 391\toprox Policy of controlling public utility is state question.

The policy of the law, which controls or should control public utility corporations and their relations to the public, is peculiarly a domestic policy, to be determined by the state concerned and to be enforced as so determined.

2. Courts 493(3)—Federal court will not entertain question already

presented to state Public Service Commission.

Whether a state Public Service Commission is an administrative department of the state government, or whether it is possessed of judicial powers and functions, a court of the United States will not inquire into its powers and jurisdiction over a question pending before it, but will refuse to interfere, leaving the parties to the jurisdiction first invoked, and to their right of removal or appeal to the courts of the United States.

3. Courts \$\infty\$ 490—Comity yields to right to invoke United States courts.

All considerations of comity must give way to a right of citizens of the United States to invoke the powers and process of a court of the United States to defend or enforce their rights.

4. Electricity €=11—Court can restrain collection of new rates, without bond, pending hearing by commission.

Where there was pending before the state Public Service Commission a proceeding to determine the legality of electric power rates, a United States court can restrain the power company from collecting the rates of the new schedule without giving bond to refund the amount, if that question was not presented to the Public Service Commission, though it might have been.

In Equity. Suit by the Carpenter Steel Company against the Metropolitan-Edison Company. On motion by the plaintiff for a restraining order. Order granted.

John A. Keppleman, of Reading, Pa., for plaintiff.

Henry P. Keiser, of Reading, Pa., S. P. Light, of Lebanon, Pa., and Ralph J. Baker, of Harrisburg, Pa., for defendant.

DICKINSON, District Judge. This cause presents a number of interesting questions. They are of more interest, perhaps, than of practical importance. The real controversy can be best presented by a contrast of what, under the paper book requirements of the Supreme Court of the state, would be the statements by the respective parties of the question involved; but the objection to doing this is that, as that question is stated, so will the answer be. To give either is in consequence to determine the cause; to state both is to state nothing. This forces us to a statement of the subject of the controversy out of which we must get the question of law involved.

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From the viewpoint of the plaintiff the parties have a contract for the supply of power by defendant to plaintiff for a defined time and at an established rate. To assure a continuance of supply, if any bill rendered was in dispute, the contract provides that defendant shall not shut off power because of nonpayment, thus limiting its right to the case of the nonpayment of an undisputed bill. In reliance on this contract, plaintiff re-equipped its plant, so that it became wholly and helplessly dependent upon the defendant for the running of its mill. Following a change of management, the defendant filed a new tariff or schedule of rates of charge for service, in accordance with the laws of Pennsylvania establishing a Public Service Commission for the state. The effect of this (assuming it to be at once effective) was to largely increase the cost of the service to the plaintiff, as provided in the contract. The defendant presented bills, in accordance with the increased rates, and demanded payment. The question of what rate the defendant may lawfully charge is before the Public Service Commission, and as yet undetermined. Disputes arose between plaintiff and defendant over the bills rendered. This dispute was, for the time being, adjusted by an arrangement under which the plaintiff paid the bills as rendered, upon receiving the refunding bond of the defendant to return the part of the amount in dispute to which it could not lay just claim.

The defendant, after complying with this second agreement for several months, refused to longer comply, and served notice upon plaintiff that service would be discontinued unless plaintiff paid the bills as rendered, and that no refunding bond would be given. Plaintiff thereupon, having the right so to do, has applied to this court for relief against the irreparable damage with which it is threatened. It has accompanied its prayer for relief with the expression of its willingness to assure the defendant against the possibility of loss by paying the undisputed part of the bill, and by giving a bond, with any condition deemed to be proper to assure payment of all found to be payable, and, as an alternative, its willingness also to pay the bills as rendered upon being given a like bond that the excess of the sums paid beyond what is due and owing shall be refunded. The strength of the appeal thus made on the showing made is felt.

From the viewpoint of the defendant, however, the plaintiff should be denied all relief. The ground of the denial of the right to relief is not based upon any denial of the fact situation, except in the particular that the only dispute between the parties (with respect to the main controversy) is one over the rates of service, and as the defendant is a public utility corporation, it is subject to the control and must obey the commands of the Public Service Commission in respect thereto, and that this commission has, under the laws of Pennsylvania, full and exclusive jurisdiction of the subject-matter and of the parties (to which jurisdiction the present plaintiff has submitted itself), and that no court has any power to or should interfere with, or do anything which might interrupt, the orderly proceedings before that chosen tribunal.

It is further asserted (although this is denied by the plaintiff) that the Public Service Commission is possessed of the legal power to grant to the plaintiff the relief which it asks to have awarded by this court. It is not pretended, however, that any such relief has in fact been prayed, or that the question before us is among the questions

pending before the commission.

[1] These opposing statements, so far as they are in opposition, bring into the light the question before us. It is at once apparent that the question is a very narrow one, although one to be determined on very broad grounds. Aside from any questions of rights, either legal or equitable, or of the power and jurisdiction of courts, the policy of law which controls or should control public utility corporations in what may be called their relations to the public is peculiarly a domestic policy, to be determined by the state concerned and to be enforced as so determined.

[2] Moreover, whether the Public Service Commission is an administrative department of the state government, or whether it is possessed of judicial powers and functions, and in this respect and to this extent is a court, if there was pending before it as a tribunal, with power to determine it, a question afterwards submitted to a court of the United States, the latter would not stop to inquire into powers and jurisdiction, but would promptly refuse to interfere, or do anything which might lead to a possible conflict of jurisdiction, leaving the parties to the jurisdiction first invoked, and to their right of removal or appeal to the courts of the United States, or whatever other rights they had.

If, therefore, there is in the instant case anything which is before the Public Service Commission peculiarly within its powers and functions to determine, that comity, which properly has a place in the relations of all courts, departments of government, and tribunals with each other, and which the relations between the United States and the states make almost a necessity, commands us to refuse to determine

the same cause or question.

[3] Of course, if a right of a citizen of the United States is involved, and he has the further right to invoke the powers and process of a court of the United States to defend or enforce his right, all considerations of comity must give way to our duty to accord him his rights.

Just here is to be found the touchstone of the instant case. Counsel for defendant have compressed into a sentence everything there is to be said, when they say that the whole controversy between these parties is a question of rates. If it is, counsel for plaintiff admits he is out of this court and before the commission. Paradoxical as it sounds, however, there may be a controversy over rates without involving any question of rates, in the sense in which the commission deals with the subject.

There is a helpful analogy in cases dealing with what the United States Public Service Commission may do and what the courts cannot do. The cases of Texas & P. R. Co. v. Abilene, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, Texas & P. R. Co. v. American, 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255, and Gimbel Brothers v. Barrett (D. C.) 215 Fed. 1004, afford us an illustration. The case of a dispute over the payment of a bill for service at the

tariff rate, in the sense of whether it has been in fact paid or not, affords us another illustration. A bill to enjoin a public utility corporation from bringing an action at law to enforce payment of a claim, based upon service according to a tariff, is another illustration. The test is what the court is asked to determine. To make good their contention, counsel for defendant insist that this court is asked to find that the proper rate of charge for service in this case is less than the tariff rate, and that we can make no such finding.

Counsel for plaintiff admits the conclusion, but disputes the premise. We are down, therefore, to what is a fact finding. Defendant asserts there is no contract rate of charge. The rate is whatever the commission fixes, and until thus fixed is whatever the tariff sets forth. However this may be, we are not asked to decide otherwise, because this, for the purposes of this case, is conceded. How, then, can the rate be the thing in controversy? The real controversy is not over any right other than the right to a remedy. Defendant is asserting and threatening to enforce its claimed right in defiance of its contract not to so enforce a disputed demand.

The question now presented turns upon whether it has such right? The Public Service Commission has not assumed jurisdiction of this cause for the purpose of determining this question. Why may not this court determine it? The commission has control of public utility corporations in a sense in which it has not control of those dealing with them, so that the situation is not quite reversible, but to reverse the question is helpful nevertheless. Could not this court (assuming its jurisdiction in other respects) entertain the suit of this defendant against this plaintiff for the payment of this very bill now in dispute? The question of rate would then be involved precisely to the extent to which it now is. If the answer is that the commission has no power to give judgment against the customer, but that the commission has the power (as asserted by defendant and denied by plaintiff) to give plaintiff the relief prayed, this is met by the retort that, granted the commission has jurisdiction, it has not asserted it, and, as this court has concurrent jurisdiction, the doctrine applies that the court which first assumes jurisdiction should retain it, and the other should not interpose.

The question of the powers possessed by the commission is a question of the meaning of a state statute, which properly is to be determined by the state courts and left to their determination. We must, however, decide the question of our own jurisdiction, and, if we have it, then the question becomes one of its exercise. If the commission had assumed jurisdiction of the cause, we would refuse to do so, following the almost universal rule of comity.

[4] As, however, the commission has not before it the question now presented, and as the question of rates which is before the commission is not here involved, the conclusion follows that we should entertain the complaint and make the necessary orders for its determination.

We find ourselves in accord with the propositions of law advanced by counsel for defendant in the very clear-cut and helpful brief submitted by them. The processes of thought by which counsel for the defendant reach the conclusion they reach affords a good illustration of the truth of the observation at the beginning of this opinion. The answer to the question addressed to the mind, whatever it is, is reached without difficulty. The real controversy is over the question properly so addressed. If the real question involved is the question stated in defendant's paper book, the answer which they make to it must be accepted. If, on the other hand, the real question is that hereinbefore presented, the answer is as readily reached. As before stated, the cause is won or lost in determining what the question is which is to be decided. If the real question before us is one of a determination of tariff or schedule rates, it is to all intents and purposes conceded by the plaintiff that the motion now made should be denied. If, however, there is no controversy over the principle for which Armour y. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, and Oakmont v. Suburban, 9 Pa. Corp. Rep. 49, are cited, the principle need not be discussed.

It is also unproductive of aid to us to enter upon the inquiry of whether the Public Service Commission has power to grant the relief now asked. Conceding that the commission does possess this power. if it has not been asked to exercise it, and this court also has jurisdiction of the instant cause, there is presented the situation of concurrent jurisdiction in two courts. The doctrine then applicable is not one of jurisdiction, but of comity, and the rule almost universally followed is that the court first asked to exercise the concurrent power should be left undisturbed in its exercise.

As our finding is that this court has jurisdiction of the cause now presented, and as it is the right of the plaintiff to invoke our jurisdiction, we cannot refuse to exercise it. This brings us to the technical motion now before us. We have not had an opportunity to examine the record. Our ruling, however, is made on the understanding that a bill has been filed, and that the motion now before us is one for a restraining order pendente lite.

The order now made is to be one in the following alternative form: (1) Upon the defendant tendering to the plaintiff an approved bond,

conditioned for the return of all moneys to which it may be determined the defendant is not entitled, the motion for a restraining order is denied.

(2) Should defendant, for any reason, refuse or fail to give such bond, the restraining order may issue upon a like bond being given by plaintiff to defendant, conditioned for the payment of all moneys to which the defendant may hereafter be shown to be entitled.

(3) A restraining order to issue ad interim, awaiting the entry of a

formal order, as above indicated.

In order to give, for appellate purposes, definiteness of date to the order made, no order other than the ad interim order is now made, but leave is granted to counsel to submit a draft of an order, in accordance with this opinion; the court retaining jurisdiction to determine the form of this order, should coursel be unable to agree thereon.

In re FOSGATE et al.

(District Court, S. D. Florida. July, 1920.)

1. Bankruptcy = 22-Equity rules govern, in the absence of statute.

In a bankruptcy case, the proceedings are governed by the equity rules, except where prescribed by the statute.

Courts \$\iff 347\$—Statement of want of knowledge equivalent to denial, under equity rules.

Under equity rule 30 (201 Fed. v, 118 C. C. A. v), providing that a statement that defendant is without knowledge shall operate as a denial, an answer by receivers in bankruptcy that they have no knowledge of the facts alleged in the petition for the recovery of property sold to the bankrupt under a claimed contract retaining title, and demanding strict proof, raises issues on those matters under rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii), providing that the case shall be at issue on the filing of the answer, unless a set-off or counterclaim is set up.

3. Bankruptcy —114(1)—Bankrupt's knowledge of contract not attributed to receivers.

Ancillary receivers in bankruptcy are officers of the court, not successors in title to the bankrupt, and are therefore not charged with the bankrupt's knowledge of the contract under which he obtained title to the property, possession of which the receivers acquired from the bankrupt, though they may be charged with knowledge of the identity of the property with that claimed, if it was sufficiently described, so that its identity could be determined from inspection.

In Bankruptcy. In the matter of the estate of Leo E. Fosgate and others, bankrupts. On motion to strike the answer of the ancillary receivers to the petition of Mach Bros. to recover possession of an automobile truck. Motion to strike denied.

Johnson & Garrett, of Kissimmee, Fla., for petitioners. Knight & Adair, of Jacksonville, Fla., for ancillary receivers.

CALL, District Judge. This cause comes on for a hearing on a motion to strike the answer of the ancillary receivers to the petition of Mach Bros. seeking to have an automobile truck, in the possession of the receivers, delivered to them, claiming that said truck was sold to one of the bankrupts under a retained title contract; the condition for payments having been broken, entitling them to possession.

This petition was filed November 13, 1919. On November 22 a motion was made to strike from the files said petition, which motion was on April 14, 1920, denied, and the receivers given 10 days to show cause why the petition should not be granted. Pursuant to this order the receivers on April 23 filed their answer, admitting receipt of a truck from one of the bankrupts, whose name purports to be signed to the sale contract set up in the petition, and the continued possession of the same. It sets up on information and belief that this is the truck referred to in the petition, but they are without knowledge, and pray strict proof; that they have no knowledge of the terms and conditions of the purchase, no knowledge as to whether there was a written agreement, and no knowledge as to whether the agreement set out in the petition was executed by the bankrupt it purports to be

signed by; and prays strict proof of these matters. Thereupon on

April 28 petitioners moved to strike said answer.

[1] The petitioners contend that the answer should be stricken, because the allegations of the petition showing their right to possession of the truck are not sufficiently denied to deprive them of such possession. This being a bankruptcy case, the proceedings, except where prescribed by the statute, are governed by the equity rules. Rule 30 (201 Fed. v, 118 C. C. A. v) is as follows:

"The defendant in his answer shall in short and simple terms set out his defense, * * * but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial."

Rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii) provides for the case being at issue, unless a set-off or counterclaim is set up, upon the filing of the answer.

Rule 33 (198 Fed. xxvii, 115 C. C. A. xxvii) is as follows:

"Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counterclaim, the plaintiff may, upon five days' notice, * * test the sufficiency of the same by motion to strike out."

It is contended by receivers' counsel that the motion to strike cannot be made in the instant case; there being no affirmative defense, set-off, or counterclaim propounded in the answer. They also contend that under rule 30 the answer denies the allegations of the petition, and therefore the petitioners are put to their proofs.

[2] If effect is to be given to rule 30, it seems to me the answer denies the allegations of the terms and conditions of the purchase, the existence of the written contract, and the execution of the contract by the bankrupt named, and, under rule 31, issue on these points was

made, and must be supported by testimony by the petitioners.

[3] It is contended on the part of the petitioners, in effect, that these receivers are the successors in title to the bankrupt, acquiring possession of the truck, and therefore they cannot allege a want of knowledge of the mode of such acquiring; but this I do not think is tenable in this case. The receivers are officers of the court, appointed to conserve the property, and are not successors in title to the bankrupts, nor charged with notice of how or by what means such possession or title was acquired. The principle contended for may apply to the identity of the truck as it is described by number, etc., and being in the possession of the receivers an examination would disclose its identity.

I have passed over the first contention of the receivers, because, even if the motion to strike could be made to perform the function of an exception for insufficiency, under the old practice the motion

would still have to be denied.

The motion to strike the answer will therefore be denied.

In re OVERSTREET.

(District Court, S. D. Florida. April 14, 1920.)

Bankruptcy 415(½)—Application to vacate order dismissing petition for

discharge denied for laches.

An application to vacate an order dismissing a petition by an involuntary bankrupt for discharge, made nine years after the filing of the petition for discharge and five years after the making of the order dismissing it, will be denied for laches, where the bankrupt waited for over three years after learning of the dismissal without taking any action.

In Bankruptcy. Proceeding against W. S. Overstreet. On petition for vacation of an order dismissing the petition for discharge. Petition denied.

Fred B. Noble, of Jacksonville, Fla., for bankrupt. R. H. Rowe, of Madison, Fla., for certain creditors.

CALL, District Judge. On November 24, 1919, petition was presented to the judge of this court praying that an order dismissing the petition for discharge, made July 14, 1914, be vacated, and petition for discharge be reinstated. A short chronological statement of the facts

shown by the record in the clerk's office is as follows:

March 30, 1909, certain creditors filed an involuntary petition in bankruptcy against the petitioner, W. S. Overstreet. April 20, 1909, adjudication in bankruptcy and reference made. March 23, 1910, petition for discharge was filed by the bankrupt. April 30, 1910, specifications of objection were filed by certain creditors. June 6, 1914, the referee filed his record in the case, closing up the case, and showing payment of dividends to creditors.

The act of bankruptcy alleged in creditor's petition was that within four months, while insolvent, the debtor delivered to his brother, brother-in-law, and two other persons, known as the Southern Salvage Company, nearly all of his entire stock of goods, in fraud of his creditors. This stock, together with the stock in possession of the debtor, was taken possession of by the trustee, and sold under order, and the proceeds paid to the creditors in dividends, less the costs of the bank-

ruptcy proceedings.

The excuse for the long delay in taking any action by the bankrupt is that the attorney representing him was taken ill in 1912, and after a protracted illness died in the latter part of that year; that he did not learn of such death until the year 1916. Thus, after the lapse of five years since the making of the order dismissing the petition for discharge, and nine years after the filing of the same, and specifications of objections to such discharge, this court is asked to vacate the order dismissing the application for discharge.

I am inclined to think that the making of the order was error, and that, upon appeal, such order would have been reversed; but no such action was taken, nor was any application made to the court to vacate same after the bankrupt became aware of it, until the expiration of more than three years. It seems to me that the existence of such laches

on the part of an involuntary bankrupt does not recommend the petition to the favorable consideration of the court, admitting for the moment—which I do not decide—that the court has the authority to go back five years and correct errors in proceedings in bankruptcy.

Petition will therefore be denied.

UNITED STATES v. MOONEY, Mercantile Appraiser, et al.

(District Court, E. D. Pennsylvania. December 7, 1920.)

No. 2049.

Courts = 262 (4)—Federal court will not enjoin imposition of license tax

on federal corporation incorporated in state.

Where a corporation organized by the United States for war purposes, but incorporated under the laws of a state to give it legal standing to sue and be sued, as incidental to its government activities established a restaurant open to the public, a federal court will not entertain a suit to enjoin the authorities of the state from imposing a license tax on it as a restaurant keeper, when it has full opportunity under the state laws to contest its liability in the state courts.

In Equity. Suit by the United States against James E. Mooney, Mercantile Appraiser, and others. Decree for defendants.

Charles D. McAvoy, U. S. Atty., and Wm. Y. C. Anderson, both of Philadelphia, Pa., for U. S. Shipping Board. Wm. I. Schaffer, Atty. Gen., and A. L. Shay, Deputy Atty. Gen., of

Pennsylvania, for defendants.

DICKINSON, District Judge. This cause, in respect to the sum involved, is of no importance to either of the parties. There is, however, thought to be a principle of law involved of sufficient importance to justify the trial of the cause and to have it determined by the court.

There are two questions first arising out of what led up to this proceeding, which are best disposed of by a short outline statement of the facts. Without attempting an accurate statement of the relations between the United States and the corporations and persons who are in this controversy with the defendants, it will suffice to make the general statement that the United States, as part of its war activities, created certain boards, and called to its assistance certain corporations charged with the construction of ships and otherwise building up and supporting a merchant marine.

The general plan of the scheme adopted was the organization of what is commonly known as the Shipping Board, the Emergency Fleet Corporation, and corporations which had directly in charge the construction of vessels. One of the latter was the Merchant Ship Building Company. This last-named corporation secured a location and built a ship-building plant in the outskirts of Bristol, Pa. The scheme embraced these private organizations as having nominally an independent existence, with the right to issue stock, as corporations ordinarily possess the right to do. In reality, however, they were in

practical effect nothing more than agencies of the United States, and the United States supplied all their capital, and was the owner of their entire issue of stock, except perhaps a few shares, which were held by individuals purely for organization purposes, or for the purpose of complying with the laws of the state of their formal incorporation.

The Merchant Ship Building Company is thus in form a corporation of the state of Delaware, having a charter issued by that state. It was found to be practically and absolutely necessary for the corporation, in addition to the ordinary work of building ships, to extend its activities in order to meet the problems of the housing and living needs of its employees. Out of this necessity grew the building of houses and the establishment of a restaurant. In order to maintain the morale of the working force, it was further found to be practically necessary to provide the men with means of entertainment when not actually employed at work.

A town grew up around the plant thus located, to which was given the name of Harriman. It is some little distance from Bristol. Visitors to the plant on business or otherwise could find no eating accommodations other than that maintained in connection with the snip-building works. Out of this situation there grew up the practice of giving dances and other functions, to which the general public were invited, and to open the restaurant to the general public, by offering its facilities to dinner parties and other functions. The Merchant Ship Building Company is the real plaintiff in the instant case, and is here-

inafter called plaintiff.

The mercantile tax appraiser, acting under authority of the law of Pennsylvania, assessed the plaintiff as one engaged in the business of a restaurant keeper. The purpose of this was to lay the basis for the levy of a tax or the collection of a license fee. This is essentially an excise tax, which is levied against and paid by those engaged in a mer-

cantile or commercial occupation or business.

The laws of Pennsylvania provide for a contest of the right of the state to thus tax a particular individual by the allowance to him of a series of appeals, first to the county treasurer, and from any adverse judgment rendered by him to the proper court of common pleas, and from any adverse judgment there to the Superior Court, and thence by allocatur to the Supreme Court of the state. Before the person attempted to be taxed becomes liable to the payment of the tax he thus receives the full benefit of due process proceedings. This plaintiff pursued the rights thus given it under the laws of Pennsylvania as far as a judgment rendered by the county treasurer, who adjudged it to be liable for the tax. No appeal was taken to any court of common pleas, but instead thereof the plaintiff had recourse to the proceedings now before us.

It has already been found by this court in other cases that the plaintiff corporation is not the United States, and, in consequence, may sue and be sued as a private corporation. It has also been held that, as all the stock of the corporation is owned by the United States, and all the moneys employed in the activities of the plaintiff are supplied by the United States, and all the moneys which flow to the plaintiff

are received by it as the moneys of the United States, so far as those activities concern the war purposes of the United States, in the furtherance of which the plaintiff is engaged as the agent of the United States, all such moneys and the property purchased therewith or produced for war purposes, is the property of the United States, and as such may be the subject of larceny.

A further consequence follows as hereinafter stated. The plaintiff itself has practically accepted and applied the principles of law involved by becoming incorporated in compliance and in conformity with laws of Delaware, so as to have existence as a legal person, and causing itself to be registered in compliance and in conformity with the laws of Pennsylvania, in order that it might lawfully engage in business to be transacted within the latter state. The plaintiff, in consequence, may be regarded as having something of a dual personality, in the respect that it may act individually as a person and for itself alone, or it may act as the agent of the United States, and wholly for the United States, having received authority to so act. It may also act during a given time alternately or substantially simultaneously, both for itself and for the United States as its agent.

There is not only nothing unusual in the supposititious situation thus presented, but it is the usual one, although not one necessarily present. A broker, attorney at law, artisan, or corporation may be brought into the war or other activities of the government to do for the government what they might have done for themselves. Assuming the laws of the state required of all persons engaged in the occupation or business suggested by these designations of the persons in government employ that they should be licensed and pay a license fee or excise tax, that the state sought to enforce these laws, and that the individuals concerned denied themselves to be subject to such laws, we have before us a situation which presents the questions involved in the instant

proceeding.

What are the rights, as individuals, of the persons employed? In what way is the United States concerned, and, so far as it is concerned, how are the rights of the state and of the individuals affected thereby? The right of any one of these individuals would be to deny liability to the payment of the tax. If he wished to secure the right to follow the occupation or business in question outside of what he did for the United States, we assume his liability to the tax could not be successfully denied. If he wished to confine his activities to what he did for the United States, we will assume he need not be licensed, and hence would not be liable to the tax. In what different position is he, so far as affects his legal status, from one who is assessed as engaged in an occupation or business, who denies that he is so engaged? An answer to this question leads us to the second question propounded. How is the United States affected by or in any way concerned with the fact that he is taxed or not taxed?

The only answer which suggests itself is the answer made by plaintiff's counsel, which in effect is that the employee of the United States is thereby interfered with and hampered in what he does for the United States. In a far-fetched sense this is true; but it is more of the truth of fiction than of the realities of life or of the present fact situation. The trolley company which exacts of an employee of the United States the payment of car fare, and refuses to take him to his place of employment unless the fare is paid, hampers and interferes with the operations of government to the same extent in theory, and if the employee does not happen to have his car fare with him interferes in a far more practical sense. It would never be contended, however, that the United States was concerned in any way in any litigation which may grow out of the relations between its employees and the trolley

company.

The consequence of the United States pressing its undoubted right to intervene to the limit of what may affect it in the remote and indirect way indicated would be to raise situations with which it would be impracticable to deal, even if they did not become ludicrous. The United States might, of course, become directly involved, and this brings us to what was before referred to as a corollary to the propositions laid down in the cases already ruled. An illustration would be afforded by the situation presented, if the tax authorities sought to collect any judgment obtained against an employee by the issuance of an execution and levy thereunder upon property of the United States. Such an interference with the property of the United States would, of course, not be permitted. The levy even upon property of the taxpayer while in use in the service of the United States might also be forbidden. The question recurs, however: How is the United States affected by either the mere levy and assessment of the tax or the entry of a judgment for the tax? The, as it seems to us, obvious answer to this question brings us in turn to the final, and we think controlling. question in the instant cause, which is: Should this court entertain jurisdiction of it?

The question may be discussed under the head of the power of the court or that of the propriety of the exercise of the power. As a denial of propriety is just as decisive of the cause as a denial of power, there is no occasion to inquire whether or not we have the power. The question of propriety arises, because the interests of two governments are involved—that of the state directly and clearly, and that of the United States by assumption, if any question is properly before us. There are no rights of which governments are more jealous than those involved in the assertion of the power to tax. This is because the power is vital to their existence. In a system of government, such as ours, in which every citizen of the United States may be, and with few exceptions is, a citizen of some state, the avoidance, whenever possible, of all conflicts of jurisdiction, or even of occasion for conflict between the officials, including the courts of the United States and those of the several states, is not only desirable, but almost a necessity. When the right of any one is involved, and comes before either a court of the United States or of a state to be declared, it is the duty of the court to adjudge the right and exert all its powers to enforce it, no matter what the consequences may be, or even if there be a conflict, which every one would deplore. The hand of no chancellor. however, can be so far forced as to be the cause of a conflict which

both should and can be averted, and may be averted, without any denial of any right, legal or equitable, which the parties may have.

One of the powers of government, which is indeed a right which is possessed by each state, is the power to tax its citizens, lessened only by the part necessarily surrendered, the assertion of which would impinge upon the sovereign powers of the United States. We have more or less remote analogues in those laws of the several states by which they have consented to their citizens becoming members of organizations which possess within certain limitations the powers of government over their membership. When any question affecting the relations between such members and the governing organization in respect to the assertion of any of the powers of government arises, any complaining member is required to exhaust the remedy afforded by his right to appeal to the tribunals of his organization before a court sitting as a court of equity will afford him any relief. This plaintiff had, under the state law, not only the right to successive appeals, such as already pointed out, before any assessment could be made; but after the assessment is thus made and the tax levied, so far as its sum is fixed, no tax can be exacted unless an action for it is brought, which goes through all the forms and steps of a common-law action, including appellate process. Beside all this, if what is called a federal question arises, he has the choice of raising the question in the state court, and, if ruled adversely to him, to take his appeal from the judgment of the highest appellate state courts, or, if any ground for removal to the courts of the United States exists, to remove the cause as soon as

The power we are asked to exercise is one directed against the very vitals of the sovereignty of the state, and one which almost certainly must lead, if established, to conflicts between the courts. Without intending any pun, why should such a conflict be courted? The policy of avoiding it, even if the power to provoke it exists, has frequently been recognized, and indeed has congressional recognition, in the acts of Congress conferring special powers upon the District Courts, when it is necessary to protect officials of the United States from interference when in the performance of their duties, and also in the other acts withholding from the court, when acting through a single judge, from the right of issuing mandatory orders in some instances.

As it thus clearly appears that there is no occasion for this court to interpose between the state taxing authorities and the Merchant Ship Building Company, the real plaintiff, we decline to interfere, and dismiss the bill for want of equity, with costs to defendants.

CORNELI v. MOORE, Internal Revenue Collector.

(District Court, E. D. Missouri. December 11, 1920.)

No. 5519.

Equity \$\infty\$ 363—Motion to dismiss bill confesses facts well pleaded.
 Motion to dismiss plaintiff's bill in effect confesses all facts in the bill which are well pleaded.

 Intoxicating liquors = 138—Transportation for beverage purposes forbidden.

The transportation of liquor for beverage purposes, except by permittees, is forbidden by the Volstead Act.

3. Evidence = 34—Judicial notice taken of duration of operation of Wartime Prohibition Act.

The court will judicially notice whether Wartime Prohibition Act Nov. 21, 1918, continues in force.

4. Internal revenue 24—Internal revenue collector cannot lawfully accept taxes on and deliver warehoused liquor for beverage purposes.

Wartime Prohibition Act Nov. 21, 1918 (Comp. St. Ann. Supp. 1919. § 3115¹¹/₁₂f), prohibiting during its continuance the removal, for beverage purposes, of distilled spirits held in bond, precludes an internal revenue collector from accepting taxes on a barrel of whisky stored in a bonded government warehouse, of which he is custodian, and affixing thereto and canceling the proper revenue stamps and delivering the barrel to the owner, a private individual, for the purpose of transporting it to his dwelling to be there used as a beverage for himself, his family, and guests

5. Internal revenue \$\iftizs 24\)—Right to delivery of liquor in bond confined to

Under Volstead Act, tit. 2, § 6, prohibiting the transportation, etc., of liquor without a permit, a collector of internal revenue, having the custody of liquor in a bonded warehouse, is not allowed to accept any money as taxes on such liquor from, or to affix and cancel stamps thereon for, or to deliver such liquor to, any persons except those who present to him a permit issued by the Commissioner of Internal Revenue.

In Equity. Suit by Charles Corneli against George H. Moore, Collector of Internal Revenue of the United States for the First District of Missouri. On motion to dismiss plaintiff's bill. Motion sustained.

Elliott W. Major and Glendy B. Arnold, both of St. Louis, Mo., for plaintiff.

James E. Carroll, U. S. Atty., of St. Louis, Mo., for defendant.

FARIS, District Judge. Plaintiff sues by injunction to compel defendant, as collector of internal revenue of the First collection district of Missouri, to accept the taxes on, affix thereto and cancel the proper internal revenue stamps, and to deliver to plaintiff possession of, a certain barrel of whisky, now stored in a bonded government warehouse in the city of St. Louis, Mo., which whisky in said warehouse is in the custody of the defendant. Defendant moves to dismiss the bill of plaintiff because of lack of equity therein.

This motion is bottomed wholly on the assumption that, under the provisions of the Volstead Act (41 Stat. 305) and other applicatory statutes, plaintiff has no right to the possession of this barrel of whisky.

and defendant, as collector, has no authority to accept the payment of the tax, or affix and cancel stamps evidencing such payment, or to deliver such whisky to plaintiff. I do not understand that the procedure here, or the nature of the remedy, is questioned. If there be such question, the point may be laid aside, until it be ruled that the right contended for exists; thereafter I can examine into the reserved question of the remedy.

[11] It is unnecessary to say that the motion to dismiss has the effect to confess all facts in the bill of plaintiff which are well pleaded. These facts, as gleaned from the bill, run substantially thus: Plaintiff bought in the month of September, 1916, and now owns, a certain barrel of whisky. This whisky is now in a so-called bonded warehouse of the United States, situate in the city of St. Louis, and is contained in a certain barrel which plaintiff definitely and sufficiently describes. This barrel of whisky contains 33½ gallons, on which the tax due the United States is \$214. Plaintiff desires to pay this tax, have affixed to the container and canceled the necessary stamps evidencing such payment, and obtain possession and control of this barrel of whisky, for the purpose of transporting it to his own private dwelling in St. Louis, and there using it as a beverage for himself, his family, and his bona fide guests. Defendant is the official custodian of all whisky in the warehouse in question, and has in his possession the keys to such warehouse, and has refused to allow plaintiff to obtain possession of his said whisky, or to accept the tax due thereon, which plaintiff has tendered, or to affix thereto and cancel all such revenue stamps as are required by law.

Upon the facts, admitted in the mode stated above to be true, the two questions which come up for judgment are: (a) Whether the Volstead Act and other laws now in force will permit defendant to accept payment of the tax tendered, affix and cancel the revenue stamps required by law to be affixed to whisky on its removal from bond, and to deliver to plaintiff the whisky in controversy; and (b) whether on such delivery plaintiff may lawfully transport this whisky to his private dwelling

for the sole uses and purposes above stated.

[2] When an exactly similar and equally strong case for plaintiff was lately before me (Corneli v. Moore, 267 Fed. 456), I was of the opinion, which I still hold, that the transportation of liquor for beverage purposes is forbidden by the Volstead Act, except by permittees. The Volstead Act, both by its explicit language and under interpretation by rules of statutory construction, which have not even been doubted by any respectable court for 100 years, plainly forbids any sort of transportation of intoxicating liquor, except by a permittee, and then only for medical uses or sacramental purposes. To these views I am constrained to adhere, except in so far as the ruling made by the Supreme Court of the United States in the case of Street v. Linco.n Safe Deposit Company et al., 254 U. S. —, 41 Sup. Ct. 31, 65 L. Ed. — (not yet officially published), decided on the 8th day of November, 1920, may have had the effect, if at all, to encroach on or overrule the opinion announced by me in the former Corneli Case.

The facts in the Street Case are sui generis; peculiar, in short, to

themselves. So regrettably narrow are they that it is hardly probable that 100 other cases exist wherein the facts are precisely similar. Street had rented, before the Volstead Act took effect, a room from the Safe Deposit Company, to which room he held the key, and as to which he possessed the undisputed and unrestricted right of ingress and egress. In this room he had stored a surplus of liquor, which had been lawfully manufactured, and lawfully obtained by him, before the Volstead Act became effective. He deposited this liquor in this room for safety's sake, and perhaps for lack of room to store it in his dwelling. All this he did before the 16th day of January, 1920. The Safe Deposit Company, from which Street rented this storage room, on threats made to it, after the effective date of the Volstead Act, by one Porter, the local prohibition enforcement officer, threatened to deliver this liquor to Porter for confiscation, and, as forecast, Porter was himself making threats and efforts to obtain this liquor in order to confiscate it. In order to prevent the threatened delivery to Porter by the Deposit Company, and to prevent Porter from confiscating this liquor, Street, averring his intent to use the liquor only in his own dwelling as a beverage for himself, his family, and his bona fide guests, sued by injunction and prevailed in the Supreme Court, though cast

In ruling that Street was entitled to enjoin the threatened delivery to Porter and confiscation by him, the Supreme Court of the United States held that the same right exists to transport liquor from such private place of deposit by the owner to his dwelling as exists to transport such liquor (under a ruling of the Commissioner of Internal Revenue mentioned by the court arguendo) from one bona fide dwelling to another, upon a change of residence. Thus it is seen that all the Street Case decides is (a) that liquor when deposited for safe-keeping, before the effective date of the Volstead Act, in a private place of deposit, cannot be confiscated under the provisions of the Volstead Act, when such liquor is intended in good faith for the owner's own personal use as a beverage, to be drunk in his dwelling by himself, his family, and his bona fide guests; and (b) that such liquor may be lawfully transported by the owner from the place of private deposit to the owner's dwelling for the use and purpose stated.

The Supreme Court did not discuss or consider the effect either of title 2, section 6, of the Volstead Act, or of the provisions of the Act of November 21, 1918 (40 Stat. 1045), upon a person standing in the shoes of the plaintiff at bar. But by the very broadest inference, arising from the analogous situation to which the court referred, a permit to transport must be gotten by Street. The court in effect holds that the facts existing fully warrant the issuance to Street of such permit

to so transport.

Title 2, section 6, of the Volstead Act, supra, says:

"No one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the commissioner so to do."

The Act of November 21, 1918, commonly called the Wartime Prohibition Act, provides among other things:

"That after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, * * no distilled spirits held in bond shall be removed therefrom for beverage purposes." Comp. St. Ann. Supp. 1919, § 3115¹¹/₁₂f.

- [3, 4] Taking the last statute first in the discussion: With reference to it the Supreme Court of the United States held in the case of Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106, 65 L. Ed. 194 (decided December 15, 1919), that the provision quoted above from the Act of November 21, 1918, was then in force. I judicially notice that nothing has since occurred to change the status existing when the Hamilton Case was decided. The Supreme Court also held in the Hamilton Case, supra, that the adoption of the Eighteenth Amendment did not operate to repeal the Wartime Prohibition Act. It fairly and inevitably follows, it seems to me, that by the statute last above quoted alone the defendant is precluded from doing at this time, and forbidden to do, the things which this bill seeks to compel him to do.
- [5] Referring briefly to the seeming effect of title 2, section 6, of the Volstead Act, supra, and particularly to that part of the same which I quote above, I am forced to conclude that this section also precludes plaintiff, under the bill filed, from the relief prayed for. It is apparent that, since the manufacture of whisky for medical purposes is clearly contemplated by the Volstead Act, it is or will become the duty of the collectors of internal revenue of the several districts to accept payment of taxes, issue stamps therefor, affix and cancel such stamps, and deliver possession of liquor designed for medical purposes to the owners thereof. But I am forced to take the view that the effect of the language I quote from title 2, section 6, supra, of the Volstead Act, is to limit the persons who may pay taxes and who may desire to have revenue stamps affixed to whisky owned or manufactured by them to such persons only as hold permits from the Commissioner of Internal Revenue pursuant to said title 2, section 6. In short. the effect of this section obviously seems to be that the collector of internal revenue is not allowed to accept any money as taxes from, or to affix or cancel stamps for, any persons, except those who present to him a permit issued by the Commissioner of Internal Revenue, to make, transport, or possess liquor. It seems clear from this section that the possession of such a permit by plaintiff is a condition precedent to the authority of the defendant here to perform the acts which it is here sought to compel him to perform. Plaintiff neither possesses such a permit, nor does he plead any facts with relation thereto. If it should be conceded then, merely for the sake of argument as contended by plaintiff, that his mere right to transport this whisky to his home from a bonded warehouse is decided by the Street Case, nevertheless, in the face of the two other things which I mention above, this court is precluded from granting plaintiff the desired relief.

It follows, therefore, that the motion to dismiss plaintiff's bill ought

to be sustained. Let it be so ordered.

In re PONZI et al.

(District Court, D. Massachusetts. November 12, 1920.)

Nos. 28063, 28072.

respondents were not partners.

In involuntary bankruptcy proceedings against three respondents, alleged to be partners, evidence held to support the referee's finding that two of the respondents were not partners of the third, who had already been adjudicated a bankrupt, although the third had filed a certificate of partnership, which he testified was without the knowledge or consent of the supposed partners.

2. Bankruptcy \$\infty\$98—Conclusions of referee entitled to weight.

In involuntary bankruptcy proceedings, the conclusions of the referee, who saw the witnesses and heard them examined, are entitled to much weight.

3. Bankruptcy ∞ 91(2)—Evidence held not to show respondent was partner, notwithstanding his claim of partnership.

In involuntary proceedings in bankruptcy against two respondents, evidence held to sustain the referee's conclusion that one of the respondents was not a partner of the other, though he had recovered money in a suit in equity in the state court on the claim that he was a copartner.

In Bankruptcy. Separate petitions for involuntary bankruptcy against Charles Ponzi, John S. Dondero, and one Bertollotti, as copartners, and against Charles Ponzi and Joseph Daniels, as copartners. Petitions dismissed as against all respondents, except Charles Ponzi. The following is the opinion of Olmstead, Referee:

On the 9th day of August, 1920, an involuntary petition was filed in said court against Charles Ponzi individually. To said petition an answer was filed by one Milton Benjamin, alleging a partnership consisting of said Ponzi, John S. Dondero and Guglielmo Bertollotti. On August 12, 1920, a second petition was filed by said Milton Benjamin and other creditors against said alleged partnership. On August 16, 1920, a third petition was filed against said Ponzi and one Joseph Daniels, alleging them to be partners. These three petitions were specially referred to me to report and find the facts as to all issues raised by the pleadings.

The three issues to be considered are partnership, insolvency, and acts of bankruptcy. It was admitted by counsel and I find that in all three petitions there existed creditors having claims in excess of \$500, and that the principal debtor, Mr. Ponzi, owed more than \$1,000. On the issues of insolvency and acts of bankruptcy a jury trial has been claimed. The issue of partnership may be determined by the court without a jury, and I proceed to consider

this issue first. I find the following facts:

About 18 years ago the respondent, Mr. Ponzi, an Italian formerly residing in Rome and Parmo, Italy, came to this country. While in Parma his landlord had been one Guglielmo Bertollotti, who was then about 70 years of age. Prior to December, 1919, Mr. Ponzi had been engaged in an import and export business, but with no great success. During this month he decided to enter upon a new venture, and sought assistance from one Joseph Daniels, a fellow countryman, from whom he had previously purchased furniture. He explained to Mr. Daniels the nature of his new business, and his reasons for his belief that it would be profitable. He borrowed from Mr. Daniels \$200 on a note which was subsequently paid at matuaity. Prrt of the proceeds of this note was used in the payment of his furniture, but a smaller portion was received by him in each or check from time to time from Mr. Daniels. I find that Mr.

Ponzi never agreed with Mr. Daniels that he would share any profits with him in his future business; his explanations being rather directed to assuring Mr. Daniels of the security of his loan, although Mr. Ponzi said that he was willing at all times to accept Mr. Daniels as an investor and to treat him like other investors.

The exact nature of the business was not disclosed in court by Mr. Ponzi, as whenever pressed on this point he raised his constitutional privilege against giving any testimony which might have a tendency to incriminate him. He did employ agents, who induced people to loan him money from time to time, with a promise in the notes issued therefor of a 50 per cent. profit at the end of 90 days. At first notes of different colors were issued for different denominations, but beginning in March, 1920, the series of notes thenceforth issued was of a yellow color.

On February 24, 1920, a Mr. John S. Dondero, whose wife was an aunt of Mrs. Ponzi, had invested the sum of \$2,000, which finally by repeated reinvestments increased to the sum of about \$80,000, as evidenced by notes payable to his wife.

On December 26, 1919, Mr. Ponzi, without consulting counsel, filed a certificate in the city clerk's office, made out in his own handwriting, in compliance with chapter 539 of the Acts of 1907, the title of which is as follows: "An act relative to recording names and residences of persons engaged in or transacting business under names other than their own, either individually or as members of firms or partnerships." In this certificate Mr. Ponzi stated that he was the sole manager of the business which he had seen fit to conduct under the name of the Securities Exchange Company, and gave its place of business as 27 School street.

On March 12, 1920, he filed a similar certificate, made out in his own handwriting, in which he named John S. Dondero and Guglielmo Bertollotti as participants, and mimself as manager. I am of the opinion that this statute, as its title would seem to indicate, was not intended to establish partnerships; the requirements of partnerships being regulated by other statutory enactments. I find, as testified by Mr. Ponzi, that his object in filing the second certificate was to forestall an attachment which he feared might be made by the Fidelity Trust Company, to which he was indebted. This apprehension appears to have been realized, for three days later a suit was brought by said trust company for a portion of its debt, which was subsequently satisfied July 14th, on execution.

The evidence clearly shows that Mr. John S. Dondero was an agent, receiving for moneys brought in and invested a commission of 10 per cent. He was authorized to employ subagents, with whom he divided his commissions, but who were not officially recognized by the Securities Exchange Company.

Up to April, 1920, Mr. Ponzi seems to have kept the accounts himself by a system of cards. In April he employed a Miss Meli, and later on, as the business grew to a great volume, there were employed about 30 in the office. He also had an office on Hanover street, next to the Daniels & Wilson Furniture Company, and later had an office in the building of the Hanover Trust Company, on the corner of Washington and Water streets. Miss Meli was his confidential clerk, and seems to have had pretty general charge of the business. She was a truthful witness, and testified that Mr. Dondero was an agent, and was at the office almost every day, occupying an outer room, however, and having no desk with Mr. Ponzi, who occupied the rear office. She had never heard Mr. Ponzi refer to Mr. Dondero as a partner, nor had she ever received any instructions from him, or heard him giving orders as a partner. Mr. Ponzi denied that Mr. Dondero and Mr. Bertollotti were his partners, and testified that his only object in filing the March certificate was to escape a possible attachment.

Mr. Dondero himself testified that he never was a partner, and, when he learned in July of the filing of the certificate in March, he protested to Mr. Ponzi, and Mr. Ponzi assured him that he would take his name off the certificate at the earliest possible date.

Counsel for the answering creditor in the first petition and for the petitioners in the second petition strenuously contended that the filing of the sec-

ond certificate amounted to a holding-out of Messrs. Dondero and Bertollotti, as partners; that it was in effect a partnership by conduct or estoppel. But such kinds of partnerships are not favored in bankruptcy. In Re Hudson Clothing Co. (D. C.) 148 Fed. 305, 307, Judge Hale says: "When federal courts have construed the law of partnership as it pertains to bankruptcy matters, they have held that a mere holding-out of partnership is not sufficient to warrant an adjudication; otherwise, a bankrupt might become liable to some creditors and not liable to others, and the proceedings in bankruptcy might be good as to some and void as to others. Partnership in fact must be actually proven in order to sustain an adjudication."

In Re Kenney (D. C. N. Y.) 3 Am. Bankr. Rep. 353, 360, 97 Fed. 554, 559, Judge Brown says: "The various provisions of section 5 of the Bankruptcy Act, as respects partners, show that it has reference to a partnership between the parties, * * * and not a partnership as to creditors only, without any possible joint estate."

The evidence also showed that in the month of June letters were written to the bank commissioner of the state of New Jersey, the Passaic National Bank, and the commissioner of corporations for the commonwealth of Massachusetts, in answer to inquiries as to the nature of the business, stating that the business was conducted under the name of the Securities Exchange Company by Mr. Charles Ponzi alone or as manager, that he was the sole owner, and that it was a one-man concern.

I find that Mr. Guglielmo Bertollotti, mentioned in the March certificate as of Parma, Italy, and who at this time would be nearly 90 years of age, was probably dead, and Mr. Ponzi testified that he believed he was dead when he put his name in the certificate. I accordingly find that this alleged partnership consisting of Mr. Dondero, Mr. Bertollotti, and Mr. Ponzi never existed.

The business, which was conducted by agents solely, continued to grow. There was no evidence adduced before me that Mr. Ponzi, who was the sole proprietor, ever conducted his business by circulars and by the use of the mails. What inducements were held out by agents to customers did not appear in the testimony, except so far as they were revealed by statements made by witnesses other than Mr. Ponzi. About March 12, 1920, Mr. Ponzi bought more furniture from Mr. Daniels. The latter testified that at the end of June he called on Mr. Ponzi and sought to sell him more furniture, stating that he had heard that he was making large sums of money and had "bought a swell house," and that he (Daniels) wanted some share in the profits which were assured him as a return for the favor he did Mr. Ponzi by his loan of \$200 in December last. Mr. Ponzi denies that he ever had this interview, but Mr. Daniels says that when he got no satisfaction he went away and consulted his counsel, and that afterwards Mr. Isaac Harris was retained. On the 2d day of July a bill in equity was brought in the superior court, alleging that Mr. Daniels had advanced to Mr. Ponzi funds with which to conduct his business, and that he was entitled to one-half the profits of the business and the right to inspect the books, in which suit an attachment by mesne process was made in the sum of \$1,000,000, and in fact deposits in various banks aggregating over half a million dollars were seized. Negotiations were subsequently had between July 2d and August 6th to dissolve the attachments by a bond. This result not having been attained, Mr. Ponzi sent word to Mr. Daniels, requesting an interview. Thereupon Mr. Daniels met Mr. Ponzi at his office in the building of the Hanover Trust Company on Washington street. A discussion took place as to the settlement of the suit. Mr. Ponzi was determined to settle it at any price, as his affairs were becoming desperate and he needed to release this large sum of money from attachment, in order that he might make payments, although he had ceased to take in money on the 26th of July by virtue of an arrangement with the state and federal district attorneys and the Attorney General of the commonwealth.

Mr. Daniels finally agreed to settle for \$50,000. Mr. Ponzi immediately sent to the Hanover Trust Company and obtained \$10,000 in cash and a certified check for \$40,000 payable to Mr. Daniels. He and Mr. Daniels then

went to the Cosmopolitan Trust Company to secure the release of certain attachments; his counsel, Mr. Fowler, having prepared the papers therefor. At the Cosmopolitan Trust Company the bank officials were somewhat suspicious of the settlement in the absence of counsel; the name of Mr. Daniels' counsel appearing on the writ. It was arranged, therefore, that Mr. Harris should be notified, and he accordingly repaired to the bank. After some angry discussion between him and Mr. Ponzi, Mr. Ponzi stated that it was necessary to make a settlement with Mr. Harris in order to secure the release of the attachment, so the sum of \$9,500 was paid to Mr. Harris in cash by Mr. Daniels, and an additional sum of \$5,000 in cash was paid by Mr. Ponzi to Mr. Harris.

In Mr. Daniels' testimony before me he practically denied all the allegations of his bill in equity. He denied that he was a partner, or that he ever had or claimed the right to inspect the books. He had learned from agents and the newspapers of Mr. Ponzi's wonderful career and success, and my explanation of his conduct is that he thought he might as well get some of the profits himself, and used this pretext for so doing.

This whole transaction illustrates the possibilities of mesne attachments as they exist in New England and nowhere else. In Peck v. Jenness, 7 How. 612, 621, 12 L. Ed. 841, the Supreme Court of the United States says: "This species of process is peculiar to the New England States." Bond v. Ward, 7 Mass. 123, 128, 5 Am. Dec. 28; Bouvier's Law Dictionary (4th Ed.) sub. "Attachments," p. 163. The two latter authorities explain the history and origin of such attachments.

Mr. Ponzi denied that Mr. Daniels was in fact his partner. I accordingly find that this alleged partnership never existed.

As to insolvency and acts of bankruptcy, the petitioners allege that the respondent made transfers of his property during July to certain creditors mentioned, and to various other creditors whose names were unknown. I find as a fact that these transfers or payments were made as alleged, and constituted the acts of bankruptcy.

The issues are: "Was Mr. Ponzi at the time of the payments insolvent?" and "Did Mr. Ponzi intend to prefer these creditors?" Sufficient has been stated above to show that Mr. Ponzi's business consisted at that time of borrowing sums of money from investors at usurious rates of interest. It is to be observed in this connection that there is no law in Massachusetts against usury. Excepting a loan of less than \$1,000, it is lawful to contract in writing for any rate of interest. R. L. c. 73, § 3; Id. c. 102, § 51.

While Mr. Ponzi is not to be classed in the same category with a robber and burglar, he was undoubtedly a clever manipulator, who took advantage of the credulity of the investing public, which in this instance is the usurer. The investors loaned their money for a return of the principal and 50 per cent. interest would seem themselves to be guilty of usury, if such existed. That Mr. Ponzi took advantage of a weakness and willingness of the community to be victimized is apparent, and sufficient to condemn his acts. So long as the current of money continued to flow in, he could pay the first investors with the receipts from the latter. It was another instance of robbing Peter to pay Paul, of which the past affords examples.

Mr. Edwin L. Pride and Mr. Charles F. Rittenhouse, public accountants, both testified that Mr. Ponzi had no regular business, that they could discover no source of profit, and that from the time of his venture in December down to the period of August 9th, when the petition was filed, he was at no moment solvent. This view was obtained from a careful inspection of his books and records. The great bulk of payments was made in July and August, when his assets and payments had reached millions. Both accountants stated that he had issued notes in excess of \$14,000,000, and had made payments of about \$9,000,000; that his outstanding liabilities, at or about the time of filing the petition, were \$6,948,267.88. To meet this liability of nearly \$7,000,000, Mr. Rittenhouse submitted a list of assets showing the grand total of \$2,195,685.56. Mr. Ponzi in a statement in court tried to meet this situation by claiming that he had paid \$9,500,000, instead of about

\$8,000,000, stated by Mr. Pride; that there should be added to the \$2,000,000 of assets reported by Mr. Rittenhouse about \$1,000,000 more derivable largely from refunds of agents' commissions. I am inclined to place more reliance on the report of the accountants that the liabilities were nearer \$7,000,000 than \$3,000,000, which Mr. Ponzi claimed that he owed. In a statement to Mr. Pride, Mr. Ponzi had said that he could not raise more than \$4,000,000, and that he was insolvent.

It is to be borne in mind that future maturities in bankruptcy become a present liability. The act provides, in section 63a (1), that among the debts of a bankrupt which may be proved and allowed is "a fixed liability, as evidenced by an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not." Hence future maturities under the bankruptcy system become fixed, provable liabilities on the filing of the petition. If this was the condition on the 9th of August, it is reasonable to infer that it related back to June, and that at the time the transfers and payments were made to the creditors Mr. Ponzi was actually insolvent.

In the receivers' examination Mr. Ponzi testified: "I never knew at any time how much I had in the banks exactly." During the month of July his funds in various banks were under attachment and his condition was growing desperate. The evidence also showed that he had deposits in other people's names. I therefore conclude that he was not only insolvent when he made these transfers or payments, but that he also knew that he was insolvent, and that the intent to prefer, as required by the statute to constitute an act of bankruptcy, is inferable from his act.

In Re McGee (D. C. N. Y.) 5 Am. Bankr. Rep. 262, 263, 105 Fed. 895, 896, Judge Coxe says: "It is a cardinal principle of law that every one is presumed to intend the necessary consequences of his acts, and where an insolvent debtor transfers a large portion of his property to one creditor, to the exclusion of all the rest, such a transaction must be taken as conclusive evidence of his intent to prefer that creditor."

In Toof v. Martin, 13 Wall. 40, 48 (20 L. Ed. 481), Mr. Justice Field says: "It is a general principle that every one must be presumed to intend the necessary consequences of his act. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy."

I accordingly find that the allegations of all the petitioners as to insolvency and acts of bankruptcy have been fully sustained. The requests for rulings are covered by my report.

The case was ably argued by the learned counsel for all the petitioners and those opposing a partnership. I regret not to have been favored with any argument by counsel for the respondent Mr. Ponzi. Whatever may be the detects of my findings and conclusions, I feel I am justified in asserting that the volume of testimony adduced at the exhaustive hearings before me will be of great assistance to the future officials of this estate, should an adjudication be had, and the testimony, briefs of learned counsel, and exhibits are transmitted with my report.

Horblit & Wasserman, Arthur Berenson, and Martin Witte, all of Boston, Mass., for petitioners.

Samuel L. Bailen, of Boston, Mass., for Dondero.

Robert S. Nason, for Daniels.

Daniel V. McIsaac, of Boston, Mass., for Ponzi.

MORTON, District Judge. So far as Charles Ponzi individually is concerned, his claim to a jury trial has been waived, and there has

been adjudication on the petition against him.

The present proceedings arise on two petitions, in the first of which Ponzi, Dondero, and Bertollotti are respondents, as copartners, and in the second of which Ponzi and Daniels are respondents, as copartners. The learned referee, to whom the matters were referred, has reported in favor of all the respondents, except Ponzi; and the present questions are whether his report should be confirmed, or whether as to some or all of the respondents, other than Ponzi, it should be set aside, and adjudication ordered.

[1] It is unnecessary to state all of the somewhat complicated facts. Speaking generally, there was nothing in the conduct of Ponzi's business which would indicate that it was a partnership. The auditors have found no indication on the books that he had any partners, and there is no evidence that any of the alleged copartners participated in the management and control of the business, or exercised any of the

rights of a partner.

The case against Dondero and Bertollotti rests chiefly upon a certificate filed by Ponzi under the act of 1907 (St. Mass. c. 539). In it he stated explicitly that he, Dondero, and Bertollotti were the persons carrying on the business. Neither Dondero nor Bertollotti signed this certificate; as appears from its face, it was made by Ponzi alone. He testified that he was never authorized to do so by Bertollotti or Dondero, and that neither of them knew anything about the certificate at the time, or was a partner. This testimony is corroborated by Dondero. As to Bertollotti, there is practically no evidence, except Ponzi's testimony. He says that Bertollotti was a real person, who had been his landlord in Italy, who would now be about 90 years of age, if living, and whom he supposed to be dead; that Bertollotti knew nothing about the use of his name, nor about Ponzi's business. On this testimony, Bertollotti's name, as used by Ponzi on the certificate, was in effect a fictitious one.

- [2] It is contended by the petitioning creditors that the established facts show that Dondero, at least, was a partner, and require the rejection of the contrary testimony of Ponzi and Dondero. But the learned referee, who saw the witnesses and heard them examined at much length, believed that on the point under discussion they were telling the truth. His conclusions are entitled to much weight, and the facts relied on by the petitioners are by no means so cogent and convincing as to satisfy me that the learned referee was wrong. I think that the evidence as a whole supports the referee's conclusions that Ponzi's certificate did not state the facts, and was a false and fraudulent statement, made for the purpose of avoiding attachment on mesne process, and that neither Dondero nor Bertollotti were partners of Ponzi.
- [3] As to the petition against Daniels: There is no doubt that Daniels lent Ponzi a small sum of money near the inception of the enterprise. Daniels made a claim under oath in his bill in equity against Ponzi in the state court that he was in effect a partner, and

he accepted in settlement of that claim a large sum of money. It does not appear that Ponzi ever acquiesced in the claim. He paid the money; but his purpose in doing so appears to have been to free his funds from the large attachment on mesne process by which they had been tied up. Daniels never conducted himself as a partner, and there is nothing in Ponzi's testimony or in his conduct which indicates that he believed Daniels to be his partner. The testimony of Daniels is, of course, worthless; but the testimony of Ponzi on this issue is not affected by such inconsistency, interest, and suspicion as that of Daniels. The learned referee believed that Ponzi was telling the truth about it; and there is nothing in the established facts or in the transcript of the testimony which, in my opinion, would justify holding that the learned referee was in error in this respect. Between the alternatives that Daniels was a partner in the enterprise, and that, not being a partner, he falsely claimed to be one, I agree with the learned referee that the latter is more probable. It is possible that there may have been an agreement between Ponzi and Daniels of such character and breadth as to constitute Daniels a partner by operation of law; but it seems to me that the learned referee was clearly right in holding, as in effect he did, that there was no sufficient proof of such an agree-

The report of the learned referee seems to me to be a fair and able decision of the questions referred to him; and it is confirmed.

Let decrees be entered, dismissing both petitions, with costs.

UNITED STATES v. ONE HAYNES AUTOMOBILE and eight other automobiles. THE VOYAGER I. THE NO. V 69.

(District Court, S. D. Florida. December 8, 1920.)

Nos. 1135, 1136, 1148, 1149, 1151, 1157, 1158, 1162, 1167, 1176, and 1177.

Internal revenue —2—Intoxicating liquors —245—Statutes —165—Volstead Act repealed prior statute for forfeiture of vehicles used for illegal transportation.

Volstead Act, tit. 2, § 26, providing for condemnation of vehicles used for transporting liquor illegally subject, however, to claims and liens of innocent parties, was apparently intended to cover the subject, and was less severe than Rev. St. § 3450 (Comp. St. § 6352), for forfeiture of vehicles used for transporting untax-paid spirits, under which the rights of innocent owners or lienholders were forfeited, and therefore the Volstead Act repealed Rev. St. § 3450, so far as it applied to distilled spirits, notwithstanding section 35, tit. 2, of the Volstead Act, providing that inconsistent laws were repealed only to the extent of the inconsistency, and that regulations therein should be additional to the existing laws.

Forfeiture Libels. Eleven separate libels by the United States for the condemnation of one Haynes automobile, of one Buick automobile, of one Cadillac automobile, of one Kissel touring automobile, of one Reo automobile, of the gas screw vessel Voyager I, of one Hudson Super-Six automobile, of one Dodge automobile, of one Roamer automobile, of one G. M. C. truck, and of one seagoing yacht, No. V 69, each of which had been used for the transportation of liquors. Libels dismissed.

Miles W. Lewis and William A. Hallowes, Jr., both of Jacksonville, Fla., and R. B. Gautier and Bart A. Riley, both of Miami, Fla., for respondents.

CALL, District Judge. Each of the above cases is brought to forfeit the vessel or automobile, as the case may be, charging a violation of section 3450 of the Revised Statutes (Comp. St. § 6352). The sufficiency of the libel in each case is challenged on the ground that, so far as distilled spirits is concerned, that section has been repealed by the Volstead Act, passed October 28, 1919 (41 Stat. 305, c. 85), pursuant to the Eighteenth Amendment to the Constitution. Each violation is charged to have occurred since the 17th of January, 1919. The libels in each case charge that the vessel or automobile, as the case may be, was being used in the removal, deposit, and concealment of untax-paid distilled spirits to a place other than one authorized by law, with intent to defraud the United States of the taxes thereon.

The courts by whom the question has been decided are not in unison. Some District Courts have held the sections of the Revised Statutes relating to the collection of the revenues of the government formerly derived from the taxes on distilled spirits still in force; others have held them repealed by the Eighteenth Amendment and the Volstead Act.

Unquestionably there has been a complete change of the policy of this government on the question of distillation of spirits since the adoption of the Eighteenth Amendment. Prior to the adoption of the amendment, the policy of the government was to raise a considerable portion of its revenues from taxes levied upon the distillation and sale of spirituous liquors. Now the policy is to prohibit such distillation and sale for beverage purposes. Section 3450 of the Revised Statutes and many other sections were adopted to aid in the collection of such taxes. The Volstead Act was adopted for the purpose of carrying out the policy outlined by the amendment, and apparently provides for every contingency.

Ordinarily, under the well-known canons of statutory construction, the last act would repeal the former acts bearing upon the same subject-matter. The courts upholding the nonrepeal of the sections passed for the purpose of aiding in the collection of the revenues seem to base such holding upon section 35, tit. 2, of the Volstead Act. That

section reads as follows:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of \$500 on retail dealers and \$1,000 on manufacturers."

Title 3 of the Volstead Act provides a complete system of law, providing for the distillation of industrial alcohol, its disposition, etc.

Registration, etc., of the plants must be with the Commissioner of Internal Revenue. Section 3, tit. 2, of the Volstead Act provides that no person shall, on or after the date when the Eighteenth Amendment goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor, except as authorized in this act. The section then provides for sale, etc., of liquor and wine for nonbeverage purposes under permits issued by the Commissioner.

Section 6, tit. 2, provides that no one shall manufacture, sell, purchase, transport, or prescribe any liquor without a permit from the Commissioner. The exceptions are not important to notice in this connection. The following sections provide regulations to control the manufacture and disposition of liquor allowed by the act, and for restraining violations, until section 26, tit. 2, is reached. That section provides:

"When the Commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established. by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the leinor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the treasury of the United States as miscellaneous receipts, All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property, If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by hand bills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the treasury of the United States as miscellaneous receipts."

Section 26, above quoted, seems to cover every illegal transportation of liquor and provides the proceeding for the forfeiture of the vehicle in which such illegal transportation is accomplished. The construction placed by the courts upon section 3450 of the Revised Statutes is that it is immaterial that the owner of the vehicle did not participate in the illegal transportation, secretion, etc. If he had consented to the use of the vehicle by the party violating the law, his vehicle was forfeited, no matter how innocent the purpose for which consent was given; and the legislators must be presumed to have known of this construction when they adopted the section 26 above. Surely it cannot be said that Congress intended by section 35 to continue in force section 3450 of the Revised Statutes with the construction theretofore placed thereon. The inconsistency between the sections, so far as intoxicating liquors is concerned, seems patent. It seems to me that section 3450 is repealed under another principle, also, in that the proceeding for forfeiture provided in the latter act is much less stringent than that provided by section 3450 as construed by the courts.

I have had access to the opinions of Judge Sibley, in U. S. v. One Essex Touring Automobile, 266 Fed. 138 (Northern District of Georgia), of Judge Bourquin, in U. S. v. Sohm et al., 265 Fed. 910 (District of Montana), and of Judge McDowell, in U. S. v. Turner, 266 Fed. 248 (District of West Virginia), all of whom hold that the Volstead Act did not repeal the prior existing revenue laws. I have also had the benefit of Judge Bean's opinion in U. S. v. Yuginni et al., 266 Fed. 746 (District of Oregon), of Judge Smith's in U. S. v. Windham, 264 Fed. 376 (Eastern District of South Carolina), and the opinion of Judge Knapp in Bruce Reed v. J. William Thurmond, United States Attorney for the Western District of South Carolina, 269 Fed. 252 (Fourth Circuit Court of Appeals, decided November 4, 1920), holding the contrary view. The libels in these cases do

tion as stating a case for forfeiture under the Volstead Act.

There are other grounds of attack in the demurrers and exceptions to the various libels, but I have passed them in order to reach the vital question involved. Other grounds of attack, if well founded, might have been cured by amendment.

not allege facts sufficient to sustain them against demurrer or excep-

An order will be entered in each case, sustaining the objections and

dismissing the libels.

In re SIMON.

(District Court, D. Massachusetts. December 1, 1920.)

No. 23777.

1. Bankruptcy \$\iff 409(2)\$—Discharge denied for concealing books of account.

A bankrupt, who had been found guilty of fraud in transferring the assets of a corporation controlled by him, held to have fraudulently concealed his personal books of account, where there are no records regarding the disposition of many thousands of dollars, and a discharge in bankruptcy should be denied him.

2. Bankruptcy \$\infty\$ 407(5)—Discharge refused for obtaining credit on false statement; "invested."

A bankrupt's statement that he had a certain amount invested is a statement of fact, not of estimated value, and his discharge from bank-

ruptcy should be refused, where he obtained credit by falsely making such a statement.

3. Bankruptcy \$\infty\$ 407(1)—Bankrupt's acquittal on one charge does not preclude refusing discharge on other specifications.

A bankrupt's acquittal on the charge of fraudulently concealing his assets does not preclude refusing him a discharge from bankruptcy on the specifications that he had concealed his books of account and had obtained credit by false statements.

 Bankruptcy \$\infty\$ 413 (3) — Specifications of objections to bankrupt's discharge held sufficient.

Specifications of objections to a bankrupt's discharge are sufficient, if they fairly apprise him of the objections made to his discharge, at least where the sufficiency of the specifications was not challenged in time to permit amendments to it.

5. Bankruptcy \$\iff 413(\frac{1}{2})\$—Creditor's objections to discharge not disfavored.

The law has gone far enough in making difficult objections by creditors to the discharge of a bankrupt.

In Bankruptcy. In the matter of Isaac Simon, bankrupt. Petition for discharge denied.

William H. Garland, of Boston, Mass., for bankrupt. William Hirsh, of Boston, Mass., for objecting creditor.

MORTON, District Judge. The bankrupt owned all but one share of the capital stock of the Simon Manufacturing Company, and was its president and treasurer. In the fall of 1915 this corporation transferred all its assets to the Simon Coat Company without consideration. The transactions between these two corporations, as stated in the opinion of the Supreme Judicial Court (233 Mass. 85, 123 N. E. 340), were grossly fraudulent, and were entered into for the purpose of hindering and defrauding creditors. As the bankrupt was the virtual owner and the manager of the Manufacturing Company, he must have actively participated in the fraudulent scheme by which he was the person to be chiefly benefited. His individual business interests were closely interrelated with those of the two corporations. It is with reference to these basic facts that the specifications of objection to his discharge are to be considered.

[1] As to the alleged concealment of personal books of account: During 1914 and 1915 the bankrupt was taking on the average about one mortgage a month, some of them for very substantial sums. His bank deposits and withdrawals amounted to about \$6,000 per month. He received during this period about \$30,000 for fire insurance, which had been paid to the Simon Manufacturing Company and taken by him, besides large sums from other sources. For many thousand dollars the returned checks are missing, and no books or papers are produced to show what became of it.

It is obvious that transactions of such kind and magnitude must have been entered on books and evidenced by various papers; and the bankrupt testified that he had various personal books, papers, and data relating to them, which for the most part have disappeared. Some of them, according to the bankrupt, were turned over by him to one or another of the lawyers connected with the case; but they were not produced or otherwise accounted for.

As the learned referee saw the witness, his finding in favor of his honesty and credibility is entitled to much weight. But the present question is whether, giving this finding the weight to which it is entitled, the court is satisfied that there has been a concealment of books of account for the purpose of concealing financial condition. On the findings of the Massachusetts court, the bankrupt had the will to cheat creditors of his company and intelligence enough to make careful plans to that end; and on the testimony now before the court it is altogether probable that he concealed or destroyed the company's books of account in order to hinder successful investigation of its affairs. These facts go far to discredit his assertions of good faith; it is likely that he would resort to similar methods in his personal affairs which were interwoven with those of the corporation. His testimony as it appears in the transcript impresses me as that of a decidedly untrustworthy witness. The absence of personal books and papers has made it impossible to trace what became of large amounts of cash received by the bankrupt. I am unable to believe that this result is accidental. I have no doubt that the lack of all data about personal transactions, aggregating many thousand dollars, was intentional, and was brought about by the bankrupt for the purpose of concealing what had been done. The specification based on concealment of books of account is sustained.

[2] As to the alleged false statement to obtain credit: In my opinion, the written statement: "We have \$75,000 invested in this property, of which I am an equal owner. I have \$37,500 invested"—which was signed by the bankrupt and given by him to the Massachusetts Trust Company, was a statement of facts, not an estimate of value, as the learned referee held. To say "I have invested" a certain amount signifies that I have put that amount of money or the equivalent of money into the property in question. It seems to me quite different from saying, "I value the property" at such a figure, which is the construction put upon it by the learned referee. The bankrupt's assertions of an honest intent, made in the shape of affirmative answers to very leading questions of his counsel, are, under the circumstances, insufficient to outweigh the natural inferences from the facts shown.

The evidence that the trust company relied on the statement in extending credit to the bankrupt is not very explicit. It appears, however, that within a few days after receiving the statement the trust company entered into a course of dealing with the bankrupt which involved loans to him from time to time, and at the time of the failure was his creditor on unsecured loans amounting to about \$10,000. The statement in question was evidently made in connection with this business. Taking all the evidence, I think it sufficiently appears that credit was obtained by means of the statement. On this ground, also, the discharge must be refused.

[3] The bankrupt was indicted jointly with Goldman by the federal grand jury for fraudulent concealment of assets, and upon his trial was acquitted by direction of the court; but the result of those pro-

ceedings has no bearing on the specifications of objection which have

been discussed.

[4, 5] If formal insufficiency of the specifications was relied on, the point should have been seasonably urged, so that amendments might be made if necessary. The law has gone far enough, I think, in making difficult opposition to the discharge of bankrupts. A creditor who goes to the trouble and expense of filing and prosecuting objections to discharge undertakes what is usually an unprofitable and often a thankless job. But he does something which in fraudulent cases is decidedly in the public interest. Specifications of objection are sufficient, if they fairly apprise the bankrupt of the nature and grounds of the objection which is being made to his discharge.

Petition for discharge denied.

DUSENBERRY v. LEHIGH VALLEY R. CO. et al.

(District Court, S. D. New York. April 15, 1920.)

1. Commerce \$\infty\$ 89—When unnecessary to present claim for discrimination to Interstate Commerce Commission before suing therefor.

A claim against a railroad company for discrimination in the distribution of cars in violation of its own rule, is not one which requires presentation to the Interstate Commerce Commission before an action may be maintained thereon, under Interstate Commerce Act Feb. 4, 1887, c. 104, § 9 (Comp. St. § 8573), nor is such presentation necessary, when there is no shortage of cars and the reasonableness of the carrier's rule for distribution is not involved.

2. Partnership = 200—Single member of partnership may be joined as defendant with reilread company in suit for discrimination

fendant with railroad company in suit for discrimination.

That a person jointly charged with a railroad company in an action to recover damages for unlawful discrimination, under Interstate Commerce Act Feb. 4, 1887, c. 104, § 10(4), as amended (Comp. St. § 8574 [4]), is a member of the partnership alleged to have been preferred, does not make it necessary to join the other members of the firm.

3. Commerce \$\infty\$-Complaint for discrimination held not to present question required to be submitted to Interstate Commerce Commission.

Where the complaint in an action against a railroad company for discrimination rests on an allegation that defendant gave rebates, not provided for in its published rates, to one shipper, and refused them to another, it presents no question requiring preliminary presentation to the Interstate Commerce Commission.

At Law. Action by Edwin B. Dusenberry against the Lehigh Valley Railroad Company and Charles Schaefer, Jr. On demurrers to complaint. Overruled.

Demurrer by both defendants to a complaint at law under the Interstate Commerce Law (Comp. St. § 8563 et seq.) for insufficiency in law. The complaint was in two counts, of which the first alleged in substance: That the corporation defendant was a railroad corporation and common carrier of passengers and freight in interstate commerce, within the act to regulate commerce of 1887 (Comp. St. § 8563 et seq.). That the plaintiff was during the years 1916 and 1917 engaged in buying, selling, and shipping hay to the state of New York from Pennsylvania, Ohio, Indiana, Maryland, Michigan, and other states. That during that period the carrier accepted certain hay for transpor-

tation from a firm, Schaefer & Son, a competitor of the plaintiff, to New York from the states just mentioned. That it provided them with many thousand cars for that purpose, and carried their hay. That during that same period the carrier refused to accept hay, when requested by the plaintiff, or to transport it from the same places, or places similarly situated, whence it was transporting hay for Schaefer & Son. That at the time of so doing the carrier "had ample and sufficient cars and equipment for the transportation of hay in interstate commerce in the quantities and at the times and from the places for which transportation facilities were requested by the plaintiff." That this refusal, in conjunction with the accommodation of Schaefer & Son, was unlawful discrimination under the statute. That the foregoing acts were done at the solicitation of the individual defendant, and were procured by his payment of money to the carrier or its agents. The damages resulting from these refusals are laid generally at \$115,200. That Schaefer & Son was a firm of which the individual defendant was a partner. The second count alleged that the carrier at the solicitation of the individual defendant charged the plaintiff \$5 a car for shipments of hay from Townley, N. J., to New York, and charged Schaefer & Son for the same service \$2 a car; further, that it allowed to Schaefer & Son a rebate for the use of lighters in New York Harbor, owned by them, and declined to allow a similar rebate to the plaintiff—all to the plaintiff's damage in the sum of \$6,000.

Thomas Downs, of New York City, for plaintiff.

Henry A. Wise, of New York City, for defendant railroad company.

Herbert Goldmark, of New York City, for defendant Schaefer.

LEARNED HAND, District Judge (after stating the facts as above). The first count is based upon the violation of section 3 of the act of 1887 (Comp. St. § 8565), forbidding the giving of "undue or unreasonable preference or advantage" to one shipper over another, or upon section 10, subd. 4 (Comp. St. § 8574), forbidding unjust "discrimination," The liability of the railroad under section 3 rests upon section 8 of the act (Comp. St. § 8572), and the jurisdiction of this court upon section 9 (Comp. St. § 8573). The liability of the individual defendant must rest upon section 10, subd. 4, and also the jurisdiction of this court. Many objections have been taken to the language of both counts, but they all proceed from a narrow and verbal criticism, and under present liberal rules of interpretation they furnish no just ground for denying the plaintiff his day in court. The allegations have been summarized in the foregoing statement according to their reasonable import, and set forth enough to advise the defendants of the nature of the claims against them. If they need more information upon the details of the allegations, they must seek relief by interlocutory motions.

[1] The substance of the attack upon the first count rests under the supposed application of Morrisdale Coal Co. v. Penn. R. R. Co., 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494, a case holding that, when the question arises inter partes of the reasonablesness of the distribution of cars adopted by the carrier, there must be a preliminary application to the Interstate Commerce Commission. This case does not, however, hold that, when there has been discrimination arising from a departure by the carrier from its own rule, an action will not lie, either at common law, under local statute, or under section 9, Penn. R. R. Co. v. Puritan Coal Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L.

- Ed. 867. It is only when the trial will involve the question of the reasonableness of the practice actually adopted by the carrier that recourse must be had to the commission, and its own rule is as much binding upon the carrier meanwhile as if it were a statute. This is as true after the Hepburn Act (34 Stat. 584) as before. Ill. Cent. R. R. v. Mulberry Coal Co., 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306. And indeed the doctrine that the carrier's practice in distribution is to be the standard only applies when there is a shortage, or not in "normal" times, when there are presumptively enough to go round. Penn. R. R. Co. v. Sonman Coal Co., 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188.
- [2] Now in the first count the allegation is that the carrier had ample cars for both Schaefer & Son and the plaintiff. If so, it violated section 3 and section 10, subd. 4, when it preferred Schaefer & Son and discriminated against the plaintiff. The case does not involve an inquiry into the reasonableness of any practice of the carrier, but of its departure from its general duty as such to accord all shippers equal treatment. Moreover, the liability of Schaefer is well laid under section 10, subd. 4, as a joint tort-feasor. Probably that section was unnecessary in any case. Nor was it necessary to join the other members of the firm, because, the act being a tort, Schaefer would have been equally liable, had he not been a partner at all, but only a third person, for any motive enough concerned with the firm's interest to try to secure for it an illegal preference. I do not see that it makes any difference whether the action against the carrier be considered as arising under sections 8 and 9 or under section 10, subd. 4. They overlap as respects the civil remedy accorded against the carrier. The demurrer to the first count is overruled.
- [3] The second count is not for discrimination in furnishing cars. but is in two parts; one for giving different rates, and the other for giving a rebate in the form of a lighterage allowance. To take up the second part first, if the allegation was that the rebate made to Schaefer & Son was in accordance with the fixed practice of the carrier, extended to all shippers, but as to Schaefer & Son unreasonable in amount, then some preliminary application would have to be made to the Interstate Commerce Commission, among other reasons, because the question would be too intricate for trial in court. Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472. It is not that; rather it rests on an allegation that the carrier gave a rebate to one shipper and refused any to the other. This is an unlawful discrimination of itself, and raises no question requiring any inquiry into the amount of the rebate or to any occasion for its allowance. No rebate whatever was permissible, unless part of the published rates. Penn. R. R. Co. v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315.

The first charge of the second count is also well laid, in alleging that the carrier gave different rates between the same points for the same goods. This is the typical case which the statute was made to reach. A question might be made under Penn. R. R. Co. v. International Coal Co., supra, whether the damages are properly laid. If the complaint

showed that the plaintiff's claim was made up of the difference between what he had paid and what Schaefer & Sons had paid, this count might be demurrable. But the plaintiff has contented himself with alleging his damages generally, as was his right in an action sounding in tort. The question must therefore await trial of the method by which his damages are computed. The demurrer to the second count is also overruled.

Demurrers overruled, with right to the defendants to plead over within 20 days.

In re BONK.

In re DETROIT STORE FIXTURE CO.

(District Court, E. D. Michigan, S. D. October 9, 1920.)

No. 4262.

1. Chattel mortgages ⇐=6, 196—Contract held a chattel mortgage, invalid as to creditors, if not recorded.

A contract for sale of store fixtures to a merchant, to be paid for in installments, providing for the giving of notes for deferred payments, and retaining title in the seller "as security for the payment" of such notes, held in effect a chattel mortgage, and, not having been recorded, void as to creditors of the purchaser, under Comp. Laws Mich. 1915, § 11988.

 Courts \$\infty\$ 366(18)—Federal courts follow state court's construction of statutes.

The decision by the Michigan Supreme Court of the question whether a chattel mortgage not filed and without change of possession is void as against creditors of the mortgagor's assignee, under Comp. Laws Mich. 1915, § 11988, making such a mortgage void as against the creditors of the mortgagor, is binding on the federal bankruptcy court.

 Chattel mortgages 197(1)—Invalidity of unrecorded mortgage does not extend to creditors of assignee of mortgagor, unless there is novation.

Under Comp. Laws Mich. 1915, § 11988, providing that chattel mortgages, not accompanied by immediate delivery of the property and followed by continued change of possession, shall be void as against creditors of the mortgagor, unless filed for record, such invalidity does not extend to creditors of an assignee of the mortgagor, where the mortgagee does not release the mortgagor from liability and accept his assignee in his stead.

4. Novation \$\iiint 7\$—Assent must be, not only to assignment, but to substitution. To establish a novation, substituting chattel mortgagor's assignee in his place, it is not enough to show the conduct of the mortgagees in consenting to the assignment, but there must also be shown an agreement between the parties that the mortgagor should be released from liability to the mortgagees, and such liability transferred to the assignee alone.

5. Bankruptcy = 185—Trustee vested with no greater rights as to unfiled chattel mortgage than creditors.

The amendment of Bankruptcy Act, § 47, by Act June 25, 1910 (Comp. St. § 9631), conferring on trustees "all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," held not to give a trustee any better standing to attack the validity of a chattel mortgage on bankrupt's property than his creditors would have had, if bankruptcy had not intervened.

In Bankruptcy. In the matter of Julius E. Bonk, doing business as the Eagle Drug Store, bankrupt. On review of order of referee denying petition of the Detroit Store Fixture Company for reclamation of property. Reversed.

Benjamin & Betzoldt, of Detroit, Mich., for petitioner. Welsh, Bebout & Kahn, of Detroit, Mich., for trustee.

TUTTLE, District Judge. This is a petition to review an order of one of the referees in bankruptcy of this district, denying a petition of Isaac Rosenthal and Abraham Rosenthal, doing business as Detroit Store Fixture Company, praying for an order instructing the trustee in bankruptcy to surrender possession of a certain soda fountain and other drug store fixtures to petitioner, or to pay the balance due thereon.

The property involved was originally sold by petitioners to one Tilley under two written contracts containing substantially the same language. Each of such contracts provided for the payment of a certain amount in cash and for the payment of the balance of the purchase price in monthly installments, for which notes were to be given. Each contract contained the following clause:

"It is agreed, as security for the payment of the above, that the Detroit Store Fixture Company retain title to said property until fully paid for, after which a receipted bill will be given for same. (Notes, drafts or checks not to be consdered as 'payment' until they are redeemed.)"

There are other provisions which it is unnecessary to set forth here. Pursuant to these contracts, Tilley, the original vendee, executed and delivered to petitioners a series of notes, nearly all of which have been paid. Subsequently, and more than four months prior to the time of the filing of the petition in bankruptcy herein, Tilley sold and assigned his interest in these contracts and notes and the property covered thereby to the bankrupt. Petitioners consented to this transfer, but there is no evidence that they agreed to release Tilley from any liability under the contracts or to accept the bankrupt in his place. Neither of the contracts executed by Tilley and assigned to the bankrupt was filed for public record. The bankrupt himself executed no contract with petitioners. No creditors of Tilley have raised any objections to the validity of these contracts, and it does not appear that said Tilley has, or at any time had, any creditors.

Under these circumstances, the trustee contends, and his contentions were sustained by the referee, that the contracts under which the property was originally sold to Tilley were, in legal effect, absolute sales to Tilley, with retention of title making them chattel mortgages by him to secure the balance of the purchase price, and that they were void as to the creditors of said Tilley, because not filed for record as required by the Michigan statute applicable; that when these contracts were assigned to the bankrupt, with the consent of petitioners, a novation occurred, and the bankrupt was substituted in the place of Tilley, and became in legal effect the mortgagor under these chattel mortgages; and that the failure of the bankrupt to file such contracts for record rendered them void as to his creditors, and subject to be set aside at the instance of the trustee in bankruptcy herein.

[1] Whether these contracts should be construed to be contracts of pure conditional sale, under which the title was wholly reserved in

the vendor until performance of the condition on which the transfer of the title was made to depend, namely, the payment of the purchase price, or whether, on the other hand, such contracts should be construed as absolute conveyances of the legal title to the vendee, with so-called retention of title in the vendor merely as security for the payment of the purchase price, and therefore in law chattel mortgages, depends, of course, upon the intention of the parties in making the contracts in question.

The referee apparently based his decision, holding these contracts to be chattel mortgages, on his opinion that the provision for the execution and delivery of promissory notes by the vendee to the vendor conclusively indicated an intention that the absolute title should pass to the vendee, subject to the so-called reservation thereof by way of security only. This court has recently held that the mere fact that promissory notes are given under a contract providing for the retention of title until payment of the purchase price is not necessarily inconsistent with an intention that no title shall pass until the payment of the purchase price, and that a contract may be construed to be one of pure conditional sale, notwithstanding a provision therein for the execution of such promissory notes. In the matter of Robinson Machine Company (D. C.) 268 Fed. 165.

It will be noted, however, that in each of the contracts here involved it is expressly agreed between the parties that title is to be retained "as security for the payment" of the purchase price. The parties having thus clearly and positively expressed their meaning as to the purpose of the retention of title, and there being no language in the contract inconsistent with the clause just quoted, it is unnecessary to consider the effect of the provision referring to the execution of the promissory notes, or of the acts or conduct of the parties in relation thereto, and the intention of the parties thus unequivocally and unambiguously expressed should be given effect, and the contracts held to be instruments intended to operate as chattel mortgages.

[2] As already observed, these chattel mortgages were not filed for record, although there was no immediate delivery, or change of actual possession, of the property covered thereby. What, then, was the effect of the failure to so file them? The Michigan statute applicable is section 11988 of the Michigan Compiled Laws of 1915, which provides that:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed"

—as provided in said statute. Under this statute every chattel mortgage not filed as therein required is void as to creditors "of the mortgagor." Is such an unfiled mortgage void also as against creditors of the assignee of such mortgagor? Of course, if this question has been determined by the Michigan Supreme Court, its decision on such ques-

tion is binding upon this court. In re Huxoll, 193 Fed. 851, 113 C. C. A. 637.

[3] In the case of Dwight v. Scranton & Watson Lumber Co., 69 Mich. 127, 36 N. W. 752, a case identical with the present one in respect to the material facts involved and the proper rule applicable, the Supreme Court of Michigan distinctly held that the invalidity of an unfiled chattel mortgage as against creditors applies only to the creditors of the original mortgagor, and does not extend to creditors of an assignee of such mortgagor. Regardless of what might otherwise be the decision of this court on this question, it must follow the construction of this statute of the state of Michigan thus announced by the court of last resort of such state. Any injustice that may result from this construction of the statute must be remedied by the state Legislature, to which tribunal should be addressed any arguments based upon the hardship which may arise from the statute as so construed.

[4] The contention that the bankrupt must be considered as substituted in the place of the original mortgagor by the conduct of petitioners in consenting to the assignment from such mortgagor to the bankrupt cannot be sustained, as there is no evidence to support a finding that there was an agreement between the parties to the effect that the mortgagor should be released from liability to the petitioners and such liability transferred to the bankrupt alone, which agreement would be necessary in order to constitute the novation alleged. Illinois Car & Equipment Co. v. Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504; Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276,

131 N. W. 559.

[5] Nor is there any merit in the argument that the 1910 amendment to section 47 of the Bankruptcy Act (Comp. St. § 9631), conferring on trustees "all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," gives to the trustee in bankruptcy herein any greater or other right in the premises than any creditor of the bankrupt would have had, if bankruptcy had not intervened. This amendment to the Bankruptcy Act changed the rule, previously in force, that a trustee merely stood in the shoes of the bankrupt, and acquired only the title and rights previously vested in the bankrupt; and now, under this amendment, the trustee possesses, in addition to the title and rights of the bankrupt, also the rights, remedies, and powers which belonged, at the time of the filing of the petition in bankruptcy, to creditors of the bankrupt, and might have been exercised by them, if such bankruptcy petition had not been filed. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275; In re Flatland, 196 Fed. 310, 116 C. C. A. 130; In re Seward Dredging Co., 242 Fed. 225, 155 C. C. A. 65; Collier on Bankruptcy (11th Ed.) p. 728. If, then, the unfiled chattel mortgages here involved would have been void as against creditors of the bankrupt, in the absence of bankruptcy proceedings, such mortgages would be equally void, under the 1910 amendment referred to, as against the trustee; but, as such mortgages were not invalid as to such creditors, neither are they void as against the trustee.

It follows that petitioners are entitled to the rights of mortgagees in respect to the property involved in this proceeding, and the order of the referee must be set aside, and the matter remanded for further proceedings not inconsistent with this opinion.

Ex parte CROWLEY.

(District Court, D. Massachusetts. December 13, 1920.)

No. 1918.

1. Jury € 19(19)—No jury trial in habeas corpus proceedings, where facts not in dispute.

A jury trial will be denied in a habeas corpus proceeding by a person in custody under an extradition warrant, where the essential facts are not in dispute.

2. Extradition 24-Request must be honored, unless defendant not in

state when crime could have been committed.

When a person is formally charged with crime, and his extradition is requested, the request must be honored, unless he proves that he was not in the demanding state at any time when it was possible for him to have committed the crime charged.

3. Extradition €=35—Sufficient if accused is shown to have been in demand-

ing state about time alleged.

As the prosecution is not bound to establish on the trial of a criminal case that the crime charged was committed on the exact date specified, it is sufficient in extradition proceedings if accused is shown to have been in the demanding state "in the neighborhood of the time alleged."

4. Extradition 35-Whether defendant's presence in the demanding state

had any connection with the crime cannot be tried.

When it appears in an extradition proceeding that defendant was present in the demanding state at a time when it was possible for him to have committed the crime charged, the question whether such presence had any connection with the crime cannot be tried.

5. Brokers 5-Principal liable under Blue Sky Law for sales of stock

which he directed, though not personally present.

Though defendant was not in Michigan when sales of stock in violation of the Blue Sky Law of that state were made by a branch office of his business, he may be criminally responsible for them while in that state, if, when there previously, he directed or arranged for them.

6. Habeas corpus =113(3)—Appeal disallowed when no doubtful questions

of fact or unsettled questions of law.

In a habeas corpus proceeding by one in custody under an extradition warrant, when there is no doubtful question of fact, and all questions of law have been settled by decisions of the Supreme Court, an appeal will be refused as frivolous.

Habeas Corpus. On petition by James D. Crowley for a writ of habeas corpus. Petition dismissed.

Thomas D. Lavelle and Walter A. Buie, both of Boston, Mass., for petitioner.

J. Weston Allen, Atty. Gen., for respondent.

MORTON, District Judge. [1] Habeas corpus to secure the discharge of the petitioner from custody under an extradition warrant issued by the Governor of Massachusetts for his rendition to the state of Michigan. The case was heard on the petition, motion to dismiss, and answer. Such evidence was introduced as either party desired to offer. The petitioner has moved for a trial by jury; but, as the essential facts are not in dispute, I do not think the motion should be allowed; and it is denied.

The petitioner did business as a stockbroker under the name of J. D. Crowley & Co., or was a member of a partnership of that name. The principal office was in Boston, where Crowley resides. There was a branch office in Detroit, Mich., at which certain stocks were sold. The petitioner was complained of before the Michigan courts for larceny, and for violation of the so-called "Blue Sky" Law of that state (Pub. Acts 1915, No. 46); and a request in due form was made by the Governor of Michigan upon the Governor of Massachusetts for his extradition. After hearing, this request was denied by the Governor of Massachusetts as to the charges of larceny, and those need not be further considered. It was honored as to the charges under the "Blue Sky" Law; and the warrant issued for Crowley's rendition to the Michigan authorities, under which he is now held. The question is whether his rights under the Constitution and laws of the United States have been violated in the extradition proceedings.

The first contention of the petitioner is that he is not a fugitive from the justice of Michigan, because he was not present in that state at the time when the crime charged is alleged to have been committed. The complaints charge Crowley with the sale of unauthorized securities to a person named and to divers other persons, on or about the 15th or 24th days of January, 1920. The Governor of Massachusetts had before him evidence that Crowley was in Michigan on December 20th, and then talked with his representatives there about sales of the stock mentioned in the complaint, and that after the dates specified he was in Michigan, and referred without disapproval to similar sales of stock. There was no evidence that he was in Michigan on either of the days named in the complaints.

[2-4] It is not necessary that there should be. When a person is formally charged with crime, and his extradition is requested, the request must be honored, unless the accused proves that he was not in the demanding state at any time when it was possible for him to have committed the crime charged. As the prosecution is not bound to establish on the trial of a criminal case that the crime charged was committed on the exact date specified, it follows that in extradition proceedings it is sufficient if the accused is shown to have been in the demanding state "in the neighborhood of the time alleged." Holmes, J., in Strassheim v. Dailey, 221 U. S. 286, 31 Sup. Ct. 560, 55 L. Ed. 735. Whether the defendant's presence had any connection with the crime—i. e., his guilt or innocence—cannot be tried in those proceedings. In re Montgomery (D. C.) 244 Fed. 967 (affirmed 246 U. S. 656, 38 Sup. Ct. 424, 62 L. Ed. 924), shows how far the decisions have gone in this direction.

[5] Even if Crowley was not in Michigan when the sales in question were made, he may be criminally responsible for them in that state, if,

while there, he directed or arranged for them. Strassheim v. Dailey, 221 U. S. 280, 31 Sup. Ct. 558, 55 L. Ed. 735.

The other questions of law raised by the petitioner are covered by

the opinion in Graves, Petitioner, filed this day.

[6] The petition must be dismissed. Inasmuch as all questions of law involved have been settled by decisions of the United States Supreme Court, and there is no doubtful question of fact, the execution of the extradition warrant ought not to be further interfered with or delayed by these proceedings. I shall therefore follow the practice approved in this circuit by Judges Putnam and Lowell in Storti's Case (C. C.) 109 Fed. 809, although I am aware that some doubt had been expressed about it, and refuse to allow an appeal, which in my opinion would be frivolous.

Petition dismissed.

In re SCHENDERLEIN.

(District Court, D. Massachusetts. November 24, 1920.)

No. 27499.

 Bankruptcy \$\infty\$ 318(3)—Creditor may waive fraud and prove claim in bankruptcy.

One from whom a bankrupt obtained money by fraud, if he could have waived the fraud and sued in assumpsit, may prove his claim in bankruptcy.

2. Bankruptcy 58—Transfer to creditor of stolen automobile, bought by bankrupt in good faith, held "act of bankruptey"; "property."

A transfer by an alleged bankrupt to a creditor of an automobile, which he had bought in good faith, and to which he had added accessories which he paid for, held a transfer of property and an "act of bankruptcy," within the meaning of Bankruptcy Act, § 3a(2), Comp. St. § 9587, although the automobile had been stolen and he did not acquire the legal title.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act of Bankruptcy; Property.]

In Bankruptcy. In the matter of Kurt E. Schenderlein, alleged bankrupt. On petition for adjudication and objections of the Exchange Trust Company, a creditor. Petition granted.

Harris H. Gilman, of Boston, Mass., for petitioning creditors. Barton & Harding, of Boston, Mass., for objecting creditor.

MORTON, District Judge. Neither party disputes the learned referee's findings of fact. The question is whether upon those findings there ought to be an adjudication. The answering creditor now contends (1) that the single petitioning creditor has not a provable claim; and (2) that neither of the alleged acts of bankruptcy has been established.

[1] As to (1): The petitioner stands in the shoes of the Southbridge Bank, whose claim has been assigned to him. If it could have waived the fraud practiced upon it, and have sued the alleged bankrupt in assumpsit for the amount of its loss, the petitioner has a provable claim; otherwise, not. Schall v. Camors, 251 U. S. 239, 40 Sup. Ct. 135. The exact form of the forged check is not stated, but I infer that it was payable to Schenderlein under the fictitious name of Waterman, and was so indorsed by him. In Schall v. Camors, supra, a partnership which became bankrupt had negotiated its commercial paper by fraudulent representations. The persons who took the paper were allowed to prove against the partnership, but not against the individual partners. Under that decision, the petitioning creditor's claim is provable.

[2] As to the alleged acts of bankruptcy: The trust company contends that, as the alleged bankrupt never had legal title to the automobile, his transfer of it could not constitute a preference. Schenderlein bought the auto in good faith, not knowing it was stolen, and he added to it before he transferred it to the trust company various accessories, which he paid for. As to them he undoubtedly conveyed a good title to the trust company. As to the auto itself, the trust company obtained from him possession of it, and the right to keep it against everybody but the true owner. Burke v. Savage, 13 Allen (Mass.) 408. This was "property," within the meaning of Bankruptcy Act, § 3a (2), Comp. St. § 9587. In In re Wellmade Gas Mantle Co., 233 Fed. 250, 147 C. C. A. 256 (C. C. A. 1st Cir.), it was held that merchandise fraudulently obtained by a bankrupt was nevertheless to be considered as part of his estate pending proceedings to establish the right of the defrauded vendor.

The trust company contends that, inasmuch as the automobile was paid for out of stolen money, the transfer of it, as well as the return of \$750 found on Schenderlein at the time of his arrest, should be regarded as the return of stolen property to the owner, instead of preferential transfers. The complete facts, as between the trust company and the Southbridge Bank, are not stated; but I understand there is no dispute that as to the \$1,450 check, which was cashed by the Southbridge Bank and remitted to the trust company, the loss will fall on the bank. If so, the money which the alleged bankrupt had in his belt came, in legal effect, from both institutions, and was not such an earmarked special fund as the trust company contends.

Adjudication ordered.

MEMORANDUM DECISIONS

ADAMS et al. v. OHIO OIL CO. (Circuit Court of Appeals, Eighth Circuit. November 12, 1920.) No. 5452. Appeal from the District Court of the United States for the District of Wyoming. F. Chatterton, of Riverton, Wyo., and William Scallon and C. B. Nolan, both of Helena, Mont., for appellants. William A. Riner, of Cheyenne, Wyo., for the United States.

PER CURIAM. Continuance to September term, 1921, vacated and set aside, and appeal dismissed with prejudice, at costs of appellants.

BALENTINE v. ELMENDORF et al. (Circuit Court of Appeals, Fifth Circuit. November 19, 1920.) No. 3516. Appeal from the District Court of the United States for the Western District of Texas; W. R. Smith, Judge. In the matter of Samuel Foster Balentine, bankrupt. From an order of the District Court, the bankrupt appeals. Affirmed. Ed. M. Whitaker, of El Paso, Tex. (Fred C. Knollenberg, Ed. M. Whitaker, and Volney M. Brown, all of El Paso, Tex., on the brief), for appellant. John L. Dyer, of El Paso, Tex., for appellees. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The order complained of is affirmed.

BASS et al. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. October 14, 1920.) No. 3572. In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge. Criminal prosecution by the United States against Joe Bass and John Pitts. Judgment of conviction, and defendants bring error. Affirmed. John R. Cooper, of Macon, Ga., for plaintiffs in error. John W. Bennett, U. S. Atty., of Macon, Ga. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The judgment of the District Court is affirmed.

BATES v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. December 13, 1920.) No. 3471. In Error to the District Court of the United States for the Southern Division of the Eastern District of Tennessee; Edward T. Sanford and A. M. J. Cochran, Judges. C. C. Abernathy, of Chattanooga, Tenn., for plaintiff in error. W. T. Kennerly, U. S. Atty., of Knoxville, Tenn.

PER CURIAM. Dismissed for failure to make deposit for printing record as required by rule 19.

BECKER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 6, 1920.) No. 5521. Appeal from the District Court of the United States for the Western District of Oklahoma. Mark Goode, of Shawnee, Okl., for appellant. Herbert M. Peck, U. S. Atty., and Frank E. Ransdell, Asst. U. S. Atty., both of Oklahoma City, Okl., for the United States.

PER CURIAM. Appeal dismissed, without costs to either party in this court, on motion of appellee.

BRUNSON et al. v. CARTER OIL CO. (Circuit Court of Appeals, Eighth Circuit. December 20, 1920.) No. 5615. Appeal from the District Court of the United States for the Eastern District of Oklahoma. For opinions below, see 263 Fed. 935; 259 Fed. 656. H. B. Lockett, of Comanche, Okl., for ap-

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pellants. James A. Veasey, C. M. Oakes, and Walter Davison, all of Tulsa, Okl, for appellee.

PER CURIAM. Appeal dismissed, with costs, for want of prosecution, on motion of appellee.

CENTRAL R. OF NEW JERSEY v. NEW YORK CENT. R. CO. (Circuit Court of Appeals, Second Circuit. November 10, 1920.) No. 9. Appeal from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge. Libel by the Central Railroad Company of New Jersey against the New York Central Railroad Company. From a decree for libelant (254 Fed. 873), respondent appeals. Affirmed. Alex S. Lyman, of New York City (W. Mann, of New York City, of counsel), for appellant. Macklin, Brown, Purdy & Van Wyck, of New York City (P. M. Brown, of New York City, of counsel), for appellee. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

CHENEY TALKING MACH. CO. v. VICTOR TALKING MACH. CO. (Circuit Court of Appeals, Sixth Circuit. October 15, 1920.) No. 3481. Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; C. W. Sessions, Judge. Wilkinson, Huxley, Byron & Knight, of Chicago, Ill., and Travis, Merrick, Warner & Johnson, of Grand Rapids, Mich., for appellant. Kenyon & Kenyon, of New York City, and Knappen, Uhl & Bryant, of Grand Rapids, Mich., for appellee.

PER CURIAM. Order dismissing without prejudice and remanding for purpose of rehearing in District Court.

ERIE R. CO. v. ANDERSON. (Circuit Court of Appeals, Sixth Circuit. October 6, 1920.) No. 3427. In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge. Cook, McGowan, Foote, Bushnel & Lamb, of Cleveland, Ohio, for plaintiff in error. Anderson, Lamb & Osborne, of Youngstown, Ohio, and J. J. Tetlow, of Cleveland, Ohio, for defendant in error.

PER CURIAM. Dismissed pursuant to stipulation.

FIRST NAT. BANK OF CHICAGO v. FIRST NAT. BANK OF CASSELTON et al. (Circuit Court of Appeals, Eighth Circuit. December 6, 1920.) No. 5657. In Error to the District Court of the United States for the District of North Dakota. See, also, 261 Fed. 912. George L. Wire, of Mitchell, S. D., and A. W. Cupler, of Fargo, N. D., for plaintiff in error. Aubrey Lawrence and M. W. Murphy, both of Fargo, N. D., for defendants in error.

PER CURIAM. Writ of error dismissed with prejudice, but without costs to either party in this court, pursuant to stipulation.

FOX TYPEWRITER CO. v. CORONA TYPEWRITER CO. (Circuit Court of Appeals, Sixth Circuit. December 9, 1920.) No. 3509. Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; C. W. Sessions, Judge. Chappell & Earl, of Kalamazoo, Mich., for appellant. Kenyon & Kenyon, of New York City, for appellee.

PER CURIAM. Order authorizing District Court to receive and consider application to reopen.

MEADOWS v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. October 14, 1920.) No. 3460. In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge. Crimi-

nal prosecution by the United States against Adolphus Meadows. Judgment of conviction, and defendant brings error. Affirmed. John R. Cooper, of Macon, Ga., for plaintiff in error. John W. Bennett, U. S. Atty., of Macon, Ga. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The judgment of the District Court is affirmed.

MIDDAUGH et al. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 6, 1920.) No. 5455. In Error to the District Court of the United States for the District of Utah. Russell Schulder and Thomas Ramage, both of Salt Lake City, Utah, and Soren X. Christensen, of San Francisco, Cal., for plaintiffs in error. Isaac Blair Evans, U. S. Atty., of Salt Lake City, Utah, for the United States.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of defendant in error.

MIDWAY PACIFIC OIL CO. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. December 6, 1920.) No. 3605. Appeal and Cross-Appeal from the District Court of the United States for the Northern Division of the Southern District of California. Theodore Martin, of Los Angeles, Cal., for Midway Pacific Oil Co. Henry F. May, Sp. Asst. Atty. Gen., for the United States.

PER CURIAM. Pursuant to stipulation, ordered, appeals dismissed.

PACIFIC MIDWAY OIL CO. et al. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. December 1, 1920.) No. 3603. Appeal and Cross-Appeal from the District Court of the United States for the Northern Division of the Southern District of California. R. T. Harding, of San Francisco, Cal., for Pacific Midway Oil Co. C. P. Kaetzel, of San Luis Obispo, Cal., for Obispo Oil Co. A. L. Weil, of San Francisco, Cal., for General Petroleum Co. Henry F. May, Sp. Asst. Atty. Gen., for the United States.

PER CURIAM. Pursuant to stipulation, ordered, appeals dismissed. See. also, 238 Fed. 575.

PARKER et al. v. THOMAS. (Circuit Court of Appeals, Seventh Circuit. October 14, 1920.) No. 2805. In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois. Action between Ulysses S. Thomas and Matthew K. Parker and others. Judgment for the former, and the latter bring error. Affirmed. Edward O. Brown and Rupert Barry, both of Chicago, Ill., for plaintiff in error. Edwin H. Cassels, of Chicago, Ill., for defendant in error. Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

PER CURIAM. The judgment is attacked upon the ground that the record conclusively shows the indorsement by plaintiffs in error of the note in question to have been for the accommodation of defendant in error. The proofs (all appearing by stipulation) afford evidence of the ultimate fact that the indorsement was not for the accommodation of defendant in error, and therefore the judgment must be and is affirmed.

RENEGAR v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. November 5, 1920.) No. 3406. In Error to the District Court of the United States for the Western Division of the Western District of Tennessee; John E. McCall, Judge. Frank S. Elgin, John E. McCall, Jr., and Charles M. Bryan, all of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

PER CURIAM. Affirmed pursuant to stipulation.

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SCHAFF v. CLINE. (Circuit Court of Appeals, Eighth Circuit. October 25, 1920.) No. 5613. In Error to the District Court of the United States for the Western District of Missouri. Ellison A. Neel, of Kansas City, Mo., and Joseph W. Jamison, of St. Louis, Mo., for plaintiff in error. C. C. Crow, of Kansas City, Mo., for defendant in error.

PER CURIAM. Writ of error dismissed with costs pursuant to stipulation.

UNITED STATES ex rel. ORMSBY v. PECK, U. S. District Judge. (Circuit Court of Appeals, Sixth Circuit. February 13, 1920.) No. 3384. Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; John W. Peck, Judge. George F. Ormsby, in pro. per. See, also, 262 Fed. 1022.

PER CURIAM. Petition for writ of mandamus denied.

WELLS v. WOLFE et al. (Circuit Court of Appeals, Eighth Circuit. December 6, 1920.) No. 5623. Appeal from the District Court of the United States for the District of Nebraska. W. B. Sadilek and George W. Wertz, both of Schuyler, Neb., and David A. Fitch, of Omaha, Neb., for appellant. W. J. Courtright, of Fremont, Neb., for appellees.

PER CURIAM. Appeal dismissed, with costs, on motion of appellant and consent of appellees, etc.

END OF CASES IN VOL. 268